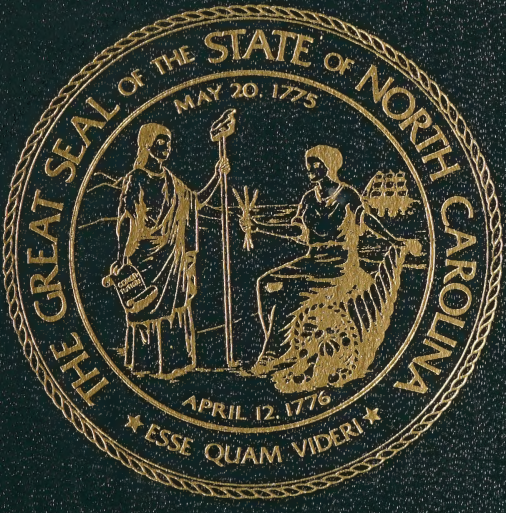
GENERAL STATUTES
OF
NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 3

Chapters 8C Through 14

Prepared Under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 8C through 14, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 8C through 14 of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2009

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

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§ 8C-1. Rules of Evidence.

The North Carolina Rules of Evidence are as follows:

Editor's Note. — The official Commentary printed under the individual Rules in this Chapter has been printed by the publisher as received, without editorial change. Subsequent amendments to the Rules may not be reflected in the Commentary in some instances.

Legal Periodicals. — For survey of North Carolina construction law, with particular reference to civil procedure and evidence, see 21 Wake Forest L. Rev. 633 (1986).

For legislative survey, see 22 Campbell L. Rev. 253 (2000).

For comment, "To Speak or Not to Speak, That Is the Question: The Impact of Attorney-Client Privilege in Prosecuting the Death of Dr. Eric Miller," 25 Campbell L. Rev. 235 (2003).

CASE NOTES

Applicability. — This Chapter was applicable to a processioning proceeding pursuant to Chapter 38 to establish a boundary, where even though the proceeding was commenced in 1980, it did not go to trial until 1985. Green Hi-Win Farm Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Effect of Commentaries. — The commentaries printed with the North Carolina Rules of Evidence in the General Statutes will not be treated as binding authority, but instead will be given substantial weight in attempting to comprehend legislative intent. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986); State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986).

Applied in State v. Belfield, 144 N.C. App. 320, 548 S.E.2d 549, 2001 N.C. App. LEXIS 425 (2001); State v. Alexander, 152 N.C. App. 701, 568 S.E.2d 317, 2002 N.C. App. LEXIS 972 (2002); State v. Wiley, 182 N.C. App. 437, 642 S.E.2d 717, 2007 N.C. App. LEXIS 688 (2007).

Cited in State v. Riddick, 316 N.C. 127, 340 S.E.2d 422 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Jordan, 319 N.C. 98, 352 S.E.2d 672 (1987); State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987); State v. Belfield, 144 N.C. App. 320, 548 S.E.2d 549, 2001 N.C. App. LEXIS 425 (2001); Robinson v. Polk, 438 F.3d 350, 2006 U.S. App. LEXIS 3454 (Feb. 14, 2006).

ARTICLE 1.

General Provisions.

Rule 101. Scope.

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101. (1983, ch. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 101 only in that "courts of this State" has been substituted for "courts of the United States and before United States magistrates." Rule 1101 provides greater details regarding the applicability of these rules in various proceedings.

Legal Periodicals. — For survey of 1983 law of evidence, see 62 N.C.L. Rev. 1290 (1984).

For article, "An Analysis of the New North Carolina Evidence Code," see 20 Wake Forest L. Rev. 1 (1984).

For note on the future of character impeachment in North Carolina, in light of State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984), see 63 N.C.L. Rev. 535 (1985).

CASE NOTES

Applicability. — The court would not consider this Chapter on the 1985 appeal of a murder conviction, where the trial of the case was completed prior to the effective date of the Chapter, July 1, 1984. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

The Rules of Evidence do not apply to a sentencing hearing where the judge must determine whether or not defendant provided substantial assistance pursuant to G.S. 90-95(h)(5). State v. Willis, 92 N.C. App. 494, 374 S.E.2d 613, cert. denied, 324 N.C. 341, 378 S.E.2d 808 (1988).

Res Gestae Rationale Survives. — Admission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception; such evidence is admissible if it "'forms part of the history of the event or serves to enhance the natural development of the facts'" and this rationale, established in pre-Rules cases, survives the adoption of the Rules of Evidence. State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990).

Teacher Dismissal Hearings. — The Rules of Evidence, G.S. 8C-1, are not applicable to teacher dismissal hearings before a board of education. Evers v. Pender County Bd. of Educ., 104 N.C. App. 1, 407 S.E.2d 879 (1991), aff'd, 331 N.C. 380, 416 S.E.2d 3 (1992).

As to the admissibility of out-of-court statements by agent to the effect that he was working for defendant insurance company while investigating plaintiff, see Daily v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148 (1985).

G.S. 1A-1, N.C. R. Civ. P. 7, 26, and G.S. 8C-1, N.C. R. Civ. P. 101 et seq., permitted a husband who had not yet been declared a child's father to file pleadings and motions, obtain discovery, and present evidence; accordingly, the husband could have introduced evidence of his paternity and/or rebutted or discredited evidence of paternity presented by a putative father. Although the husband could have accomplished neither, his presence was not obviously, utterly immaterial, as it afforded him an opportunity to defend the presumption that he was the child's father and discredit the putative father's evidence to the contrary. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Cited in State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998).

Rule 102. Purpose and construction.

(a) *In general.* — These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(b) *Subordinate divisions.* — For the purpose of these rules only, the subordinate division of any rule which is labeled with a lower case letter shall be a subdivision. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 102 by the addition of subdivision (b) which is explained below. The commentary to each rule indicates whether the rule is identical to or different from its counterpart in the federal rules. The intent is to make applicable, as an aid in construction, the federal decisional law construing identical or similar provisions of the Federal Rules of Evidence.

Of course, federal precedents are not binding on the courts of this State in construing these rules. Nonetheless, these rules are not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.

Problems of construction may arise that have not been settled by federal precedents. In these instances, our courts should examine North Carolina cases as well as federal cases for enlightenment.

Although these rules answer the vast majority of evidence questions that arise in our courts, there are some evidentiary questions that are not within the coverage of these rules. In these instances, North Carolina precedents will continue to control unless changed by our courts.

The commentary to each rule indicates whether the rule is consistent with current North Carolina practice. The discussion of North Carolina law is included to highlight the changes made by these rules.

Wherever the commentary refers to "the Advisory Committee's Note", the reference is to the Advisory Committee on Rules of Evidence appointed by United States Chief Justice Warren on March 8, 1965. See Saltzburg and Redden, *Federal Rules of Evidence Manual,* p. 2-4 (3d ed. 1982).

Rule 102 provides that these rules shall be construed to promote growth and development of the law of evidence. Of course, this provision is not intended to give discretion to construe the rules unfettered by the language of the rules. Rather, the language of Rule 102 permits a flexible approach to problems not explicitly covered by the rules.

Subdivision (b) was added to this rule to make it clear that the scheme of subordinate divisions being followed is that of the federal rules. The North Carolina statutory scheme would term the subordinate divisions referred to as "subsections." It was felt by the drafters of the North Carolina rules and commentary that following the federal scheme would avoid confusion in comparing the federal rules to the North Carolina rules and in applying authorities which refer to the federal rules.

Legal Periodicals. — For note, "Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina," see 83 N.C. L. Rev. 1613 (2005).

CASE NOTES

Interests of Justice. — Admission of a victim's statements to his friends that he had a confrontation with defendant and was afraid of him, under residual exceptions to the hearsay rule, was proper under G.S. 8C-1, N.C. R. Evid. 102(a) because the admission served the interest of justice by providing jurors with the necessary tools to ascertain the truth. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Court Has Inherent Authority to Order Sua Sponte Preliminary Hearing on Evidence. — Under G.S. 8C-1, N.C. R. Evid. 102(a), 104(a), a trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to clarify questions of admissibility and to prevent undue delay in the proceedings. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Cited in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Williams, 322 N.C. 452, 368 S.E.2d 624 (1988); Chandler v. U-Line Corp., 91 N.C. App. 315, 371 S.E.2d 717 (1988); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Outlaw, 94 N.C. App. 491, 380 S.E.2d 531 (1989); State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1989).

Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;

(2) Offer of proof. — In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling.* — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Review of errors where justice requires.* — Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so. (1983, c. 701, s. 1; 2003-101, s. 1; 2006-264, s. 30.5.)

COMMENTARY

This rule is identical to Fed. R. Evid. 103, except for subsection (1) of subdivision (a), and subdivision (d).

Subdivision (a) adopts the "substantial rights" language used in the majority of states in testing for harmless error. North Carolina Civ. Pro. Rule 61 provides that no error is grounds for reversal unless the error amounts to the denial of a substantial right. Subdivision (a) is not intended to affect the additional requirement in criminal cases that a reasonable possibility exist that a different result would have been reached if the error had not been committed. See G.S. 15A-1443.

Subdivision (a) also provides that rulings on evidence cannot be assigned as error unless the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. This is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 27, at 107 (1982); G.S. 15A-1446. The wording of subsection (1) differs from the federal rule by borrowing the language of G.S. 15A-1446(a) to describe the minimum requirements of an objection or motion to strike.

The provisions of subdivision (b) are substantially the same as current North Carolina practice. North Carolina Civ. Pro. Rule 43(c) and G.S. 15A-1446(a) should be amended where necessary to conform to Rule 103.

Subdivision (c) is in accord with North Carolina practice.

Subdivision (d) differs from Fed. R. Evid. 103(d). The federal rule provides that, although an error was not brought to the court's attention (as required by subdivision (a)), the court may nevertheless review "plain error affecting substantial rights." Subdivision (d) of this rule borrows its language from G.S. 15A-1446(b), which applies in criminal proceedings, and makes that the standard for both criminal and civil proceedings, but with the addition that "substantial rights" must be affected. This represents an expansion of the areas in civil cases in which North Carolina appellate courts may review error where no proper objection or motion was previously made. See *Brandis on North Carolina Evidence* § 27 (1982).

It is anticipated that in civil cases appellate courts will rarely exercise the authority to take notice of errors that were not brought to the attention of the trial court. G.S. 15A-1446(b) should be amended to reflect the adoption of Rule 103(d).

Legal Periodicals. — For article, "Recent Developments: State v. Hinnant: Limiting the Medical Treatment Hearsay Exception in Child Sexual Abuse Cases," see 79 N.C.L. Rev. 1089 (2001).

For recent development, "The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power: State v. Tutt," see 84 N.C. L. Rev. 2100 (2006).

CASE NOTES

The 2003 amendment to G.S. 8C-1, Rule 103(a)(2) applies only to rulings made on or after October 1, 2003; since the pre-existing rule applied to defendant's robbery case, defendant failed to fully preserve the issue of the admissibility of the confession of a non-joined co-defendant where, although defendant's motion to suppress was denied, defendant failed to repeat his objection when the confession was admitted into evidence at trial. State v. Pullen, 163 N.C. App. 696, 594 S.E.2d 248, 2004 N.C. App. LEXIS 585 (2004).

Applicability of Amendment. — Although an amendment to G.S. 8C-1-103(a)(2), which provided that due to defendant's lack of objection to the admission of evidence at trial he failed to preserve for appellate review all issues related to the evidence found, was found unconstitutional by a judicial precedent, the appellate court reviewed defendant's assignments of error on the merits regarding a search of his vehicle and with respect to the denial of his suppression motion, as the amendment to G.S. 8C-1-103 went into effect before the trial in the matter, at which time the amendment was under a presumption of constitutionality. State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615, 2005 N.C. App. LEXIS 1778 (2005).

Because under G.S. 8C-1-103(a)(2), which was later held unconstitutional but had been presumed constitutional at the time of trial, the trial court had assured defendant that he did not need to renew his objections to the evidence when it was offered at trial, the appellate court would review defendant's arguments as to the affected evidence. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Conflict Between G.S. 8C-1-103(a)(2) and N.C. R. App. P. 10(b)(1). — Constitution of North Carolina expressly vested in the Supreme Court of North Carolina the exclusive authority to make rules of procedure and practice for the Appellate Division; although G.S. 8C-1-103(a)(2) was contained in the Rules of Evidence, it was manifestly an attempt to govern the procedure and practice of the Appellate Division as it purported to determine which issues were preserved for appellate review, and to the extent it conflicts with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Oglesby, 361 N.C. 550, 648 S.E.2d 819, 2007 N.C. LEXIS 812 (2007).

Timely Objection Required. — Absent some exceptional situation, error may not be predicated upon the admission of evidence unless a timely objection or motion to strike appears of record. Forsyth County Hosp. Auth. v. Sales, 82 N.C. App. 265, 346 S.E.2d 212, cert. denied, 318 N.C. 415, 349 S.E.2d 594 (1986).

An assignment of error ordinarily will not be considered on appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Where, at the time of defendant's objection to the admission of the envelope's contents, plaintiff had previously been permitted to testify about them without objection, defendant's objection was not raised in a timely manner. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Party believing the methodology used by an expert witness in valuing property at issue is not valid or, if valid, is not properly applied to the facts at issue has an obligation to object to its admission; if a timely objection is not lodged at trial, it cannot be argued on appeal that the trial court erred in relying on this evidence in determining the value of the asset at issue. Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

In a husband's action against his separated wife's boyfriend for criminal conversation and for alienation of his wife's affections, at trial the boyfriend had not properly presented some of his objections to the trial court pursuant to G.S. 8C-1, N.C. R. Civ. P. 103(a)(1), (2), so the alleged errors were not preserved for appellate review, and, because a witness had not testified as an expert, G.S. 8C-1, N.C. R. Evid. 702 did not apply. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Late Objection at Trial. — Defendants' motion to strike witness' testimony was untimely, where it occurred at least 100 questions and answers after plaintiff adduced testimony and where defendants neither offered nor argued a "specific reason" for postponing their objection until well past time in which court or plaintiff could have remedied effect of alleged error. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Where defendant's motion to strike witness' in-court identification came well after the witness' response to the prosecutor's question, defendant's motion was not made in a timely manner and the defendant therefore waived any objection to the in-court identification. State v. McCray, 342 N.C. 123, 463 S.E.2d 176 (1995).

The function of an objection is not only to signify that there is an issue of law, but also to give notice of the terms of its issue. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

Alleged Error Must Be "Clearly Presented". — Although this rule requires no particular form for objections in order to preserve the alleged error on appeal, it does require that the alleged error be "clearly presented" to the trial court. State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986).

Although under this rule no particular form is required to preserve the right to assert an alleged error on appeal, the motion or objection must be timely and must clearly present the alleged error to the trial court. State v. Reid,

322 N.C. 309, 367 S.E.2d 672 (1988).

In termination of parental rights proceeding, a father failed to comply with G.S. 8C-1-103(a) to preserve any alleged error based on the trial court's refusal to allow his attorney to cross-examine a key witness because the trial court instructed the attorney to "just go to the testimony," and she responded "okay" proceeding with her substantive cross-examination so that there was no way of determining what the attorney was precluded from asking in that she failed to make an offer of proof. In re L.C., 181 N.C. App. 278, 638 S.E.2d 638, 2007 N.C. App. LEXIS 83 (2007).

Where a relevant response was not apparent from the context of the examination defendant was precluded from predicating error upon the trial court's ruling on the State's objection to the question. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

A general objection, if overruled, is ordinarily not effective on appeal. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Error may not be argued on appeal where the underlying objection fails to present the nature of the alleged error to the trial court. This rule serves to facilitate proper rulings and to enable opposing counsel to take proper corrective measures to avoid retrial. State v. Catoe, 78 N.C. App. 167, 336 S.E.2d 691 (1985), cert. denied, 316 N.C. 380, 344 S.E.2d 1 (1986).

Objection to Opinion Testimony. — In the absence of a special request to qualify a witness as an expert, a general objection to specific opinion testimony will not suffice to preserve the question of the expert's qualifications, even on ultimate issues. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1966).

If a witness' evidence indicates that he is in fact qualified to give a challenged opinion, even a timely specific objection will not likely be sustained on appeal. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1966).

Burden on Alleging Improper Admission of Evidence. — An appellant alleging improper admission of evidence has the burden of showing that he was unfairly prejudiced or that the jury verdict was probably influenced thereby, that appellant has been denied some substantial right and that the result of the trial would have been materially more favorable to appellant. McNabb v. Town of Bryson City, 82 N.C. App. 385, 346 S.E.2d 285, appeal dismissed, 319 N.C. 397, 354 S.E.2d 239 (1987).

The burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred; furthermore, the erroneous admission of testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative. Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003).

Defendant Failed to Carry His Burden of Showing Prejudice. — Although trial court did not allow defense counsel to impeach defendant with evidence of his prior convictions, where defendant made no offer of proof as to the matter excluded, nor was the answer apparent from the context in which the question was asked of defendant, the defendant failed to carry his burden of showing prejudice and the court had no basis for concluding that a substantial right of defendant was affected. State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

Where plaintiff entered a timely objection to question eliciting witness' opinion as to the speed of motorcycle, a further motion to strike his answer was not required. Coley v. Garris, 87 N.C. App. 493, 361 S.E.2d 427 (1987).

Waiver of Objection. — Except in certain circumstances, failure to object to the admission of evidence at the time it is offered waives the objection. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

Failure to move to strike an answer, when its admissibility is not indicated by the question but becomes apparent by some aspect of the answer, waives any objection to the inadmissible information. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Defendant waived any objection as to use of a witnesses' prior statements by using them extensively himself on cross-examination, and by failing to object to the use of the statements to refresh the witnesses' memory. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

Defendant's attempt to "shock" the victim with a stun gun constituted the use of a dangerous weapon during a robbery; defendant failed to preserve his argument that the trial court improperly excluded testimony. State v. Gay, 151 N.C. App. 530, 566 S.E.2d 121, 2002 N.C. App. LEXIS 774 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 315 (2003).

By failing to preserve evidence for review, defendant deprived the Supreme Court of the necessary record from which to ascertain if the alleged error was prejudicial. Proper consideration of defendant's argument was therefore precluded. State v. Miller, 321 N.C. 455, 364 S.E.2d 387 (1988).

Where the relevance of the proffered evidence was not obvious from the record, and defendant did not make an offer of proof showing the substance of what the witness would have testified, defendant's question regarding the admissibility of the evidence would not be reviewed on appeal. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Where trial judge excluded testimony of an expert regarding the standard of care, defendant attempted to elicit his testimony from its expert at trial and judge sustained plaintiff's objection, and thereafter defendant made no offer of proof and the record failed to disclose what the substance of the expert's evidence might have been, defendant waived its right to assert issue on appeal since the essential substance of the witness' testimony was not discernible from the record. River Hills Country Club, Inc. v. Queen City Automatic Sprinkler Corp., 95 N.C. App. 442, 382 S.E.2d 849 (1989).

Where the defendant made no offer of proof regarding his proffered testimony and the significance of the excluded testimony was not obvious from the record, the defendant failed to preserve any issue concerning the exclusion of the testimony for appellate review. State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (1994).

Several assignments of error relating to rulings by the trial court excluding evidence the plaintiffs attempted to offer were not addressed by the court because in each instance the plaintiffs failed to make an offer of proof. Tolbert v. County of Caldwell, 121 N.C. App. 653, 468 S.E.2d 504 (1996).

Although defendant failed to preserve an evidentiary issue for appellate review, pursuant to G.S. 8C-1-103(a)(2), a review under G.S. 8C-1-403 indicated that the probative value of a letter that he wrote to his daughter, who was the victim of his unlawful sexual conduct, was not outweighed by the potential prejudice, as the meaning and intent of the letter were for the jury to decide. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

In order to preserve an argument on appeal which relates to the exclusion of evidence, including evidence solicited on cross-examination, the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

This rule does not contemplate an extensive offer of proof; thus, the trial court, while allowing expert's two-page report, properly refused to allow "a lengthy testimony" about the records she relied upon in reaching her conclusions and opinions. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Substance of Evidence Apparent From Context. — Substance of the testimony was apparent from the context within which the questions were asked under G.S. 8C-1-103(a)(2), the grounds for admitting the testimony as evidence of the victim's violent character pertinent to defendant's assertion of self-defense under G.S. 8C-1-404(a)(2) were apparent from the context under N.C. R. App. P. 10(b)(1), and the issue of the testimony's admissibility was properly preserved for appellate review. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Failure to Offer Proof Precludes Appellate Review. — Defendant, who did not make an offer of proof to show that witness's response to defense's question would have revealed that victim was put on lock-up for profane language and disrespect, failed to preserve this issue for appellate review under the standard set forth in this rule, where the answer was not otherwise apparent from the context. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Because the will beneficiaries made no offer of proof to a witness's possible answers, and the substance of the evidence was not apparent from the context within which the questions were asked (because no questions were asked), the will beneficiaries failed to preserve the issue of the trial court's exclusion of the witness's testimony for appellate review. In re Will of Barnes, 157 N.C. App. 144, 579 S.E.2d 585, 2003 N.C. App. LEXIS 643 (2003), cert. denied, 357 N.C. 460, 586 S.E.2d 96 (2003), appeal dismissed, 357 N.C. 460, 586 S.E.2d 95 (2003), cert. denied, petition denied, 357 N.C. 460, 587 S.E.2d 94 (2003).

Defendant who did not produce witnesses or submit affidavits which supported his theory that a child who died in an automobile accident would not have died if he had been restrained in a different manner did not preserve his claim that the trial court erred by excluding evidence that the child was improperly restrained, and the appellate court dismissed defendant's assignment of error. State v. Locklear, 159 N.C. App. 588, 583 S.E.2d 726, 2003 N.C. App. LEXIS 1535 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 394 (2004), aff'd, 359 N.C. 63, 602 S.E.2d 359 (2004).

In a medical malpractice case, objection to evidence excluded by motion in limine was not preserved for appellate review where there was no attempt to introduce the evidence during the trial. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Codefendant's answer to a question was not readily apparent from the context within which the question was asked, pursuant to G.S. 8C-1, N.C. R. Evid. 103(a)(2), the appellate court would not speculate as to what codefendant's answer might have been. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Failure to Object to Admission of Evidence Precludes Appellate Review. — Department of Transportation's contention on appeal that a tractor-trailer driver's own testimony was insufficient to support a finding of damages as to his lost income and additional costs could not be asserted because the Department had failed to object to the receipt of such evidence pursuant to G.S. 8C-1, N.C. R. Evid. 103(a). Smith v. N.C. DOT, 156 N.C. App. 92, 576 S.E.2d 345, 2003 N.C. App. LEXIS 83 (2003).

Constitution of North Carolina vests the Supreme Court of North Carolina with exclusive authority to make rules of practice and procedure for the appellate division of the courts; while G.S. 8C-1-103(a)(2) permitted appellate review of an evidentiary ruling even though the party failed to object at trial, since G.S. 8C-1-103(a)(2) was inconsistent with N.C. R. App. P. 10(b)(1), G.S. 8C-1-103(a)(2) failed. State v. Tutt, 171 N.C. App. 518, 615 S.E.2d 688, 2005 N.C. App. LEXIS 1313 (2005).

Failure to Object to Parole Evidence. — Where the record did not show that plaintiff objected to parol evidence in the form of affidavits submitted by the defendants, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon the motions for summary judgment. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Admission of Twelve Video Clips was not Unfairly Prejudicial. — In a trial charging defendant with twelve counts of third degree sexual exploitation of a minor in violation of G.S. 14-190.17A, the admission into evidence of 12 video clips from defendant's computer depicting children engaged in sexual activity was not unfairly prejudicial where the State showed only a few seconds from each clip, each clip was presented for one of the charges levied against defendant, the images were not duplicative, and the images were not shown on an unusually large screen. State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

Applied in State v. Slone, 76 N.C. App. 628, 334 S.E.2d 78 (1985); State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985); State v. Bunn, 79 N.C. App. 480, 339 S.E.2d 673 (1986); Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); Smith v. Starnes, 88 N.C. App. 609, 364 S.E.2d 442 (1988); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); Crump v. Board of Educ., 93 N.C. 168, 378 S.E.2d 32 (1989); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990); State v. Hyder, 100 N.C. App. 270, 396 S.E.2d 86 (1990); State v. Phillips, 328 N.C. 1, 399 S.E.2d 293; State v. Baker, 106 N.C. App. 687, 418 S.E.2d 288 (1992); State v. Long, 113 N.C. App. 765, 440 S.E.2d 576 (1994); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336, 2005 N.C. App. LEXIS 1015 (2005); State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

Cited in Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988); State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402 (1991); State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Dial, 122 N.C. App. 298, 470 S.E.2d 84 (1996); State v. Hairston, 123 N.C. App. 753, 475 S.E.2d 242 (1996); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); Garrett v. Smith, 163 N.C. App. 760, 594 S.E.2d 232, 2004 N.C. App. LEXIS 574 (2004); State v. Leach, 166 N.C. App. 711, 603 S.E.2d 831 (2004); State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005); State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005); State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586, 2005 N.C. App. LEXIS 2123 (2005); State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006); State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006); State v. Hammett, 361 N.C. 92, 637 S.E.2d 518, 2006 N.C. LEXIS 1296 (2006).

Rule 104. Preliminary questions.

(a) *Questions of admissibility generally.* — Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* — When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* — Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* — The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* — This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. (1983, ch. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 104 with the exception of subdivision (c) which is discussed below.

Subdivision (a) states as a general rule that preliminary questions shall be determined by the judge. This is in accord with North Carolina practice. See H. Brandis, *Brandis on North Carolina Evidence* § 8 (1982). The Advisory Committee's Note to the federal rule states:

"The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term 'question,' without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for 'conditional relevancy' in subdivision (b) and those for confessions in subdivision (d)."

The second sentence of subdivision (a) provides that in making its determination on preliminary questions, the court is not bound by the rules of evidence except those with respect to privileges. The Advisory Committee's Note states:

"If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are 'scattered and inconclusive,' and observes:

'Should the exclusionary law of evidence, "the child of the jury system" in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.'

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. *** Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant 'so far as appears [has] had an opportunity to observe the fact declared'. McCormick § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. ***

The rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

'When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.'

. . . Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b)."

Subdivision (b) concerns relevancy conditioned on fact. The Advisory Committee's Note states:

"In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled 'conditional relevancy'. Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (1), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. ***

The order of proof here, as generally, is subject to the control of the judge."

Subdivision (b) is in accord with North Carolina practice in making an exception to the general rule that preliminary questions are for the court. When the relevancy of evidence depends upon the existence of some other fact which also requires proof, the determination of the preliminary fact question is for the jury. *Brandis on North Carolina Evidence* § 8, p. 27-28 (1982).

Subdivision (c) concerns when hearings on preliminary questions will be out of the hearing of the jury. The Advisory Committee's Note states:

"Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require."

Subdivision (c) has been changed from the federal rule by the addition of language requiring other motions to suppress evidence in criminal cases in superior court to be conducted out of the hearing of the jury. This is in accord with G.S. 15A-977(e) which should be amended to reflect the adoption of this rule.

Subdivision (d) provides that the accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case. As the Advisory Committee's Note states:

"The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b).

The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See Walder v. United States, 347 U.S. 62 (1954); Simmons v. United States, 390 U.S. 377 (1968); Harris v. New York, 401 U.S. 222 (1971)."

There are no North Carolina cases on this point.

Subdivision (e) makes it clear that after the court makes its determination on a preliminary question of fact, the party opposing the ruling is entitled to introduce before the jury evidence that relates to the weight or credibility of certain evidence. For example, even if the court determines that a confession was not coerced, the defendant may introduce evidence of coercion, since this is relevant to the weight of the evidence.

Subdivision (e) is in accord with North Carolina practice.

Legal Periodicals. — For article, "The Admissibility of Expert Testimony in North Carolina After Howerton: Reconciling the Ruling with the Rules of Evidence," see 28 Campbell L. Rev. 1 (2005).

CASE NOTES

The decision to admit evidence rests in the discretion of the court upon consideration of the facts supporting relevancy. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), modified on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

When making preliminary determinations under G.S. 8C-1, N.C. R. Evid. 104(a) concerning the qualifications of experts to testify or to the admissibility of expert testimony under G.S. 8C-1, N.C. R. Evid. 702, trial courts are not bound by the rules of evidence; in this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Court Has Inherent Authority to Order Sua Sponte Preliminary Hearing on Evidence. — Under G.S. 8C-1, N.C. R. Evid. 102(a), 104(a), a trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to clarify questions of admissibility and to prevent undue delay in the proceedings. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

The exclusion of evidence concerning defendant's understanding of the Miranda warnings was error. As a matter of law, there was a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Testimony prohibited by trial court relating to the defendant's mental ability to understand Miranda warnings was clearly admissible as evidence of the surrounding circumstances under which the statements were made. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Credibility and Weight of Confessions. — In order for a jury to adequately evaluate the credibility and weight of confessions, they must hear all the competent evidence of the surrounding circumstances. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Testimony involving an expert opinion as to defendant's mental ability to understand the questions to him during his interrogation was competent as going to the weight and credit the jury should give to his confession. State v. Sanchez, 328 N.C. 247, 400 S.E.2d 421 (1991).

Declarant's Conflicting Statements. — Where the hearsay statements of a declarant are conflicting the conflict creates a question of credibility and not one of reliability. Questions of credibility are to be determined by the jury. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

Habitual Conduct of Victim. — The trial court did not abuse its discretion in denying admissibility of evidence of a victim's prior assault which the defendant claimed the victim fabricated so as to obtain a pregnancy test and which he wanted to introduce to demonstrate "habit" where it noted that the two incidents occurring two years apart were not sufficient to constitute a habit within G.S. 8C-1, Rule 406. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

In deciding preliminary matters, the trial court may consider any relevant and reliable information that comes to its attention, whether or not that information is technically admissible under the rules of evidence. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

Treatment of Motion Raising Qualification of Witnesses. — The trial judge correctly treated motion filed by the State, entitled "Motion in Limine to Allow Witnesses to Testify," seeking to admit the testimony of a social worker, two detectives, a licensed practical nurse, and a medical doctor, pursuant to this rule, as one concerning the qualification of witnesses to testify. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Where competency is questioned, the trial judge is not required to conduct a formal hearing at which all of the rules of evidence are applicable. The trial court must make only sufficient inquiry to satisfy itself that the witness is or is not competent to testify. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

The competency of a witness is determined at the time the witness is called upon to testify. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

Discretion in Determining Competency. — While the trial court's power to determine the competency of a witness is not an arbitrary one, there is no abuse of its discretion where there is evidence to support its ruling. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

Trial court did not abuse its discretion in finding competent a witness who suffered from viral encephalitis, a motor disease that affected his speech, because the witness was sufficiently audible and understandable when he repeated his testimony. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Competency of Child Witness. — The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel, absent the trial judge's independent finding pursuant to personally examining or observing the child on voir dire. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

In a prosecution charging defendant with first-degree rape, incest, and taking indecent liberties with his three-year-old daughter, the trial judge's adoption of counsels' stipulation in concluding that the child victim was incompetent to testify, where he never personally examined or observed the child's demeanor in responding to questions during a voir dire examination, was reversible error, where highly prejudicial testimony was erroneously admitted pursuant to G.S. 8C-1, Rules 803 (24) and 804 (b)(5) on the basis of this improperly based conclusion. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Hearing on Child's Competence to Testify. — Subsection (c) of this rule requires that a hearing to determine the competency of a young victim be held out of the presence of the jury only when the ends of justice require it. State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987).

Defendant's Right to Introduce Evidence as to Statement's Weight or Credibility. — Although the court ruled that defendant's statement confessing to certain crimes was admissible, defendant, who claimed that due to his mental retardation he confessed to crimes he did not commit, retained the right to introduce before the jury evidence relevant to his statement's weight or credibility. State v. Moore, 321 N.C. 327, 364 S.E.2d 648 (1988).

Finding That Witness Was Not Competent Upheld. — Trial judge did not abuse her discretion by finding that witness was incapable of remembering, understanding, and relating to the jury matters of detail concerning the holographic will in question, where the events and conversations which witness would have testified about occurred during the period of 1979-1982, and where the witness could not remember having twice been involuntarily committed during that same period of time. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

Where trial judge conducted a competency hearing at which he was able to observe for himself a five-year-old's competence to be a witness, and the record showed that the child could not respond to simple questions about basic facts in her life, and was contradictory, uncommunicative, and frightened, there was no error in the court's finding the child incompetent to testify. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

Expert Testimony. — Trial court did not err in allowing expert testimony that defendant's blood alcohol content at the time of the crash was 0.08 based on an average alcohol elimination rate of 0.0165 because the State was not required to establish that level to prove that defendant was driving while impaired, and the evidence was sufficient for a DWI conviction regardless of the expert's testimony; the evidence established (1) that a trooper smelled an odor of alcohol on defendant's person at the accident scene, (2) that defendant needed assistance with walking to the patrol car, (3) that defendant had difficulty writing defendant's statement on the appropriate lines, (4) that defendant had a "blank face," and (5) that defendant did not perform satisfactorily on field sobriety tests administered by the trooper. State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483, 2004 N.C. App. LEXIS 1519 (2004).

Applied in Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24 (1987); In re Faircloth, 137 N.C. App. 311, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000); State v. Noffsinger, 137 N.C. App 418, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Cited in Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991); State v. Hester, 330 N.C. 547, 411 S.E.2d 610 (1992); State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993); State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995); State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998); State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009); Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009).

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 105. The Advisory Committee's Note states:

"A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious."

Rule 105 is in accord with the general rule in North Carolina that evidence that is inadmissible for one purpose may be admitted for other and proper purposes. See *Brandis on North Carolina Evidence* § 79 (1982).

Legal Periodicals. — For articles, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence," see 21 N.C. Cent. L.J. 1 (1995).

CASE NOTES

The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

When evidence is competent for one purpose, but not for all purposes, the objecting party cannot rely on a general objection; he or she must state the grounds and ask for any desired limiting instructions. State v. Short, 322 N.C. 783, 370 S.E.2d 351 (1988).

Admission of Evidence Proper Where Limiting Instruction Given. — There was no error in the admission of a witness's prior consistent statement, as it was not hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) where it was not offered for substantive purposes but instead, it was used by the State for corroborative purposes; moreover, the trial court properly gave a limiting instruction to the jury regarding use of the statement under G.S. 8C-1, N.C. R. Evid. 105. State v. Early, — N.C. App. —, 670 S.E.2d 594, 2009 N.C. App. LEXIS 49 (2009).

Failure to Request Instruction. — In a sexual abuse prosecution, where defendant failed to request a limiting instruction, under G.S. 8C-1, N.C. R. Evid. 105, as to evidence admitted under G.S. 8C-1, N.C. R. Evid. 404(b), he could not complain that the trial court should have intervened ex mero motu to give such an instruction. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

In a prosecution for bank robbery in New Bern, the court did not err in permitting a teller at another New Bern bank to testify that one of the defendants came into that bank on the day of the robbery and got change for a one hundred dollar bill, where this testimony was offered and received for the limited but proper purpose of showing that the defendants were in New Bern on the day of the robbery and to corroborate the testimony of a confessed participant in the robbery. State v. Alston, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

Applied in State v. Autry, 101 N.C. App. 245, 399 S.E.2d 357 (1991); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Cited in State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991); State v. Jones, 105 N.C. App. 576, 414 S.E.2d 360 (1992); State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000).

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Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 106. The Advisory Committee's Note states:

"The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a) (4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. *** The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations."

N.C. Civ. Pro. Rule 32(a) (5), which applies to depositions, is similar to Rule 106.

CASE NOTES

The Supreme Court frequently looks to federal decisions for guidance with regard to the Rules of Evidence, and the lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness it too should be admitted. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Requirements. — Federal decisions make clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Defendant's argument that the trial court erred in denying his introduction of excluded portion of a statement he gave to the police failed because he did not seek to introduce the excluded portion of the statement contemporaneously as required, but instead sought to introduce the excluded portion on rebuttal. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Admission of Entire Report Concerning Child Sex Abuse. — Assuming error in admitting that portion of a licensed psychological associate's report which stated her opinion that a child sexual abuse victim was "not telling everything," the error was harmless in view of the weight of the substantive evidence against the defendant. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Prior Inconsistent Statements. — Co-conspirator was allowed to use her attorney-client privilege with regard to a prior inconsistent statement made in conference with her attorney; that privilege was not waived when the information was published and defendant had the opportunity to cross-examine and discredit the witness as to that portion of her statement and never asserted, and was never denied, the right to pursue any other aspect of the statement. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

Error Not Prejudicial. — Even if, assuming arguendo, defendant was correct that a portion of his statement was admissible under the rule in his trial for attempted first-degree rape, he failed to show that, had the statement been admitted, a different result would have been reached. State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689, 2003 N.C. App. LEXIS 1443 (2003).

Cited in State v. McCrimmon, 89 N.C. App. 525, 366 S.E.2d 572 (1988); State v. Castrejon, — N.C. App. —, 635 S.E.2d 520, 2006 N.C. App. LEXIS 2121 (2006).

ARTICLE 2.

Judicial Notice.

Rule 201. Judicial notice of adjudicative facts.

(a) *Scope of rule.* — This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of facts.* — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When discretionary.* — A court may take judicial notice, whether requested or not.

(d) *When mandatory.* — A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to be heard.* — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of taking notice.* — Judicial notice may be taken at any stage of the proceeding.

(g) *Instructing jury.* — In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 201, except subdivision (e) which is discussed below. The Advisory Committee's Note states:

"This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of 'adjudicative' facts. No rule deals with judicial notice of 'legislative' facts. ***

The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. ***

What, then, are 'adjudicative' facts? Davis refers to them as those 'which relate to the parties,' or more fully:

'When a court or an agency finds facts concerning the immediate parties — who did what, where, when, how, and with what motive or intent — the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .

'Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.' 2 Administrative Law Treatise 353."

Current North Carolina law does not deal with procedure for taking judicial notice of facts. Judicial notice of domestic and foreign law is dealt with in § Chapter 8, Article 1, which remains in force.

Subdivision (b) concerns the kinds of facts that may be judicially noticed. The Advisory Committee's Note states:

"With respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent."

Subdivision (b) is consistent with current North Carolina practice. See *Brandis on North Carolina Evidence* § 11 (1982).

Subdivisions (c) and (d) govern when judicial notice is discretionary and when it is mandatory. The Advisory Committee's Note states:

"Under subdivision (c) the judge has a discretionary authority to take judicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect

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existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such."

Subdivisions (c) and (d) are in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 11 (1982).

Subdivision (e) entitles a party, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice. It differs from the federal rule by its limitation to a trial court. The Advisory Committee's Note states:

"Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely."

Subdivision (e) departs from current North Carolina practice which generally does not require an opportunity to be heard prior to the court taking judicial notice on its own initiative. See *Brandis on North Carolina Evidence* § 11 (1982).

With respect to notice at administrative hearings, see G.S. 150A-30 [150B-30].

Subdivision (f) is in accord with North Carolina practice in allowing judicial notice to be taken at any stage of the proceedings, whether in the trial court or on appeal.

Subdivision (g) concerns instructing the jury with respect to judicially noticed facts. The Advisory Committee's Note states:

"Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e)."

Subdivision (g) is in accord with North Carolina practice in civil cases by not allowing evidence to be introduced to dispute a fact that has been judicially noticed. See *Brandis on North Carolina Evidence* § 11, at 34 (1982).

However, subdivision (g) differs from North Carolina practice by permitting evidence to be introduced in a criminal trial to rebut a fact that has been judicially noticed. In adopting subdivision (g), Congress was of the view that a mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is contrary to the spirit of the right to a jury trial.

CASE NOTES

Prior Proceedings. — A court may take judicial notice of its own prior proceedings, and if requested to take notice of its prior proceedings it must do so. In that case, the court simply instructs a civil jury to accept the fact(s) noticed. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Trial court did not err by taking judicial notice of findings from a prior custody action between biological parents, in which the mother had been found unfit, to support an award of custody to a non-parent in a second custody action. Davis v. McMillian, 152 N.C. App. 53, 567 S.E.2d 159, 2002 N.C. App. LEXIS 862 (2002), cert. denied, 356 N.C. 669, 577 S.E.2d 114 (2003).

In a termination of parental rights hearing, it was not error for a trial court to take judicial notice of previous orders of adjudication, review orders, and permanency planning orders, under G.S. 8C-1, N.C. R. Evid. 201(b), because the trial court, acting as fact-finder, was presumed to disregard any incompetent evidence, and nothing showed that the trial court did not conduct the required independent determination, as the trial court specifically found it considered the testimony offered by both sides in making its determination that a mother neglected her children, for purposes of termination. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), aff'd, — N.C. —, 625 S.E.2d 780 (2006).

Judicial Notice Not Mandatory Without Request and Production of Necessary Information. — Appellate court held that district court did not abuse its discretion by failing to take judicial notice of the fact that judgments were public records and that constructive notice existed of the status of any judgment, because company did not argue on appeal that it requested that the district court take such judicial notice, and the company did not allege that it supplied the district court with the necessary information to take such judicial notice. Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

Notice of Consent Order Held Improper. — Consent order was not entered into to dispose of any facts critical to disposition of the issues which were to be tried; therefore, the trial judge erred in taking judicial notice of the order. American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

Legal Conclusions, Municipal Ordinances, or Police Department Regulations. — North Carolina courts may not take judicial notice of legal conclusions, municipal ordinances, or police department regulations. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

Board of Election Decision. — Court properly refused to take judicial notice of the Board of Elections' decision dismissing a law firm's complaint against a political campaign committee regarding an ad the committee published which defamed the firm and one of its members, because the board's decision that the ad did not constitute criminal election activity under G.S. 163-274(8), was a legislative fact not properly subject to judicial notice. Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893, 2002 N.C. App. LEXIS 1088 (2002), cert. denied, — U.S. —, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003).

Experience of Foreign Attorneys. — A judge properly took judicial notice of (1) the number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in the state, and (2) the number of times plaintiff/law firm participated in litigation in North Carolina by relying on information supplied by the North Carolina State Bar Association. Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000), cert denied, 353 N.C. 381, 547 S.E.2d 435 (2001), aff'd, 354 N.C. 212, 552 S.E.2d 139 (2001).

Sunset and Moon Phase. — The trial court was not required to take judicial notice of the time of the sunset and the phase of the moon as reported in a local newspaper. State v. Canady, 110 N.C. App. 763, 431 S.E.2d 500 (1993).

Nighttime element of burglary was satisfied as: (1) judicial notice under N.C. R. Evid. 201 was taken of the end of twilight, (2) by the end of twilight, the victim had returned home, and the perpetrators were only in the victim's home a short time, (3) a call to a police officer shortly after the incident was placed during the nighttime, and (4) defendant's testimony that the men returned to their car when it was "just turning dark," alone, was insufficient to negate the nighttime element. State v. Jordan, 186 N.C. App. 576, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

Distances Between Cities. — Where an attorney sought to have a deposition admitted pursuant to Rule 32(a)(4) of the Rules of Civil Procedure by asserting that the witness was more than 100 miles from the place of trial, the trial court did not abuse its discretion by declining to take judicial notice of the distance between two cities. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Testimony Needed Regarding Safety of Motel. — In a child custody proceeding, the trial court should not have taken judicial notice sua sponte of criminal activity around the motel where the father lived where the prevalence of crime in the area was disputed; the court should have had a member of the community testify on the matter. Hinkle v. Hartsell, 131 N.C. App. 833, 509 S.E.2d 455 (1998).

Judicial Notice Did Not Constitute Improper Consolidation. — It was proper for trial court to consider discovery orders from a caveat proceeding in its consideration of sanctions for failure to comply in a discovery proceeding, where both proceedings involved plaintiff and defendant, plaintiff referred to the caveat action in his first set of interrogatories to defendant, and discovery of evidence with respect to the possession and content of the disputed sexually explicit videotapes was relevant to both proceedings. Sugg v. Field, 139 N.C. App. 160, 532 S.E.2d 843, 2000 N.C. App. LEXIS 817 (2000).

Judicial Notice of Racial Slurs. — No fact is more generally known than that a white man who calls a black man a "nigger" within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate; thus, the trial court was free to judicially note this fact. In re Spivey, 345 N.C. 404, 480 S.E.2d 693 (1997).

Judicial Notice of Criminal Offenses. — Trial court did not err in concluding that the minor child was a neglected juvenile, as the allegation in the petition that the minor child was neglected because the minor child lived in an environment injurious to the minor child's welfare was proven by clear and convincing evidence; indeed, the evidence showed that the minor child's older sibling was adjudicated abused and neglected because the mother's boyfriend, who was cohabitating with the mother at the time of the abuse, pled guilty to several felony sex offenses, and the trial court was entitled to take judicial notice of that criminal record. In re D.S.A., 181 N.C. App. 715, 641 S.E.2d 18, 2007 N.C. App. LEXIS 375 (2007).

Judicial Notice of Co-Defendant's Guilty Plea. — Co-defendant's guilty plea was properly excluded under G.S. 8C-1, N.C. R. Evid. 201(d), because it was not an adjudicative fact; the co-defendant did not testify at defendant's trial for breaking or entering a motor vehicle with intent to commit larceny and the plea was irrelevant. It was improper to place irrelevant facts before a jury, by judicial notice or otherwise under G.S. 8C-1, N.C. R. Evid. 402. State v. Baskin, 190 N.C. App. 102, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Trend in Electric Utility Industry. — The Utilities Commission did not act arbitrarily in taking judicial notice of the current restructuring trend in the electric utility industry, where the reality of this trend was not subject to reasonable dispute because it was generally known within the industry. State ex rel. Utils. Comm'n v. Carolina Indus. Group For Fair Util. Rates, 130 N.C. App. 636, 503 S.E.2d 697 (1998), cert. denied, 349 N.C. 377 (1998).

Newspaper Articles. — Court properly refused to take judicial notice of newspaper articles, in rendering its decision on a political campaign committee's motion to dismiss a law firm's defamation and unfair practices complaint against it, because the articles had no relevance to the complaint's legal sufficiency or to any absolute defense to the firm's claims. Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893, 2002 N.C. App. LEXIS 1088 (2002), cert. denied, — U.S. —, 124 S. Ct. 431, 157 L. Ed. 2d 310 (2003).

Judicial Notice of Assumptions Underlying Abolished Tender Years Doctrine Held Improper. — Trial court erred in entering a custody order concerning the parties' child; the trial court improperly relied on the tender years presumption in granting custody to the mother, as that presumption had been abolished, and G.S. 50-13.2(a) required that the custody decision be based solely on the best interests of the child, and G.S. 8C-1, Rule 201(b) did not allow the trial court to take judicial notice of the assumptions underlying an abolished doctrine in order to resurrect the doctrine. Greer v. Greer, 175 N.C. App. 464, 624 S.E.2d 423, 2006 N.C. App. LEXIS 183 (2006).

Applied in In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Cited in Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 342 S.E.2d 582 (1986); Albritton v. Albritton, 109 N.C. App. 36, 426 S.E.2d 80 (1993); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Helms, 127 N.C. App. 375, 490 S.E.2d 565 (1997).

ARTICLE 3.

Presumptions in Civil Actions and Proceedings.

Rule 301. Presumptions in general in civil actions and proceedings.

In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact. (1983, c. 701, s. 1.)

COMMENTARY

The first sentence of this rule is identical to Fed. R. Evid. 301, except that the phrase "by statute, by judicial decision" is used in lieu of the phrase "by Act of Congress." The last three sentences of the rule, which were modeled upon Alaska Rule of Evidence 301 (1979), clarify the effect of the rule.

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed or inferred from another fact established in the action. The term "basic fact" is used to designate the fact from which the assumption or inference is made and the term "presumed fact" is used to indicate the fact assumed or inferred.

The rule does not apply to "conclusive presumptions", which are merely statements of substantive law and have nothing to do with the law of evidence. See *Brandis on North Carolina Evidence* § 215, at 170 (1982).

In some situations, when the basic fact has been established, the presumed fact may (but need not) be found to exist. The existence of the presumed fact is for the trier of fact to determine from all the evidence *pro* and *con*. The term "permissive presumption" is used to describe this situation. *Id.* at 171. Or it is said that the basic fact is *prima facie* evidence of the fact to be inferred. Rule 301 does not apply in situations where a statute or judicial decision creates a "permissive presumption" or merely provides that one fact shall be *"prima facie"* evidence of another.

The term "mandatory presumption" is used when the presumed fact *must* be found when the basic fact has been established, unless sufficient evidence of the nonexistence of the presumed fact is forthcoming. *Id.* at 171. Rule 301 is intended to govern mandatory presumptions.

Care should be taken to determine whether the presumption in question is within the scope of this rule since the term presumption is often misused. The first sentence of the rule makes it clear that the General Assembly and the courts retain power to create presumptions having an effect different from that provided for in this rule. Nonetheless, a presumption created by a prior statute or judicial decision should be construed to come within the scope of this rule unless it is clear that the presumption was not intended to be a "mandatory presumption".

Under Rule 301, the presumption satisfies the burden of producing evidence of the presumed fact. Evidence sufficient to prove the basic fact is sufficient proof of the presumed fact to survive a directed verdict at the end of the proponent's case-in-chief. This is in accord with North Carolina practice.

The general rule in North Carolina is in accord with Rule 301 in that a presumption does not shift the burden of proof. *Id.* § 218, at 179. However, with respect to some presumptions in North Carolina, the opponent has the burden of persuading the jury, by a preponderance of the evidence or otherwise, that the presumed fact does not exist. *Id.* If by statute or judicial decision a particular presumption shifts the burden of proof, Rule 301 does not apply.

Proof of the basic fact not only discharges the proponent's burden of producing evidence of the presumed fact but also places upon the opponent the burden of producing evidence that the presumed fact does not exist. If the opponent does not introduce any evidence, or the evidence is not sufficient to permit reasonable minds to conclude that the presumed fact does not exist, the proponent is entitled to a peremptory instruction that the presumed fact shall be deemed proved. This is in accord with North Carolina practice. *Id.* § 222, at 189.

If the opponent introduces evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist, no peremptory instruction should be given. Rather, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from proof of the basic fact.

Of course, the opponent may avoid the effect of a presumption by proving that the basic fact does not exist.

CASE NOTES

Total Charges Must Be Reasonable. — When plaintiff proffers the evidence required by G.S. 8-58.1, the fact-finder must find that the total amount of the alleged medical charges is reasonable, unless defendant carries its burden of going forward by rebutting the presumed fact of reasonableness. Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996).

Failure to Rebut Statutory Presumption Resulted in Summary Judgment. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of this section and G.S. 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000).

Trial Court Must Instruct Jury As to Presumption. — Under G.S. 8C-1, N.C. R. Evid. 301, the trial court must instruct the jury when a statutory or judicial presumption exists. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Trial Court Did Not Err in Refusing to Instruct the Jury As to Statutory Presumption. — Trial court did not err by failing to instruct the jury that the amount of a passenger's medical expenses was presumed reasonable under G.S. 8-58.1, even though G.S. 8C-1, N.C. R. Evid. 301, required the trial court to instruct the jury of a statutory presumption; all parties stipulated to the amount of the passenger's medical charges and to the reasonableness of the charges, and any instruction regarding the medial expenses would have been redundant and confusing to the jury. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003),

cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Applied in Poore v. Swan Quarter Farms, Inc., 95 N.C. App. 449, 382 S.E.2d 835 (1989).

Cited in Kisiah v. W.R. Kisiah Plumbing, Inc., 124 N.C. App. 72, 476 S.E.2d 434 (1996).

Rule 302. Applicability of federal law in civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 302 in that "federal law" has been substituted for "state law." The Comment to Rule 302 of the Uniform Rules of Evidence (1974) explains the purpose of the change:

"Parallel jurisdiction in state and federal courts exists in many instances. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied."

ARTICLE 4.

Relevancy and Its Limits.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 401. The Advisory Committee's Note states:

"Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called 'conditional' relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applies logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a 'tendency to make the existence' of the fact to be proved 'more probable or less probable.' Compare Uniform Rule 1(2) which states the crux of relevancy as 'a tendency in reason,' thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is 'more ... probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, 'A brick is not a wall,' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, '... [I]t is not to be supposed that every witness can make a home run.' Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase 'fact that is of consequence to the determination of the action' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material'. *** The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a 'material' fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission."

While North Carolina courts have used slightly different definitions of relevant evidence, the rule is unlikely to alter significantly North Carolina practice. See *Brandis on North Carolina Evidence* § 78 (1982). Although the rule speaks in terms of relevancy, the definition includes what is often referred to in our courts as materiality. *Id.* § 77.

Legal Periodicals. — For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?," see 21 Wake Forest L. Rev. 93 (1985).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For comment, "Admissibility of DNA Evidence: Perfecting the 'Search for Truth'," see 25 Wake Forest L. Rev. 591 (1990).

For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For article, "The Admissibility of Expert Testimony in North Carolina After Howerton: Reconciling the Ruling with the Rules of Evidence," see 28 Campbell L. Rev. 1 (2005).

For casenote, "Howerton v. Arai Helmet, Ltd.: Last Dance with the Daubert-Kumho Decisions: One Step Forward from Two Steps Back," see 28 N.C. Cent. L.J. 109 (2005).

CASE NOTES

I. General Consideration.
II. Relevant Evidence.
III. Irrelevant Evidence.

I. GENERAL CONSIDERATION.

This rule sets a standard to which trial judges must adhere in determining whether proffered evidence is relevant; at the same time, this standard gives the judge great freedom to admit evidence because the rule makes evidence relevant if it has any logical tendency to prove any fact that is of consequence. State v. Wallace, 104 N.C. App. 498, 410 S.E.2d 226 (1991), cert. denied, 331 N.C. 290, 416 S.E.2d 398, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Rulings on Relevance Given Great Deference. — Even though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. State v. Wallace, 104 N.C. App. 498, 410 S.E.2d 226 (1991), cert. denied, 331 N.C. 290, 416 S.E.2d 398, 506 U.S. 915, 113 S. Ct. 321, 121 L. Ed. 2d 241 (1992).

Compliance with the facial requirements of Rule 901(a), regarding authentication and identification, does not mean (i) that an exhibit automatically qualifies as relevant under Rule 401 or (ii) if relevant, that it is admissible under Rule 802, the hearsay rule. State v. Patterson, 103 N.C. App. 195, 405 S.E.2d 200, aff'd, 332 N.C. 409, 420 S.E.2d 98 (1992).

While G.S. 8C-1, N.C. R. Evid. 411 does not prohibit the admission of evidence of liability insurance to establish agency, the evidence must still meet the relevancy requirements of G.S. 8C-1, N.C. R. Evid. 401 to be admissible. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. State v. Sloan, 316 N.C. 714, 343 S.E.2d 527 (1986); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989); State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Evidence is relevant if it can assist the jury in understanding the evidence. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Every circumstance that is calculated to throw any light upon the supposed crime is admissible; the weight of such evidence is for the jury. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

The court has interpreted this rule broadly and has explained on a number of occasions that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

Even though evidence may tend to show other crimes, wrongs or acts by the defendant, and his propensity to commit them, it is admissible under G.S. 8C-1, Rule 404(b) so long as it is also relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 312 (1988).

An individual piece of evidence need not conclusively establish a fact to be of some probative value. It need only support a logical inference of the fact's existence. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

When Relevant Hearsay Is Admissible. — Hearsay evidence, even if relevant, is inadmissible unless it is covered by statutory exception, or unless its exclusion deprives a defendant of a trial in accord with fundamental standards of due process. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

When Evidence Is Irrelevant. — If proffered evidence has no tendency to prove a fact in issue in the case, the evidence is irrelevant and must be excluded. State v. Coen, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

Admission of irrelevant evidence is generally considered harmless error. State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

Admission of irrelevant evidence will be treated as harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Defendant has the burden of showing that he was prejudiced by the admission of evidence. In order to show prejudice, defendant must meet the statutory requirements of G.S. 15A-1443(a). State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

When relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial. This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Admission of Evidence Held Prejudicial Error. — Where the challenged evidence that defendant was in custody for assault with a deadly weapon with intent to kill his girlfriend was especially prejudicial because of its similarity to the charge at issue, which was murder and assault with a deadly weapon with intent to kill, and the similarity of the charges was compounded by the additional "verification" evidence of a detective, such admissions constituted prejudicial error and defendant was entitled to a new trial. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Cumulative Effect of Admitted Evidence Held Prejudicial. — Where, in a murder prosecution, the State spent a great deal of time focusing on the details of defendant's alleged prior offenses of selling marijuana to high school students, citation for possession of marijuana, and breaking and entering, the cumulative effect of the admission of the evidence was prejudicial error entitling the defendant to a new trial. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Admission of Evidence Held Not Prejudicial Error. — In prosecution for rape, first-degree kidnapping, sexual offense, and common law robbery, the admission of the officer's testimony that the defendant had a rifle in his car when he was arrested, if error, was not prejudicial, where there was no intimation by the officer that the defendant attempted to use the rifle when he was arrested, that it was used in the commission of any crime or that possession of the rifle was otherwise unlawful. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Evidence of Defendant's Behavior. — Trial court did not abuse its discretion by admitting evidence of the defendant's anti-social and disruptive behavior while in custody awaiting trial for the purpose of impeaching the defendant's credibility. State v. Myers, 123 N.C. App. 189, 472 S.E.2d 598 (1996).

Evidence of Credentials. — Evidence of the physical locations of the universities listed on the resume and diplomas of defendant, a naturopath, was relevant since it showed that he held himself out as a medical doctor. State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 469 (2003).

In deciding whether evidence of insurance should be received under G.S. 8C-1, N.C. R. Evid. 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully; (2) If so, is the evidence relevant to show that other purpose; and (3) If so, is the probative value of the relevant evidence substantially outweighed by the factors set forth in G.S. 8C-1, N.C. R. Evid. 403. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Error Alleged on Appeal Not Preserved. — Defendant's claim that certain testimony was erroneously admitted was not preserved for purposes of appeal because defendant claimed, on appeal, that the testimony was irrelevant, under G.S. 8C-1, N.C. R. Evid. 401 and 402, and that the testimony was unduly prejudicial, under G.S. 8C-1, N.C. R. Evid. 403, but defendant did not make these specific objections at trial, nor were such objections apparent from the context, under N.C. R. App. P. 10(b)(1), from which it appeared that defendant made a hearsay objection. State v. Hueto, — N.C. App. —, 671 S.E.2d 62, 2009 N.C. App. LEXIS 62 (2009).

Applied in Buie v. Johnston, 69 N.C. App. 463, 317 S.E.2d 91 (1984); State v. Pridgen, 313 N.C. 80, 326 S.E.2d 618 (1985); State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24 (1987); State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987); State v. Welch, 89 N.C. App. 135, 365 S.E.2d 190 (1988); State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988); State v. Barber, 93 N.C. App. 42, 376 S.E.2d 497 (1989); Crump v. Board of Educ., 93 N.C. 168, 378 S.E.2d 32 (1989); State v. Givens, 95 N.C. App. 72, 381 S.E.2d 869 (1989); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 97 N.C. App. 511, 389 S.E.2d 576 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990); State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990); State v. Davis, 101 N.C. App. 409, 399 S.E.2d 371 (1991); State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991); State v. Ferguson, 105 N.C. App. 692, 414 S.E.2d 769 (1992); State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992); Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992); In re Beck, 109 N.C. App. 539, 428 S.E.2d 232 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797; State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995); State v. Hightower, 340 N.C. 735, 459 S.E.2d 739 (1995); State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996); State v. McAllister, 132 N.C. App. 300, 511 S.E.2d 660 (1999); State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999); In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553, 2000 N.C. App. LEXIS 820 (2000); State v. Stephenson, 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 535 (2001); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); State v. Bullock, — N.C. App. —, 566 S.E.2d 768, 2002 N.C. App. LEXIS 885 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745, 2002 N.C. App. LEXIS 1179 (2002); State v. Bethea, 167 N.C. App. 215, 605 S.E.2d 173, 2004 N.C. App. LEXIS 2150 (2004); Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004); State v. Bruton, 165 N.C. App. 801, 600 S.E.2d 49, 2004 N.C. App. LEXIS 1508 (2004); State v.

Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005); State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007); State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008); State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

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v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999); State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585, 1999 N.C. App. LEXIS 1144 (1999); State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000); State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000); State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002); State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); State v. Bartlett, 153 N.C. App. 680, 571 S.E.2d 28, 2002 N.C. App. LEXIS 1247 (2002); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002); Hummer v. Pulley, Watson, King & Lischer, P.A., 157 N.C. App. 60, 577 S.E.2d 918, 2003 N.C. App. LEXIS 375 (2003); State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Oakley, 167 N.C. App. 318, 605 S.E.2d 215, 2004 N.C. App. LEXIS 2185 (2004); State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133, 2004 N.C. App. LEXIS 2333 (2004); State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705, 2005 N.C. App. LEXIS 1167 (2005); State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007); State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Beatty, 189 N.C. App. 464, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (2008); Moseley v. Branker, 545 F.3d 265, 2008 U.S. App. LEXIS 22689 (4th Cir. 2008); Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008); State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009); Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009).

II. RELEVANT EVIDENCE.

Background Evidence. — Evidence which is essentially background in nature is universally offered and admitted as an aid to understanding. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

Amount of Damages in Personal Injury Action. — Where the determination to be made in a personal injuries action was the amount of damages, any fact bearing on the degree or severity of injury sustained by plaintiff was properly admitted. Ferrell v. Frye, 108 N.C. App. 521, 424 S.E.2d 197 (1993).

Evidence concerning the speed the defendant's vehicle was traveling when it struck the rear of the plaintiffs' vehicle was relevant to the extent of the plaintiffs' injuries, and thus was relevant to the issue of damages. Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

Passenger's testimony regarding the force of the impact was relevant to determining damages for the injured party and thus, the trial court did not abuse its discretion in admitting said testimony. Dunn v. Custer, 162 N.C. App. 259, 591 S.E.2d 11, 2004 N.C. App. LEXIS 112 (2004).

Evidence that another person committed the crime for which defendant is charged generally is relevant and admissible, as long as it does more than create an inference or conjecture in this regard; under this rule, such evidence must tend both to implicate another and be inconsistent with the guilt of the defendant. State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987), overruling prior decisions to the extent that they tend to indicate that a defendant may not present evidence to show that the crime charged was committed by another unless the crime was one that only could have been committed by one person acting alone. See also, State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Excluded evidence which showed that within a few hours during the same night three homes in close proximity were broken into, the female occupants were sexually assaulted, and the modus operandi in each case was very similar, which tended to show that the same person committed all of the similar crimes in the neighborhood in question on that night and that the person was someone other than the defendant, was both relevant and admissible under this rule, and the trial court erred in ruling to the contrary. State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987).

The defendant was entitled to a new trial because a different result might have been reached had the trial court not excluded relevant and admissible evidence which cast doubt upon the State's evidence that defendant was the perpetrator of the murder of an elderly victim and which further implicated another person as that perpetrator beyond conjecture or mere implication. State v. Israel, 353 N.C. 211, 539 S.E.2d 633, 2000 N.C. LEXIS 912 (2000).

Trial court did not err in not permitting defendant to introduce evidence that three other people may have been responsible for the crimes for which he was tried because the evidence did not tend both to implicate the others and to be inconsistent with the guilt of defendant. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Witness' testimony in which he stated he was "pretty sure" that defendant had admitted to killing victim was relevant to the issue of the identification of defendant and not unfairly prejudicial. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Testimony Defendant Attempted to Procure False Alibi. — Evidence that defendant attempted to procure a false alibi from a former girlfriend was relevant and, thus, admissible. State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Videotaped interview, initiated by defendant herself and containing the story as told to her family, police, doctors and the news reporter, was relevant to show how she lied consistently concerning the cause of the injuries leading to her child's death and, even if wrongly admitted into evidence, was not prejudicial. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Defendant's videotaped statement made in the back of a patrol car during a conversation with an officer was admissible; the defendant was not being interrogated by the officer at the time and Miranda warnings therefor were not required, the statement was relevant to the crime, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. State v. Gantt, 161 N.C. App. 265, 588 S.E.2d 893, 2003 N.C. App. LEXIS 2055 (2003).

Although defendant pled guilty, videotape showing murder was admissible as it showed that the murder was committed for pecuniary gain and that the murder was part of a course of conduct which included a crime of violence against another person. State v. Jones, 336 N.C. 229, 443 S.E.2d 48, cert. denied, 513 U.S. 1003, 115 S. Ct. 518, 130 L. Ed 2d 423 (1994), 339 N.C. 619, 454 S.E.2d 263 (1995).

The witness's plea agreement with the State, in which she agreed to testify against the defendant, was relevant to her credibility and therefore properly admitted. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Evidence to Indicate Defendant Was Racist. — In trial for murder, evidence which indicated that defendant was a racist was relevant where no evidence other than race as to why victim was singled out for abuse appeared from the record. State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991).

Testimony Regarding Victim's Behavior. — Testimony of a lay witness as to a child sexual abuse victim's behavior before and after the alleged sexual abuse was relevant as to whether the abuse occurred. State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212, 2001 N.C. App. LEXIS 860 (2001).

Under a plain error analysis, because of the defendant's failure to object at trial, testimony explaining the murder victim's various employment duties, responsibilities, and performance was admissible as it showed why the victim worked late nights; additionally, the testimony was relevant to describe the victim's payday routine as well as where and how he kept his money. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Testimony Regarding Mental State. — Where doctor was allowed to testify about defendant's mental state at the time of the murders and gave his opinion that defendant did not form the specific intent to kill, but was not allowed to give his opinion that the defendant "snapped", defendant received a fair trial, free of prejudicial error. State v. Burgess, 345 N.C. 372, 480 S.E.2d 638 (1997).

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Testimony of a victim of armed robbery as to how she felt when the gun was placed to her head was relevant, pursuant to G.S. 8C-1, Rule 401, in that her testimony as to her fear for her life and her intimidation proved the main element of the offense of robbery with a dangerous weapon in violation of G.S. 14-87. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Testimony by two of the adult armed robbery victims as to the children's state of mind was relevant to suggest that their lives were endangered and threatened by defendant's actions. State v. Anderson, 181 N.C. App. 655, 640 S.E.2d 797, 2007 N.C. App. LEXIS 410 (2007).

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Expert Testimony Regarding Post Traumatic Stress Disorder. — If believed, expert testimony regarding post traumatic stress disorder could be helpful to jury in understanding behavioral patterns of sexual assault victims. North Carolina Court of Appeals and courts of other jurisdictions have recognized reliability of post traumatic stress disorder testimony in sexual assault cases. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Evidence Pertaining to Parental Relations of Decedent in Wrongful Death Action. — Evidence pertaining to disease of plaintiff's decedent and the effect it had on his relationship with his parents had a tendency to prove the extent of damages, which were in controversy in wrongful death action. The evidence was therefore relevant and should have been admitted on that ground. Hales v. Thompson, 111 N.C. App. 350, 432 S.E.2d 388 (1993).

Evidence of Sexually-Transmitted Disease in Sexual Abuse Case. — In a sexual abuse prosecution, testimony from a public health department that defendant and the victim were both diagnosed with and treated for gonorrhea at approximately the same time, according to the department's records, was relevant, under G.S. 8C-1, N.C. R. Evid. 401, to show that the victim had sexual contact with an infected person and defendant was an infected person. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Evidence of Sexual Activity in Paternity Case. — Character evidence is generally not admitted in civil cases unless it is character which is in issue because this evidence is often more prejudicial than probative. Where, however, evidence of sexual activity and promiscuity goes to a central element of the case, i.e., the opportunity to impregnate plaintiff, whether or not other men had the opportunity to father child born out of wedlock is of ultimate relevance to the issue of paternity. In addition, this nongenetic outside information, as a factor in the probability of paternity calculation, must be received in order for the jury to weigh any expert's assumptions underlying the calculation of numerical probability of paternity. State ex rel. Williams v. Coppedge, 105 N.C. App. 470, 414 S.E.2d 81, rev'd on other grounds, 332 N.C. 654, 422 S.E.2d 691 (1992).

Evidence from a Void Statutory Rape Charge. — The court rejected the defendant's claim that the admission of evidence on a void statutory rape charge was irrelevant and unfairly prejudicial and found that the evidence of defendant's sexual activity with the fourteen-year-old was relevant to establish intent, motive, knowledge, as well as defendant's scheme of involving himself with vulnerable, disturbed teenage girls at the home. State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Evidence of Previous Traffic Violations. — The defendant's previous traffic violations were relevant and admissible in his second-degree murder prosecution arising from a traffic accident to show malice based on defendant's "depraved heart" on the night that he struck the two victims' vehicle while intoxicated and while rounding a sharp curve at a speed at least 40 mph over the speed limit. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

Trial court properly allowed plaintiff's attorney to ask defendant motorist about traffic citations he received that resulted in a conviction, because the evidence was relevant to the issue of whether defendant company was liable for negligent entrustment because it employed the motorist and allowed him to drive a company van. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

Police Officer's Opinion Relevant. — Where a defendant made a general objection to a police officer's testimony and not a specific objection to the officer's qualification as an expert, the admissibility of the officer's testimony was not preserved for review, and because the testimony was in the form of an opinion based on the officer's expertise and was likely to assist the jury, the testimony was not patently inadmissible or prejudicial. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Deputy's testimony that defendant fell over when the deputy asked defendant to stand on one leg and hop was relevant to the deputy's lay opinion that defendant was impaired. State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

Medical Opinion Relevant. — Court did not err in admitting doctor's opinion that victims wound was consistent with the victim leaning over a chair when he was shot. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Medical Records Relevant. — The court properly allowed evidence of the plaintiff's medical records indicating the possibility of a history of alcohol abuse to explain the reason defendants considered the possibility that alcohol withdrawal was a potential cause of the plaintiff's post-operative confusion or hallucinations. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

Dreams and Diary Relevant. — Testimony from witness about her dreams and diary entry when first incarcerated was relevant under this rule and admissible under Rule 403; however, references to later bad dreams were properly excluded. State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997).

Victim's Character. — Evidence that defendant had murdered a blood relative who had opened her home to him, had been especially caring, and had offered him a stable environment was admissible as it tended to support the aggravating circumstance that the murder was especially heinous, atrocious or cruel. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Trial court did not err in admitting the testimony of the victim's mother about the victim's involvement with drugs or a photo showing the victim before the victim started using drugs. Pursuant to G.S. 8C-1, N.C. R. Evid. 401, the evidence was relevant to support the State's theory that the murder of the victim by defendant and another man was drug-related and to show the victim's health before the victim became involved with drugs. State v. Hope, 189 N.C. App. 309, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (2008).

Evidence of Decedent's Drinking Habits Held Relevant. — Although evidence of decedent's drinking habits did not by itself show that decedent knew defendant was under the influence, all of the evidence of decedent's drinking habits, along with the evidence of defendant's drinking on the day of the accident, established that decedent's prior use of alcohol and his knowledge of its effect was relevant on the issue of contributory negligence for riding with intoxicated driver. McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995), cert. denied, 340 N.C. 114, 458 S.E.2d 183 (1995), cert. denied, 340 N.C. 114, 456 S.E.2d 317 (1995).

Evidence of the Method Used by the Defendant in Loading Merchandise After the Accident. — Since plaintiff allegedly had been injured by merchandise falling from the defendant's trailer, defendant's employee was properly permitted to testify that he had observed the method by which defendant loaded and packed its trailers and that he had observed merchandise fall out of the trailers when the rear doors were opened. The observations were not too remote in time (within 18 months) and allowed a reasonable inference that the same methods had been used to load the trailer involved in plaintiff's injury. Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000).

Surveillance Video of Personal Injury Plaintiffs Admissible. — A surveillance videotape was relevant and admissible in a personal injury trial on damages, where the occupants of a van were shown engaging in various physical activities, and this evidence was relevant to whether and to what extent the occupants were disabled by the injuries they sustained in a rear end collision. Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

A jury view of the police vehicle that defendant shot during incident was well within the court's discretion and the evidence was relevant as defendant's intent when he fired shots into the vehicle was at issue. State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997), cert. denied, 523 U.S. 1061, 118 S. Ct. 1389, 140 L. Ed. 2d 649 (1998).

Weapons Evidence Admissible. — The drawing of and testimony about a knife that the defendant habitually carried was admissible where the witnesses' descriptions of the approximate size of defendant's pocketknife overlapped with the medical examiner's testimony regarding the approximate depth and width of the victim's wounds; any variance in size between the knife described by the witnesses and the medical examiner's description of the victim's wounds merely affected the weight or probative value of the evidence, not its admissibility. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Presence of a gun was relevant to the charges of possession of cocaine with intent to manufacture, sell, or deliver, and trafficking in cocaine. State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

Evidence that defendant who shot a police officer with a shotgun possessed an assault rifle was relevant and was not more prejudicial than probative; evidence showed why defendant was in a field and why he used the shotgun rather than the rifle, and it was also highly probative of defendant's motive for the shooting: not wanting the victim to discover that defendant was violating his probation by possessing firearms. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Admission of photos of guns found in defendant's home in a case charging defendant with drug trafficking and possession was proper because such evidence was relevant, and because guns were often used for protection in illegal drug trade, probative value was not substantially outweighed by danger of unfair prejudice. State v. Lakey, 183 N.C. App. 652, 645 S.E.2d 159, 2007 N.C. App. LEXIS 1093 (2007).

Victim's testimony regarding the shiny object in defendant's hand, which the victim thought to be a knife, was relevant to the first-degree rape charge. State v. Lawrence, 191 N.C. App. 422, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Three loose nine-millimeter cartridges turned over to investigators by the manager of the trailer park where defendant lived and where bodies were discovered were properly included as relevant evidence and an adequate foundation was laid for their inclusion. State v. Lytch, 142 N.C. App. 576, 544 S.E.2d 570, 2001 N.C. App. LEXIS 188 (2001), aff'd, 355 N.C. 270, 559 S.E.2d 547 (2002).

Demonstration of Effects of Pepper Spray. — Trial court properly allowed the State, during its presentation of rebuttal evidence, to demonstrate the effects of pepper spray in an experiment under circumstances dissimilar to those that actually occurred and with the use of law enforcement officers trained in the use of pepper spray; defendant was given, but chose not to take, the opportunity to present his own demonstration on lay witnesses. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Testimony of Coast Guard officer as to ocean currents was relevant to show a connection between defendant and the crime where an inference could be drawn therefrom that a body had drifted from an area with which defendant was familiar. State v. Dial, 122 N.C. App. 298, 470 S.E.2d 84 (1996).

Cross-Examination Held Proper. — Where state did not cross-examine defendant in murder case about an unrelated rape accusation to show defendant was unworthy of belief because of this alleged bad act, but for purpose of establishing defendant's motive for crime for which he was on trial, cross-examination was proper. State v. Meekins, 326 N.C. 689, 392 S.E.2d 346 (1990).

Photographs of Crime Scene and Victim's Clothes. — Photographs of the crime scene and victim's bloody clothes were admissible since they were only used so that the witnesses could explain and illustrate their testimony and the trial court instructed the jury as to their limited purpose; further, the photographs were not unnecessarily gory. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Autopsy photographs, photographs of the victim's car after she was shot, testimony regarding the amount of blood at the scene, and blood stained material were all properly admitted at defendant's murder trial in accordance with G.S. 8C-1, N.C. R. Evid. 401, 402, and were not overly prejudicial in violation of G.S. 8C-1, N.C. R. Evid. 403. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Evidence of Threat in Abuse Case. — Finding of fact by the North Carolina Department of Health and Human Services, Division of Facility Services, stating that the nurse aide had told an elderly nursing home patient that, if the patient kicked the nurse aide again, then the nurse aide would "knock the f—king hell out of" the patient, was relevant to the determination of whether the nurse aide abused the patient within the meaning of 42 C.F.R. § 488.301 and the nurse aide failed to show prejudice. Allen v. N.C. Dep't of Health & Human Servs., 155 N.C. App. 77, 573 S.E.2d 565, 2002 N.C. App. LEXIS 1634 (2002), cert. denied, 357 N.C. 163, 580 S.E.2d 358 (2003).

Evidence of Prior Assaults on Same Victim. — In defendant's trial on a charge of murder in the first degree, the trial court properly admitted testimony which showed that defendant assaulted the victim, his girlfriend, on prior occasions and that defendant's girlfriend had asked defendant to leave her residence on the day he shot her, because the testimony was relevant to defendant's claim that he discharged his gun accidentally and the prejudicial effect of the evidence did not outweigh its probative value. State v. Latham, 157 N.C. App. 480, 579 S.E.2d 443, 2003 N.C. App. LEXIS 743 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Relevancy Not Renewable Under Abuse of Discretion Standard. — A trial court's ruling on whether evidence is relevant is technically not discretionary and therefore is not reviewed under the abuse of discretion standard. Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997), rev'd on other grounds, 348 N.C. 526, 500 S.E.2d 708 (1998).

Evidence Improperly Excluded. — In a murder trial, where guilt was based on circumstantial evidence, the trial court committed reversible error in refusing to admit into evidence defendant's proposed exhibit, a drawing found by law enforcement officers among the victim's personal effects, which included a rough map of the area surrounding defendant's North Carolina home and numerous written notations indicating a possible larceny scheme.

The exhibit was clearly relevant to a crucial issue in the case, namely, whether this defendant, and not some other person, was in fact the perpetrator of the crime, and it therefore should have been admitted into evidence at trial. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Trial court erred by its exclusion of evidence, during the trial on the issue of damages, regarding whether a businessman was financially ready, willing, and able to exercise a stock purchase option and restriction agreement during the period specified in the option contract, because the evidence was relevant to the issue of damages; for if, the businessman was not ready, willing, and able to exercise his rights under the option, he would be entitled to no more than nominal damages for its breach. Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

While a corporation and its principal were properly held liable for breaching an option agreement with a consultant, it was error to exclude evidence as to whether the consultant ever intended to exercise the option; the corporation and the principal were entitled to a new trial so that a jury could determine whether the consultant was ready, willing, and able to exercise the option and, if not, the consultant was entitled to only nominal damages. Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

Court properly excluded evidence that victim's father had been convicted of sexually assaulting the victim's sister 17 years before the claimed sexual assault allegedly committed by defendant was properly excluded. State v. Couser, 163 N.C. App. 727, 594 S.E.2d 420, 2004 N.C. App. LEXIS 592 (2004).

Evidence Properly Excluded. — Evidence of substantial amounts of drugs belonging to others and seized at the trailer where the defendant lived was irrelevant, prejudicial and inadmissible to show his knowledge that the substance in a van he was driving was cocaine where the defendant was not charged with any offense in connection with the drugs seized. State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52, 2000 N.C. App. LEXIS 1287 (2000).

In prosecution of defendant for committing sexual offenses upon two of her young stepsons, trial court committed reversible error in excluding evidence that defendant, her husband and the oldest stepson consulted a lawyer for the purpose of bringing an action for custody of the boys against their natural mother shortly before natural mother accused defendant of sexual offenses against them, as this evidence was relevant in tending to establish why natural mother might have suborned her sons' testimony. State v. Helms, 322 N.C. 315, 367 S.E.2d 644 (1988).

Where defendant was accused of sexually abusing his 14-year-old adopted daughter, evidence regarding a prior accusation of sexual misconduct made by the prosecutrix directed at her uncle was relevant and defendant should not have been prevented from offering such proof at his trial. State v. Maxwell, 96 N.C. App. 19, 384 S.E.2d 553, cert. denied, 326 N.C. 53, 389 S.E.2d 83 (1989).

Evidence of prior methamphetamine use by a shed owner's daughter was not relevant, as it did not tend to exculpate defendant, who was charged with various drug related offenses, in any way. State v. Loftis, 185 N.C. App. 190, 649 S.E.2d 1, 2007 N.C. App. LEXIS 1701 (2007).

Evidence Held Relevant. — In a murder trial involving a 60 year old victim who was beaten and kicked about the head in June, 1983 and died in December, 1983 of complications resulting from injury to the brain received in the incident, admission of evidence regarding victim's physical appearance at the scene and in the hospital was relevant under this rule on the issue of excessive force, was not prejudicial under G.S. 8C-1, Rule 403, and was not inflammatory under the old rules. State v. Moxley, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Challenged testimony which addressed the substance of a New York lawsuit from which the action at issue, an action for attorneys' fees, arose provided needed background information pertaining to the dispute at issue, was not prejudicial, and was properly admitted. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

Although motive was not an element of any of the crimes for which the defendant was convicted (murder, arson, and assault with a deadly weapon inflicting serious injury), his motives and state of mind at the time of the fire certainly were facts "of consequence to the determination of the action ...", and the trial court did not err by admitting evidence thereof. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

In prosecution for first degree rape and intercourse by a substitute parent, the trial court did not commit prejudicial error in admitting into evidence, over objection, a letter which the defendant wrote to the victim's mother, in which defendant promised not to "bother" victim again, despite defendant's contention that what he had meant was that he would not discipline the victim anymore. State v. Moses, 316 N.C. 356, 341 S.E.2d 551 (1986).

The alcohol level of defendant's blood approximately one hour after the accident is relevant to the issue of defendant's intoxication. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986), cert. denied, 317 N.C. 711, 347 S.E.2d 448 (1986).

In prosecution for rape and other offenses, where the State produced evidence that one of the defendants had threatened victim with a knife when they abducted her and that one of the three assailants had told her that he would be back for her and that she would be shot if she reported the crimes, trial court did not err in admitting knives and razor found in defendants' car five nights later when defendants came to victim's apartment around 1:00 a.m., beat on the door and attempted to open it, before leaving when a neighbor stepped outside his apartment, as by entering pleas of not guilty and denying that they were the assailants, defendants made identity an issue in the case, and this evidence clearly bore on the issue of identity. State v. Gilliam, 317 N.C. 293, 344 S.E.2d 783 (1986).

Watch and ring taken from victim of rape and kidnapping were "relevant" in defendant's trial for those offenses, because they tended to make the existence of a fact of consequence — defendant's connection to the offenses with which he was charged — more probable than it would be without the evidence, and their admission was not unduly prejudicial. State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986).

State's exhibits, which included $5,900 in United States currency, rolling papers and pipe, electric digital scales, a triple beam balance scale, a water bong, a plastic bag containing white powder, an airline bag in which the white powder was found and a briefcase with documents, with the exception of the briefcase, were relevant to the crime of trafficking in cocaine, in that they intended to show that defendant knowingly possessed cocaine and was trafficking in it, and the briefcase, which was in defendant's possession at the time of arrest, tended to explain or illustrate the circumstances surrounding his arrest. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Because defendant's statement that he had "unfinished business" in the area to take care of upon his release from prison had some probative value on the issue of defendant's intent to kill the victim, the evidence was relevant and properly admitted. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

Evidence merely disclosing subsequent pregnancy of the rape victim was admissible as tending to prove penetration, an essential element of the crime of forcible rape; moreover, victim's simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy, and the mere fact that an abortion took place was not so inflammatory as to render it inadmissible. State v. Stanton, 319 N.C. 180, 353 S.E.2d 385 (1987).

In a first degree sexual offense case, evidence that defendant attempted a remarkably odd and strikingly similar modus operandi some 10 weeks after his attack on victim was relevant and admissible as tending to prove the defendant's modus operandi, motive, intent, preparation and plan. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

Videotape and magazines and detective's testimony concerning them were relevant to corroborate child victim's testimony that defendant had shown him such materials at the time defendant committed the crimes for which he was on trial, and since the exhibits and testimony were relevant to a fact or issue other than the character of the accused, G.S. 8C-1, Rule 404(b) did not require that they be excluded from the evidence at trial. State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988).

In prosecution for second-degree murder, evidence concerning defendant's sale of marijuana to the victim was relevant in showing the relationship between the victim and defendant, and given the evidence defendant once questioned the witness about whether the victim was a "nark," the evidence that defendant sold marijuana was admissible since it had some probative value concerning defendant's possible motive in the shooting. However, the testimony that the defendant was in the business of selling marijuana to high school age persons had no tendency to make any fact of consequence more or less probable, nor was the evidence about how defendant procured his automobile and the evidence concerning the details of how the marijuana was packaged and sold relevant to any material fact in issue. Equally irrelevant was evidence concerning the victim's citation for possession of marijuana. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

In a rape case hair comparison testimony was clearly relevant on the issue of whether the victim was sexually assaulted even though the evidence of hair comparison analysis was not used to establish the identity of perpetrator, since a hair belonging to someone other than the victim was found in her pubic area tended to show that the person from whom the hair came could have engaged in sexual contact with the victim. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Testimony by a rape victim that the defendant was on "house arrest" at the time of the rape was part of the chain of circumstances and relevant to the victim's account of the crime, where the victim further explained that she ran to the corner after the attack because she knew that the defendant could not follow her as he was wearing a control device on his ankle. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

In a first-degree murder case evidence that insulation particles in defendant's clothing had apparently come from the attic used to gain access to the victim's apartment did not prove that he killed her, but was relevant to the State's case since evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue, and certainly a fact of consequence was the presence of fiber on the defendant's clothing consistent with that found in the victim's apartment. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Evidence that approximately two weeks before he killed victim the defendant threatened to kill him, or to kill a group of which he was a member, was relevant and admissible as evidence tending to show premeditation and deliberation and to negate self-defense. State v. Groves, 324 N.C. 360, 378 S.E.2d 763 (1989).

Evidence that shortly after his arrest defendant gave as his address 6619 Somersworth Drive, Charlotte, was relevant since evidence tended to show that defendant lived at the house at the time of the search and his arrest. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

In a negligence action where defendant employee parked garbage truck on the shoulder of the road facing oncoming traffic and van collided with the truck, evidence of the alternative method for collecting customer's garbage prior to the accident as well as testimony revealing defendant employee's rationale for stopping as he did was relevant not only to the issue of whether defendant employer and defendant employee violated G.S. 20-161(a) and (b) but also to the issue of defendant employee's alleged negligent conduct. Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

In trial for charges of trafficking in marijuana, trial court did not err in overruling defendant's objection to the State's evidence which tended to show defendant's driving activities around the Virginia Beach area, the type of boat which was present several months earlier in a campground in which defendant was living and which was later present outside a beach cottage, and the accessibility of the beach cottage to a nearby inlet; the evidence was relevant to show defendant was arrested while she was on a trip which followed the same general route as trips which she had previously taken, the accessibility of the beach cottage to the inlet partially explained why surveillance of the beach cottage was instituted and the evidence about the boat being at the campground showed that the boat had some connection to the person who paid the cottage's electric bill. State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989).

Evidence of footprints or shoe prints at the scene of the crime corresponding to those of the accused is admissible as relevant circumstantial evidence tending to connect an accused with the crime. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

In trial for robbery with a dangerous weapon, evidence of victim's scholastic achievements presented by the assistant district attorney during preliminary questioning was relevant; it was offered as a means of introducing the victim to the court and jury and to assist in explaining the victim's background, and considering the fact that defendant later portrayed victim as the aggressor, the challenged testimony was not prejudicial. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

A witness' statement that his wife heard a rape victim say "Are you going to shoot me, too?" was relevant for the limited purpose of explaining why the witness called the sheriff a second time after he heard a commotion outside his house, and the statement was not inadmissible hearsay. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Testimony by a captain of a county sheriff's department that, to his knowledge, wife of murder victim was beneficiary of the victim's life insurance policy did not point directly to the guilt of another; at most, it cast suspicion upon another or raised a mere conjectural inference that the crime may have been committed by another. Therefore, it did not meet the relevancy test of this rule. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Testimony that the defendant was calm and was not crying which described her emotional state shortly after her husband was killed, based upon the witnesses' observations of her demeanor at that time, and evidence that the defendant disposed of her husband's personal effects the day after his funeral, amounted to evidence tending to shed light upon the circumstances surrounding husband's killing and, thus, were relevant and admissible. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Photographs which showed numerous gunshot wounds were relevant to show not only the cause of death, but were also relevant as a means of proving the premeditation and deliberation elements of first-degree murder. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Where defense counsel attacked the professionalism of the conduct of the law enforcement officers who investigated the case, the evidence that defendant was read his Miranda rights according to law and that he indicated his understanding of them tended to refute the characterization of the officers' conduct as unprofessional and was therefore relevant. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

Evidence which tended to show that the defendant did not support his children and did not send them gifts following his wife's death tended to shed light upon the circumstances surrounding the shooting and tended to rebut the defendant's characterization of his relationship with his wife and children as a caring, supportive one and was thus relevant and admissible. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

Evidence that the defendant had escaped from jail was relevant and probative in that it tended to show the defendant's consciousness of his guilt. Furthermore, the threats made by defendant during the course of his escape were relevant to show the strength of his desire to escape. State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994).

Evidence regarding the issuance of a warrant for defendant's arrest for beating murder victim in the hour immediately preceding the murder tended to shed light on defendant's emotional state at or around the time of the killing and the circumstances surrounding that killing; thus, it was relevant and admissible. The testimony established intent and motive of returning to continue the assault and tended to prove premeditation, deliberation, and malice. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, 513 U.S. 1098, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Condensed videotape which included footage of a body being turned over, placed in a body bag and on a stretcher, then transported to elevator for removal was relevant to illustrate the crime scene prior to the arrival of medical personnel and was neither excessive nor cumulative evidence. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

The evidentiary fact that defendant was armed and hesitant to submit to arrest was not inconsequential and was relevant to the determination of his guilt in the murder. State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994).

Where the state's theory of case was that defendant had moved to county to act as the leader of a drug ring, and as such had ordered a "hit" on the victim, evidence demonstrating that defendant may have had alternative motivations in moving to the county was relevant. The testimony may have had the tendency to make the State's theory less plausible than it would have been without the testimony. State v. Wilson, 338 N.C. 244, 449 S.E.2d 391 (1994).

Testimony of police officers, which stemmed from their personal experience combined with their observation of defendant, was helpful to a clear understanding of a relevant issue — defendant's demeanor shortly after the crime — was admissible under Rule 701 and relevant under this rule. State v. Lambert, 341 N.C. 36, 460 S.E.2d 123 (1995).

Bloody clothing of a victim that is corroborative of the state's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Plaintiff's possession of a Taurus .357 pistol was relevant where the victim died from gunshot wounds, a spent .38/.357 bullet was found in close proximity to the victim's body, and this bullet had markings consistent with those of a Taurus pistol. State v. Soles, 119 N.C. App. 375, 459 S.E.2d 4, appeal dismissed, cert. denied, 341 N.C. 655, 462 S.E.2d 523 (1995).

Photographs received with limiting instructions that they were being admitted for the purpose of illustrating and explaining the testimony of victim's mother and were not to be considered for any other purpose were appropriately admitted. State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996).

Handgun and bullets introduced as evidence were relevant because they tended to link defendant to the crime where the handgun and bullets found in dumpster were linked to defendant through both his fingerprints and his own testimony, and the bullets found in the dumpster were consistent with the type of bullets recovered from the victim's body; the evidence was probative on the question of defendant's guilt. State v. Burke, 342 N.C. 113, 463 S.E.2d 212 (1995).

Admission of consent to search form bearing defendant's signatures was not prejudicial error; the form was relevant evidence on the issue of defendant's control of the premises. State v. Shine, 121 N.C. App. 78, 464 S.E.2d 475 (1995).

Evidence of a car chase was properly received as evidence of flight and was sufficient to support the trial court's instruction on flight. State v. King, 343 N.C. 29, 468 S.E.2d 232 (1996).

Evidence of flight, i.e. that the defendant did not appear at his first scheduled trial, is a relevant circumstance to be considered by the jury, together with other circumstances, in determining the issue of the defendant's guilt. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

Where blood spatter experiments demonstrated that it was probable that defendant was in close proximity to victim at the time the gun was fired, the results cast doubt on the credibility of defendant's statements to police chief that she did not remember being close to her husband at the time of the shooting and that she did not see the shooting; thus, the trial court properly admitted the results of the experiments. State v. Clifton, 125 N.C. App. 471, 481 S.E.2d 393 (1997), cert. granted, 346 N.C. 182, 486 S.E.2d 200 (1997), discretionary review improvidently allowed, 347 N.C. 391, 493 S.E.2d 56 (1997).

Evidence that decedent was a police officer was not unfairly prejudicial and was relevant. State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997), cert. denied, 522 U.S. 917, 118 S. Ct. 304, 139 L. Ed. 2d 234 (1997).

Photographs of male models and men in underwear were properly admitted into evidence in defendant's trial for taking indecent liberties with a child and crime against nature. State v. Creech, 128 N.C. App. 592, 495 S.E.2d 752 (1998), cert. denied, 348 N.C. 285, 501 S.E.2d 921 (1998).

Testimony by the wife of an eyewitness to a murder that he was restless and unable to sleep prior to his identification of the defendant but that he slept much better after doing so was admissible in the defendant's prosecution for second degree murder, where the eyewitness' credibility was in issue, and the wife's testimony was relevant to the reliability of his identification. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

Where witness remembered that defendant had a gun similar to the one used in the two murders at issue because defendant had playfully held it to his head, the trial court properly allowed the prosecution to present evidence of the defendant's prior misconduct with a handgun. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Officer's testimony that he had training in the investigation of drug offenses, had dealt with occupants of the subject house when investigating drug offenses, and had arrested "folks" that resided in the house for drug offenses was relevant to show motive, i.e., that defendant committed robbery with a dangerous weapon in order to get money to buy drugs. State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

Murder defendant's statement that he would like to see his former girlfriend get the electric chair was admissible in order to show defendant's bias against her, as he had accused her of participating in the murder. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Evidence of defendant's possession of pornographic materials, without any evidence that defendant had viewed the pornographic materials with the victim, or any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant to proving defendant committed the offenses of indecent liberties with a child and first degree sex offense with a female child under the age of 13 and should not have been admitted by the trial court; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Evidence that a defendant used drugs shortly before a fire he was accused of starting was relevant because it was part of the chain of events or circumstances leading to the time of the fire. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

Testimony as to the existence of a bullet hole in the wall of the defendant's house trailer, which an expert testified was made by a bullet that was not found and which exited the defendant's house trailer and which other parties testified did not exist before the victim's disappearance, was relevant and admissible in a case in which the defendant was found guilty of voluntary manslaughter in the death of a woman whose recovered skeletal remains showed was beaten to death. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

Testimony from a police officer that defendant was arrested while driving a vehicle that had been reported stolen was properly admitted and was relevant because it offered an explanation for why defendant was detained and how defendant's picture came to be included in a photographic lineup after he was stopped driving a vehicle similar to that described by prosecuting witnesses as being driven by an armed robber in an armed robbery two weeks earlier. State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348, 2003 N.C. App. LEXIS 1667 (2003), notice of appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 855 (2003).

Testimony from an inmate that shared a jail cell with one of two defendants accused of robbery, burglary, and kidnapping that one defendant told him that defendants were going to claim that they were forced to commit the crimes was properly admitted because the evidence tended to prove that defendant and his co-defendant concocted a scheme to avoid liability for their criminal actions. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Court properly admitted evidence of lessors' violation of a preliminary injunction and a temporary restraining order to be presented to the jury in a trial for breach of lease agreement and conversion; the evidence was relevant under G.S. 8C-1, N.C. R. Evid. 401 because it supported the lessees' claims of breach of a lease agreement, conversion, and punitive damages. Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Trial court did not abuse its discretion during defendant's trial on two counts of first-degree murder by allowing the State to introduce the testimony of nurses who treated defendant while he was in the hospital, even though the testimony duplicated other evidence the State offered. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Defendant's threats to a holding cell officer that he "already killed one" and "I got one up under my belt" could have been interpreted as statements of guilt and used as direct evidence to prove that defendant acknowledged guilt in the death of his victim, as what was "up under his belt" was a human life, that he had already "killed one" was a woman like the officer, and "belt" was meant to imply that defendant had a black belt; accordingly, the statements were relevant in defendant's felony murder trial. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

In a cardiologist's action for breach of employment contract, the employer's testimony about reservations prior to hiring the cardiologist was relevant to rebut the cardiologist's offered evidence of a high collection rate at a previous hospital and a generally successful cardiology practice; also, testimony that the employer offered to allow the cardiologist to continue employment under certain conditions was relevant to both the issues of the employer's attempt to mitigate any damages if the jury found a breach, and to the issue of the employer's good faith and fair dealing in attempting to adhere to the employment contract terms. Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005).

Testimony regarding conversation between officer and witness regarding a statement by the victim was relevant because it concerned one of the circumstances surrounding the parties, and was necessary to be known, to properly understand their conduct or motives. State v. McMillian, 169 N.C. App. 160, 609 S.E.2d 265, 2005 N.C. App. LEXIS 544 (2005).

Trial court did not err by admitting without editing or redacting letters that defendant and his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

No plain error existed in the trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and alcohol in defendant's trial for driving while impaired, hit and run, and second degree murder, following an auto accident, as the evidence was relevant to the charges against defendant. State v. Edwards, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

Evidence of prison records on defendant's father were relevant in defendant's rape trial to eliminate other potential perpetrators of the rape; specifically paternal relative of defendant. State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Trial court properly admitted two photographs of defendant's foster daughters into evidence because they were relevant to the victim's motives for coming forward with her allegations. State v. Whitman, — N.C. App. —, 635 S.E.2d 906, 2006 N.C. App. LEXIS 2167 (2006).

Admissions of evidence of defendant's unauthorized use of church credit cards in an action charging defendant with the murder of defendant's wife was upheld because defendant's use of the credit cards was linked in time and circumstances with the crime and was relevant to show the financial status of defendant and defendant's wife before and immediately after the disappearance of defendant's wife. State v. Pulley, 180 N.C. App. 54, 636 S.E.2d 231, 2006 N.C. App. LEXIS 2242 (2006).

In defendant's murder trial, the trial court did not err in admitting evidence of defendant's and defendant's wife's finances as well as the wife's job status as relevant for showing motive, pursuant to G.S. 8C-1-401; at trial, the evidence presented on finances tended to show that the couple had some financial difficulty and defendant stood to inherit a large amount of money upon the wife's death. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

Average alcohol elimination rate offered by expert could have aided a finder of fact in determining whether it was more or less likely defendant's breath alcohol level exceeded the statutory limit for driving while impaired purposes; accordingly, the testimony was relevant. State v. Teate, 180 N.C. App. 601, 638 S.E.2d 29, 2006 N.C. App. LEXIS 2515 (2006).

In a trial in which the state sought to show that defendant pressured her daughter to shoot defendant's husband so that defendant could be with a boyfriend she met at a swingers party, the admission of sexually suggestive photographs of defendant and the boyfriend was proper under G.S. 8C-1-401, G.S. 8C-1-403, and G.S. 8C-1-404(b) because the photographs corroborated the existence of a sexual relationship between defendant and the boyfriend, the photographs illustrated the chain of events leading up to the murder, and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Evidence of a knife and a condom found at a crime scene was properly admitted as it was relevant under G.S. 8C-1-401 since: (1) defendant's relationship with the victim's mother was ending badly, and defendant had recently been experiencing sexual tension with the victim and had been asked to leave the home; (2) defendant stated that defendant had initially intended to use the condom when defendant assaulted the victim, and that defendant had left the knife in the master bedroom because defendant intended to kill the mother when the mother got home; (3) the knife further tended to corroborate the state's evidence that the victim's bra was cut in the front; and (4) defendant failed to establish prejudice. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Employee of a victim's identification of a camera was clearly relevant, as the employee stated that the employee was personally familiar with the camera and testified that the employee recognized the camera found in a trailer that defendant claimed was defendant's as the camera that was taken from the victim's office. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Pastor was properly allowed to identify a camcorder as the one stolen from the pastor's church, as the identification of the camcorder was relevant and was preceded by a proper foundation. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Detective's statements as to other businesses that had reported break-ins was not inadmissible hearsay as: (1) defendant's objection was overruled only as to what the detective did, and the evidence offered was both relevant, in that it explained the chain of events in the police investigation, and was not hearsay as it precluded the further admission of statements regarding the reported break-ins; (2) the statements were offered to explain the chain of events and were not offered for the truth of the matter asserted; and (3) the probative value of the statements was not substantially outweighed by their prejudicial effect as the detective's testimony did not directly accuse defendant of other crimes, and was not offered to prove defendant's conformity with character to commit wrongs, but was offered to explain the sequence of events. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Statements referring to an officer's testimony given during trial and introduced to challenge the credibility of defendant's testimony were relevant and thus, admissible. State v. Parker, 187 N.C. App. 131, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Testimony of a trooper and a witness regarding an employee's actions in fleeing the scene of a motor vehicle accident was relevant to show the employee's motivation for leaving the scene as the evidence related to the possibility that the employee was acting as an agent for the employee's employer. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Evidence of the victims' state of mind, including the victim's fear that defendant would abuse the victim's younger sister, kill the victim, and kill the victim's family, and evidence concerning the treatment plan developed for the victim were all relevant to whether the victim had been sexually abused by defendant. State v. Davis, 191 N.C. App. 535, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (2008).

Evidence of defendant's extra-marital affair was admissible because the evidence was relevant and helped explain why the child victim waited to come forward and report a sexual assault by defendant. State v. Tadeja, 191 N.C. App. 439, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, 191 N.C. App. 743, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

Testimony about prior acts against defendant committed against the victim was admissible, where the testimony was relevant because it made it more probable than not that defendant committed the charged crimes against the victim given defendant's belief that the victim was cheating on defendant again. State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

Testimony that the victim of an arson refused to agree to allow defendant to store stolen goods in her home was relevant under G.S. 8C-1, N.C. R. Evid. 401 to show defendant's motive to burn the premises. G.S. 8C-1, N.C. R. Evid. 404(b) did not require exclusion of the victim's testimony as evidence that was probative only of defendant's propensity to commit crimes. State

v. Chappelle, — N.C. App. —, 667 S.E.2d 327, 2008 N.C. App. LEXIS 1809 (2008), appeal dismissed, review denied, 362 N.C. 684, 670 S.E.2d 568 (2008).

Testimony by defendant's sister and the sister's boyfriend that they were feared defendant was relevant because the fear was a product of their belief in defendant's guilt and explained by the sister did not contact law enforcement directly or more immediately after a codefendant confessed; as such, the testimony had some tendency as circumstantial evidence to make the existence of defendant's guilt more probable. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Letter from defendant to defendant's mother was properly admitted, because it constituted defendant's admission to the crime in defendant's own words, reflecting a calculated murder for money and goods without any provocation, and had some tendency to make the fact of defendant's real deliberation of the murder more probable, and thus, it was relevant. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Trial court did not err by admitting into evidence a DVD recording of defendant's police interview without redacting those questions posed to him by the detectives, which contained statements attributed to non-testifying third parties. The questions were relevant under G.S. 8C-1, N.C. R. Evid. 401 as their content made facts of consequence to the case more probable or less probable than they would be otherwise and also gave context to defendant's responses. State v. Miller, — N.C. App. —, 676 S.E.2d 546, 2009 N.C. App. LEXIS 805 (May 19, 2009).

Evidence of the reason for a son's discontinued employment was relevant to the extent of opportunities usurped from a partnership and the resulting lost profits in an unfair trade practices suit; therefore, the evidence bore substantial probative value and minimal risk of confusing the issues, misleading the jury, or unfairly prejudicing the son and the father. Accordingly, the trial court did not abuse its discretion in allowing the partners' counsel to ask questions concerning an alleged theft. White v. Thompson, — N.C. App. —, 676 S.E.2d 104, 2009 N.C. App. LEXIS 530 (2009).

Admission of statements defendant made after defendant's arrest was proper, because they showed defendant's intent and the absence of mistake or accident in the commission of the offenses. State v. Madures, — N.C. App. —, 678 S.E.2d 361, 2009 N.C. App. LEXIS 1077 (July 7, 2009).

Testimony Which Opens the Door to Otherwise Inadmissible Evidence. — When defendant testified that he loved his wife and did not intend to kill her, the door was opened to questions by the State as to matters which would show the defendant did not love his wife, as evidenced by his affairs with other women. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

In a cardiologist's action for breach of employment contract, the employer was properly allowed to present rebuttal evidence of the cardiologist's prior performance problems at another hospital since the cardiologist had testified regarding his positive performance prior to working for the employer. Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005).

Demonstrative Evidence Properly Admitted. — Where defendant, who was convicted of strangling his pregnant high school girlfriend with her waitress apron string, testified that his action was impulsive as shown by the fact that he tore off the "skirt" part of the apron after the strangulation. It was proper to allow a detective, using a mannequin at trial, to demonstrate how the apron was tied around the victim's neck as the demonstration was relevant as to whether defendant acted with premeditation and deliberation and the demonstration was not excessively inflammatory. State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637, 2003 N.C. App. LEXIS 1511 (2003).

Repetition of Evidence During Closing Argument. — Defendant waived his right to object to the admission of testimony of a prosecution witness that he was afraid to testify for fear of gangs and to the prosecutor's reference to that testimony during closing arguments; because the evidence was previously admitted under G.S. 8C-1, N.C. R. Evid. 401, allowing repetition of the evidence by the State in closing arguments was not an abuse of discretion. State v. Bodden, 190 N.C. App. 505, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008), review denied, appeal dismissed 336 N.C.131, 675 S.E.2d 660 (2009).

III. IRRELEVANT EVIDENCE.

Prosecutor's Questions Exceeded the Purpose for Which They Were Allowed. — Although, in murder prosecution, evidence that defendant was familiar with the gun and had used it previously might have rebutted defendant's claim of accident, the State greatly exceeded this purpose and questioned the witness at length about the details of the breaking and entering, details which had no connection with the crime for which defendant was being prosecuted. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Evidence Attempting to Implicate Another. — Evidence showing that the defendant's ex-girlfriend's two sons were hostile toward his wife and were not in school on the day of the murder was not admissible under this rule because it did no more than arouse suspicion that the sons had motive and opportunity to murder the victim; this evidence neither directly linked sons to the murder nor tended to exculpate the defendant. State v. Floyd, 143 N.C. App. 128, 545 S.E.2d 238, 2001 N.C. App. LEXIS 215 (2001), cert. denied, 534 U.S. 1092, 122 S. Ct. 838, 151 L. Ed. 2d 717 (2002).

There was no abuse of discretion in the denial of defendant's request to argue that another person shot the victim, where there was no evidence presented at trial that pointed directly or indirectly to the guilt of the other person, as the admissibility of the guilt of one other than defendant was governed by the general principle of relevancy, pursuant to G.S. 8C-1, N.C. R. Evid. 401. State v. Bullock, 154 N.C. App. 234, 574 S.E.2d 17, 2002 N.C. App. LEXIS 1476 (2002), appeal dismissed, 357 N.C. 64, 579 S.E.2d 396 (2003), cert. denied, 540 U.S. 928, 124 S. Ct. 338, 157 L. Ed. 2d 231 (2003).

Evidence of Prior Convictions. — In an habitual offender prosecution, evidence of convictions not relied on to prove the habitual offender charge were irrelevant and should have been redacted from documents submitted to the jury. State v. Lotharp, 148 N.C. App. 435, 559 S.E.2d 807, 2002 N.C. App. LEXIS 18 (2002).

Evidence Properly Excluded. — In an action against an insurer in which plaintiff sought to recover the cost of chiropractic services rendered to her and her two minor children as a result of injuries sustained in an automobile collision, where plaintiff testified to the extent and type of damage to her automobile as a result of the collision, the court, in the exercise of its discretion under G.S. 8C-1, Rule 403, could properly exclude the automobile repair bill by which plaintiff sought to corroborate her testimony, as this evidence was cumulative and its probative value was weak, and moreover, the potential for confusion of issues by its admission was clear. Brown v. Allstate Ins. Co., 76 N.C. App. 671, 334 S.E.2d 89 (1985).

Proffered testimony as to the amount of rent victim was paying for her apartment had no logical tendency to prove that the shower in her apartment was in good working order on the day in question. State v. Coen, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

Evidence that another person, bearing a resemblance to defendant and utilizing a modus operandi similar to that used in the robbery for which defendant was being tried, robbed another fast food restaurant two months after the robbery was not admissible where there was no evidence that the other person committed the crime with which defendant was charged. Stated another way, the proffered evidence did not point directly to the other person's guilt of the crime with which the defendant was charged. Neither did the proffered evidence in any way refute the identification of the defendant by the eyewitnesses as the perpetrator of the robbery. State v. Allen, 80 N.C. App. 549, 342 S.E.2d 571, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

The fact that defendant pointed his gun at victim three years previously and that both men laughed afterward did not indicate that three years later defendant did not fear victim or make the apparent necessity to defend himself more or less probable than it would be without the evidence; thus, it was error to allow testimony of this extrinsic act of misconduct in order to show the defendant's character for violence and that therefore he must have acted in conformity with that character, and not in self defense, when he fatally shot the victim. State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986).

The evidence defendant sought to introduce in his trial for first-degree sexual offense of his two daughters, which primarily involved his marital dispute over their property would only have muddled the evidence worthy of the jury's consideration, and the trial court committed no error in precluding the introduction of evidence regarding defendant's theory that the victim's mother devised this scheme for her financial benefit. State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424, cert. denied, 325 N.C. 230, 381 S.E.2d 789 (1989).

The trial court properly excluded exhibits which merely indicated plaintiff's legal position towards defendants and did not have a tendency to prove a fact at issue in the case. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, rev'd on other grounds, 342 N.C. 159, 463 S.E.2d 72 (1995).

Interjecting evidence which the defendant contended would allow the jury to infer his immaturity, and immaterial matter, so that the jury could make an additional leap to infer a fact of consequence, that he lacked capacity to form the requisite intent would have unnecessarily confused the issues, given the slight probative value of the contested evidence; therefore, even if this evidence was relevant and admissible, its exclusion was within the trial court's discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

Trial court properly denied defendant's motion to question victim about prior arrests, where the arrests showed nothing beyond the facts that victim was arrested and there was insufficient evidence to proceed with the charges. State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (1998).

Trial court properly precluded defendant from cross-examining victim concerning an alleged sexual offense on grounds of lack of relevance. State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999).

The trial court properly excluded the defendant's proffered expert testimony that the defendant was reacting to a potential fear that he was about to be harmed when defendant killed the victim since such testimony would not aid but rather tend to confuse the jury in understanding the evidence and determining the facts in issue. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Trial court properly excluded as irrelevant evidence regarding the income and assets of an ex-wife's current husband, who was not a party, because a prior out-of-state court order determined the obligations of the ex-wife and her ex-husband for their sons educational and medical expenses and that order, by its plain and unambiguous language, obligated only the parties to pay for their sons' expenses and mandated that only the parties' income, assets, and liabilities be considered. Helms v. Schultze, 161 N.C. App. 404, 588 S.E.2d 524, 2003 N.C. App. LEXIS 2202 (2003).

Where defendant was indicted for first-degree kidnapping, but the arrest warrant charged him with second-degree kidnapping, the trial court properly denied defendant's attempt to admit evidence of the arrest warrant since it had no relevance on the issue of defendant's guilt or whether the victim was released in a "safe place," because the allegations of an arrest warrant do not necessarily "frame" what is relevant to a particular criminal case tried upon an indictment. State v. Corbett, 168 N.C. App. 117, 607 S.E.2d 281, 2005 N.C. App. LEXIS 146 (2005), aff'd, — N.C. —, 624 S.E.2d 625 (2006).

Personal representatives for a decedent were properly disallowed from admitting evidence of a fishing club's insurance policy because the policy did not show whether a boat driver, who was a director for the fishing club, was its agent. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

In a termination of parental rights hearing in a case in which a mother's children were removed from her because, inter alia, her house was unsanitary, and the children were adjudicated neglected on that basis, in part, it was proper for the trial court to sustain an objection, at the termination hearing, to questions about the condition of the mother's home the day after the department of social services' initial visit there, because the relevant issue, under G.S. 8C-1, N.C. R. Evid. 401, at the termination hearing was whether the evidence supported a finding of neglect at the time of the termination hearing, rather than the condition of the mother's home before the children were adjudicated neglected. In re J.W., 173 N.C. App. 450, 619 S.E.2d 534, 2005 N.C. App. LEXIS 2109 (2005), aff'd, — N.C. —, 625 S.E.2d 780 (2006).

That an unidentified man accused the victim of assault several years before the murder for which defendant was charged took place did not make any fact in the case more probable or less probable, and the trial court's ruling that the testimony was not relevant and was, hence, inadmissible until defendant introduced substantive evidence of self-defense or evidence that the victim was the first aggressor, was not in error. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Trial court properly prohibited defendant from cross-examining a witness who was also at the crime scene as to why he refused to voluntarily submit DNA sample to compare with that taken from a hat; conflicting testimony was presented as to whether the assailant was wearing a hat, and thus whether or not the witness would submit to a DNA test did no more than raise a conjecture that he was wearing the hat, a fact which was not inconsistent with defendant's guilt and did not directly point to the witness's guilt. State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006).

Parents' substance abuse records were not relevant during the adjudication hearing in a neglect and dependency case because the department of social services presented sufficient evidence of the parents' substance abuse without the subject records, and based upon the evidence presented, the trial court made findings regarding the parents' substance abuse and its impact on the welfare of the children. In re E.P, 183 N.C. App. 301, 645 S.E.2d 772, 2007 N.C. App. LEXIS 1163 (2007).

In an involuntary manslaughter case, the trial court did not err in excluding the testimony of a nurse and a trooper, that defendant's brother told him he was a passenger in defendant's car at the time of the accident, because it was irrelevant; the excluded evidence did not point directly to the guilt of defendant's brother, did not tend to implicate defendant's borther in the commission of the crimes, and was not inconsistent with defendant's guilt. State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008).

Trial court did not err in precluding ex mero motu defendant's cross-examination of his employer regarding the side effects of the chemicals to which defendant was exposed the day prior to a collision because defendant failed to show that the preclusion of the testimony constituted a manifest abuse of discretion; the trial court interrupted defense counsel's cross-examination, which attempted to introduce evidence of defendant's impairment by chemicals at work, sent the jury out of the courtroom, and found that the questioning was irrelevant, and defendant failed to request a limiting instruction upon the jury's return and to lay a sufficient foundation for the line of questioning through later testimony. State v. Cook, — N.C.

App. —, 666 S.E.2d 795, 2008 N.C. App. LEXIS 1750 (2008).

Evidence Held Irrelevant. — In trial on charge of first degree rape, which was tried on the theory that defendant was the principal and two other men were aiders and abettors, evidence of previous convictions of the other men was irrelevant under this rule, and being irrelevant, was not admissible. Further, the admission of such evidence violated defendant's U.S. Const., Amend. VI right to confront the witnesses against him with regard to this charge. State v. Brown, 319 N.C. 361, 354 S.E.2d 225 (1987).

Testimony of cellmate and detective that defendant was in jail on a charge of attempted murder of his girlfriend was not relevant where defendant was on trial for an unrelated crime of murder since the court determined that this testimony was not relevant to any fact or issue other than the character of the accused. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Evidence of prior, noncriminal unrelated fire held inadmissible because of its prejudicial character since such evidence was irrelevant in that it neither confirmed nor suggested a relationship between two defendants charged with burning down a food market. Moreover, the State failed to show defendants had any connection with the previous fire. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

There can be no question that prejudice resulted from the testimony that defendant had returned to witness's motel room three hours after the murder occurred with "mud or grass" stains on the knees of his pants, and that he was "very nervous and upset" and wanted to "get drunk" and did so, and the prejudicial effect of this testimony far outweighed the need to show witness to be less than credible (especially where the remainder of her testimony included little of value in the State's case) or the need to bolster officer's credibility. State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989).

In wrongful death action, trial court erred in denying administrator's in limine motion seeking to prevent the admission of testimony concerning decedent's possession of a firearm and his blood/alcohol level; since no testimony existed on record that the defendant knew decedent had a handgun in his possession or that he was aware that decedent had consumed any alcohol, this evidence was not relevent. Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989).

Proffered testimony as to the victim's alcohol consumption with other people in party settings had no tendency to prove that the victim consented to sexual activity with the defendant on the day in question. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Admission in capital case of testimony by fingerprint expert witness to the effect that he had discovered identifiable fingerprints in only three percent of the criminal cases in which he had been involved was error, as the testimony was not relevant to the issues in the case; however, the error was not prejudicial. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

The trial court did not abuse its discretion by not permitting cross-examination of witness in order to show the extent of the affectionate relations between defendant and the witness after a shooting. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

Where defendant was charged with trafficking in cocaine, the mere ownership of a passport showing travel to Colombia was not probative of a fact at issue in the case. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

Even though the trial court erred in admitting evidence of defendant's passport showing travel to Colombia, that error alone did not mandate a new trial where it was unlikely that a different result would have occurred at trial but for the introduction of the passport. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

Testimony of codefendant's cell mate, which defendant sought to introduce to prove codefendant's manipulative hold over defendant, did not concern defendant's motives or any actions taken by defendant in relation to proving his guilt or innocence, and as such was collateral and irrelevant. State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997).

The fact that defendant's wife had a prior criminal record, used drugs, had extra-marital affairs, and had a baby by another man during her marriage to defendant were of no relevance to any theory of defendant's case, nor probative of his defense of diminished capacity. State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997), cert. denied, 348 N.C. 285, 501 S.E.2d 913 (1998).

In a rape and kidnapping case, evidence that defendant possessed pornographic magazines was not relevant because it did not tend to make the existence of any fact that is of consequence more or less probable since they were not shown to the victim, and they were not used to show dominion and control over a motel room; however, the error was harmless since a different outcome in the case would not have resulted due to overwhelming evidence of guilt. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In a rape and kidnapping case, evidence of a criminal citation issued to defendant for drugs a few days before an attack was not relevant because it did not matter whether defendant actually possessed drugs; the admission of the evidence was harmless because the state could have proven the attack at any rate due to the testimony of the victim. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

In defendant's trial ending in her conviction for second-degree murder, evidence of her prior conduct in shooting a dog was irrelevant under G.S. § 8C-1-401; the evidence was not necessary to show that defendant was knowledgeable about firearms or had used a gun in the past because defendant had admitted that she shot her victim and whether or not she knew how to use a pistol was not contested, and the evidence was irrelevant to her claim of self-defense. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

In the absence of evidence connecting a nine-millimeter bullet to a murder victim or to the defendant, the bullet was not relevant evidence, G.S. 8C-1, N.C. R. Evid. 401; the bullet did not have any tendency to prove that defendant committed the crime. State v. Bodden, 190 N.C. App. 505, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008), review denied, appeal dismissed 336 N.C.131, 675 S.E.2d 660 (2009).

Domestic violence protective order against entered against a father pursuant to G.S. 50B-3 was erroneous because there was no competent evidence that the father had placed a member of the mother's family in fear of (1) imminent serious bodily injury or (2) continued harassment that rose to such a level as to inflict substantial emotional distress; the fact that there was an investigation by the Department of Social Service was not relevant where there was no evidence presented regarding what any alleged investigation revealed. The director of Department of Social Service was required to investigate any report of abuse, neglect, or dependency pursuant to G.S. 7B-302(a). Burress v. Burress, — N.C. App. —, 672 S.E.2d 732, 2009 N.C. App. LEXIS 148 (2009).

Erroneously But Not Prejudicially Admitted. — The State's exhibition of investigating officer's gun was error but not prejudicial error; the gun had not been introduced into evidence, and the exhibition was not relevant under this rule because the evidence did not establish any relationship between the investigating officer's gun and the gun used by defendant other than that defendant's gun "could have been a little bigger" than the investigating officer's gun. The exhibition of the gun did not establish that defendant knew the procedure for firing the gun that he used in the shootings; rather, this fact was established by his testimony regarding his use of his own gun. State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566, 2000 N.C. App. LEXIS 1097 (2000), cert. denied, 532 U.S. 964, 121 S. Ct. 1499, 149 L. Ed. 2d 384 (2001).

Evidence that defendant, who shot a police officer with a shotgun, possessed a pistol was irrelevant because the pistol was not connected to the shooting in any way; the error was harmless under G.S. 15A-1443(a), however, because of the overwhelming evidence of defendant's guilt. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

In defendant's prosecution for trafficking in cocaine by possession, the admission of testimony about defendant's alleged gang affiliation was erroneous under G.S. 8C-1-403 because such testimony was irrelevant under G.S. 8C-1-401 as to whether defendant trafficked in or possessed cocaine under G.S. 90-95(h)(3), but the error was harmless because the evidence of defendant's guilt was overwhelming, so defendant could not show that defendant was prejudiced. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

In defendant's prosecution for carrying a concealed weapon, the admission of testimony about the effect of hollow point bullets, which were found in the weapons seized from defendant and defendant's associate, was erroneous because such testimony was irrelevant under G.S. 8C-1-401 as to whether defendant possessed a concealed weapon under G.S. 14-269(a1), but the error was harmless because the evidence of defendant's guilt was overwhelming, so defendant could not show that defendant was prejudiced. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

Trial court abused its discretion in allowing the state, over defendant's objection, to make arguments referencing the amount of punishment that the finding of an aggravating factor would empower a judge to impose and the effect of the merger doctrine on defendant's convictions in the closing argments, as those issues were irrelevant to the issue of a factor's presence in an offense; however, based on the overwhelming evidence that defendant was operating his vehicle at a dangerously high rate of speed while legally intoxicated, there was no reasonable possibility that, had the error in question not been committed, a different result would have been reached, and the error was therefore not prejudicial. State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008).

Picture of the decedent with his family was irrelevant in that it did not make the existence of any fact that was of consequence to the determination of the murder trial more probable or less probable than it would have been without the evidence. However, the admission of the evidence was harmless due to the fact that, following defendant's objection to the picture, a witness testified about the decedent's family life and described his family, including his wife and two young children, without objection. State v. Mitchell, — N.C. App. —, 671 S.E.2d 340, 2009 N.C. App. LEXIS 10 (2009).

Evidence of defendant's aunt's trial and conviction for drug trafficking was not relevant in defendant's trial for various controlled substance and firearms offenses, because it did not make the existence of any fact that was consequential to defendant's guilt or innocence more or less probable that it would have been without the evidence. State v. Cowan, — N.C. App. —, 669 S.E.2d 811, 2008 N.C. App. LEXIS 2248 (2008).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 402 except that the phrases "by the Constitution of North Carolina" and "by Act of the General Assembly" were added and the phrase "by other rules prescribed by the Supreme Court pursuant to statutory authority" was deleted. The Advisory Committee's Note states:

"The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.' Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. ***

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil ... Procedure ..., by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, ... Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil ... Procedure in some instances require the exclusion of relevant evidence. For example, ... the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions.

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The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)."

Rule 402 is consistent with North Carolina practice.

Legal Periodicals. — For a note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

For comment, "Admissibility of DNA Evidence: Perfecting the 'Search for Truth'," see 25 Wake Forest L. Rev. 591 (1990).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

CASE NOTES

Section 8C-1, Rule 803 Does Not Annul Relevancy Requirement. — While G.S. 8C-1, Rule 803 delineates instances in which evidence will not be excluded simply because such evidence is hearsay, it does not annul the requirement of this rule that the evidence be relevant. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987), cert. denied, 322 N.C. 116, 367 S.E.2d 922 (1988).

Res Gestae Rationale Survives. — Admission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it "forms part of the history of the event or serves to enhance the natural development of the facts"; and this rationale, established in pre-Rules cases, survives the adoption of the Rules of Evidence. State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990).

Evidence pertaining to the foreseeability of criminal attack shall not be limited to prior criminal acts occurring on the premises. Evidence of criminal acts occurring near the premises in question may be relevant to the question of foreseeability, and such evidence is admissible unless excluded by some specific rule. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

Admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

When relevant evidence not involving a right arising under the Constitution of the United States is erroneously excluded, a defendant has the burden of showing that the error was prejudicial. This burden may be met by showing that there is a reasonable possibility that a different result would have been reached had the error not been committed. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Evidence Not Probative. — Where defendant was charged with trafficking in cocaine, the mere ownership of a passport showing travel to Colombia was not probative of a fact at issue in the case. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

In an involuntary manslaughter case, the trial court did not err in excluding the testimony of a nurse and a trooper, that defendant's brother told him he was a passenger in defendant's car at the time of the accident, because it was irrelevant; the excluded evidence did not point directly to the guilt of defendant's brother, did not tend to implicate defendant's borther in the commission of the crimes, and was not inconsistent with defendant's guilt. State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895, 2008 N.C. App. LEXIS 199 (2008).

Probative Value Outweighed by Prejudicial Potential. — Where officer saw two small bottles of liquor in a purse but had no reason to believe that alcohol consumption contributed to car accident the probative value of this evidence was outweighed by its prejudicial potential. Browning v. Carolina Power & Light Co., 114 N.C. App. 229, 441 S.E.2d 607 (1994), aff'd, 340 N.C. 254, 456 S.E.2d 307 (1995).

In order to establish the relevancy of blood test results, plaintiff is required to lay a foundation by way of expert testimony explaining the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in this particular case. Further, the substance analyzed must be accurately identified by proving a chain of custody to insure that the substance came from the source claimed and that its condition was unchanged. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Psychiatric Testimony About Ability to Form Specific Intent in Murder Trial. — Testimony of a psychiatric expert that in his opinion the defendant was suffering from organic brain impairment, that the defendant's capacity to plan, think or reflect was impaired at the time of the shootings, and that the defendant was incapable of forming the specific intent to kill at the time of the shootings was evidence tending to show that the defendant acted without premeditation or deliberation when he murdered victim and that he was incapable of forming the specific intent to kill when he shot his stepson and was therefore relevant in the defendant's trial for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Expert Testimony Regarding Battered Child Syndrome. — Testimony from expert in pediatrics and child abuse regarding battered child syndrome was properly admitted. State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996), cert. denied, 520 U.S. 1106, 117 S. Ct. 1111, 137 L. Ed. 2d 312 (1997).

Photographs of Crime Scene and Victim's Clothes. — Photographs of the crime scene and victim's bloody clothes were admissible since they were only used so that the witnesses could explain and illustrate their testimony and the trial court instructed the jury as to their limited purpose; further, the photographs were not unnecessarily gory. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Autopsy photographs, photographs of the victim's car after she was shot, testimony regarding the amount of blood at the scene, and blood stained material were all properly admitted at defendant's murder trial in accordance with G.S. 8C-1, N.C. R. Evid. 401, 402, and were not overly prejudicial in violation of G.S. 8C-1, N.C. R. Evid. 403. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Evidence Held Relevant. — Although motive was not an element of any of the crimes for which the defendant was convicted (murder, arson and assault with a deadly weapon inflicting serious injury), his motives and state of mind at the time of the fire certainly were facts "of consequence to the determination of the action ...", and the trial court did not err by admitting evidence thereof. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

Watch and ring taken from victim of rape and kidnapping were "relevant" in defendant's trial for those offenses, because they tended to make the existence of a fact of consequence — defendant's connection to the offenses with which he was charged — more probable than it would be without the evidence, and their admission was not unduly prejudicial. State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986).

State's exhibits, which included $5,900 in United States currency, rolling papers and pipe, electric digital scales, a triple beam balance scale, a water bong, a plastic bag containing white powder, an airline bag in which the white powder was found and a briefcase with documents, with the exception of the briefcase, were relevant to the crime of trafficking in cocaine, in that they intended to show that defendant knowingly possessed cocaine and was trafficking in it, and the briefcase, which was in defendant's possession at the time of arrest, tended to explain or illustrate the circumstances surrounding his arrest. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Evidence merely disclosing the subsequent pregnancy of the rape victim was admissible as tending to prove penetration, an essential element of the crime of forcible rape; moreover, the victim's simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy, and the mere fact that an abortion took place was not so inflammatory as to render it inadmissible. State v. Stanton, 319 N.C. 180, 353 S.E.2d 385 (1987).

In trial for robbery with a dangerous weapon, evidence of victim's scholastic achievements presented by the assistant district attorney during preliminary questioning was relevant; it was offered as a means of introducing the victim to the court and jury and to assist in explaining the victim's background, and considering the fact that defendant later portrayed victim as the aggressor, the challenged testimony was not prejudicial. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Whether or not building met the standards of the Building Code, though not determinative of the issue of negligence, had some probative value as to whether or not defendant failed to keep his store in a reasonably safe condition, and expert testimony on this issue could properly be introduced in a negligence action against store owner. Thomas v. Dixson, 321 N.C. App. 226, 363 S.E.2d 209 (1988).

Testimony that the defendant was calm and was not crying which described her emotional state shortly after her husband was killed, based upon the witnesses' observations of her demeanor at that time, and evidence that the defendant disposed of her husband's personal effects the day after his funeral, amounted to evidence tending to shed light upon the circumstances surrounding husband's killing and, thus, were relevant and admissible. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Plaintiffs failed to make a timely objection to the admission of a report prepared by financial consultant, which was listed by defendant in the "order on final pre-trial conference," thus affording plaintiffs ample time to prepare for a timely objection to the introduction of the exhibit at trial. Furthermore, the report was relevant since it tended to show the interconnected operations of the parties, the inadequacies of the financial record keeping, and the degree of control that plaintiffs exercised over one party. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Evidence regarding the issuance of a warrant for defendant's arrest for beating murder victim in the hour immediately preceding the murder tended to shed light on defendant's emotional state at or around the time of the killing and the circumstances surrounding that killing; thus, it was relevant and admissible. The testimony established intent and motive of returning to continue the assault and tended to prove premeditation, deliberation, and malice. State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994), cert. denied, 513 U.S. 1098, 115 S. Ct. 768, 130 L. Ed. 2d 665 (1995).

Testimony that the victim was a very good person, always went to church, loved her children, was a good wife and mother and died not knowing what happened to her two-and-a-half year old child was properly admitted. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, 514 U.S. 1114, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995).

Evidence of flight, i.e. that the defendant did not appear at his first scheduled trial, is a relevant circumstance to be considered by the jury, together with other circumstances, in determining the issue of the defendant's guilt. State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996).

Bloody clothing of a victim that is corroborative of the state's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Plaintiff's possession of a Taurus .357 pistol was relevant where the victim died from gunshot wounds, a spent .38/.357 bullet was found in close proximity to the victim's body, and this bullet had markings consistent with those of a Taurus pistol. State v. Soles, 119 N.C. App. 375, 459 S.E.2d 4, appeal dismissed, cert. denied, 341 N.C. 655, 462 S.E.2d 523 (1995).

Testimony of Coast Guard officer as to ocean currents was relevant to show a connection between defendant and the crime where an inference could be drawn therefrom that a body had drifted from an area with which defendant was familiar. State v. Dial, 122 N.C. App. 298, 470 S.E.2d 84 (1996).

Evidence that victim, her family members, and a friend had threatened defendant's life was relevant to explain why defendant had a gun and to explain defendant's behavior and was not unfairly prejudicial. State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (1997).

Testimony by the wife of an eyewitness to a murder that he was restless and unable to sleep prior to his identification of the defendant but that he slept much better after doing so was admissible in the defendant's prosecution for second degree murder, where the eyewitness' credibility was in issue, and the wife's testimony was relevant to the reliability of his identification. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

Evidence concerning the speed the defendant's vehicle was traveling when it struck the rear of the plaintiffs' vehicle was relevant to the extent of the plaintiffs' injuries, and thus was relevant to the issue of damages. Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998).

Evidence of electrocution was relevant and admissible in a death benefits proceeding before the Industrial Commission, where the issue was whether the employee died of electrocution or of a preexisting heart condition. Westbrooks v. Bowes, 130 N.C. App. 517, 503 S.E.2d 409 (1998).

Where persuasive evidence existed to show that a death caused by unprotected floor openings placed the defendant on notice of the danger, evidence of OSHA citations against the defendant/general contractor showing continuing violations several days later was properly admitted as relevant to the questions of negligence and gross negligence. Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 521 S.E.2d 137, 1999 N.C. App. LEXIS 1153 (1999).

Although the weapons could not be directly tied to defendant's crimes, the trial court did not err in admitting the pepper spray and stun gun into evidence and allowing the prosecution to demonstrate their functioning to the jury. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Testimony as to the existence of a bullet hole in the wall of the defendant's house trailer, which an expert testified was made by a bullet that was not found and which exited the defendant's house trailer and which other parties testified did not exist before the victim's disappearance, was relevant and admissible in a case in which the defendant was found guilty of voluntary manslaughter in the death of a woman whose recovered skeletal remains showed was beaten to death. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

Trial court erred by its exclusion of evidence, during the trial on the issue of damages, regarding whether a businessman was financially ready, willing, and able to exercise a stock purchase option and restriction agreement during the period specified in the option contract, because the evidence was relevant to the issue of damages; for if, the businessman was not ready, willing, and able to exercise his rights under the option, he would be entitled to no more than nominal damages for its breach. Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

Trial court properly allowed plaintiff's attorney to ask defendant motorist about traffic citations he received that resulted in a conviction, because the evidence was relevant to the issue of whether defendant company was liable for negligent entrustment because it employed the motorist and allowed him to drive a company van. Campbell v. McIlwain, 163 N.C. App. 553, 593 S.E.2d 799, 2004 N.C. App. LEXIS 399 (2004).

Although not conclusive, the testimony of a general partner of a company that owned land as to the intent to dedicate a right-of-way to the public if a rezoning application for property that the company owned was admissible into evidence as it was relevant to the trial court's determination of whether a dedication of the company's property was made. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

Defendant's threats to a holding cell officer that he "already killed one" and "I got one up under my belt" could have been interpreted as statements of guilt and used as direct evidence to prove that defendant acknowledged guilt in the death of his victim, as what was "up under his belt" was a human life, that he had already "killed one" was a woman like the officer, and "belt" was meant to imply that defendant had a black belt; accordingly, the statements were relevant in defendant's felony murder trial. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Various items of drug paraphernalia, packaging materials, and bus tickets found at accomplice's house were properly placed into evidence because they were clearly relevant to the issue of defendant's guilty of the trafficking of drugs and conspiracy offenses. State v. Howell, 169 N.C. App. 741, 611 S.E.2d 200, 2005 N.C. App. LEXIS 795 (2005).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Admission of testimony of victim's mother about the victim's involvement with drugs and admission of a photo of the victim before the victim started using drugs were proper since the testimony and the photo were relevant evidence pursuant to G.S. 8C-1-402, N.C. R. Evid. 402. The evidence was admitted to support the State's theory that the murder of the victim by defendant and another man was drug related and to show how the victim looked before the victim became caught up in drug use. State v. Hope, 189 N.C. App. 309, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (2008).

Evidence Held Irrelevant. — Proffered testimony as to the amount of rent victim was paying for her apartment had no logical tendency to prove that the shower in her apartment was in good working order on the day in question. State v. Coen, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

Evidence that another person, bearing a resemblance to defendant and utilizing a modus operandi similar to that used in the robbery for which defendant was being tried, robbed another fast food restaurant two months after the robbery was not admissible, where there was no evidence that the other person committed the crime with which defendant was charged. Stated another way, the proffered evidence did not point directly to the other person's guilt of the crime with which the defendant was charged. Neither did the proffered evidence in any way refute the identification of the defendant by the eyewitnesses as the perpetrator of the robbery. State v. Allen, 80 N.C. App. 549, 342 S.E.2d 571, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

In medical malpractice case, evidence of plaintiffs' separate lawsuit against a different defendant, which had been dismissed, was irrelevant under this rule, and its admission contravened the strong public policy favoring settlement of controversies out of court. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

In a negligence action against a hospital, in which plaintiffs had previously settled with the attending physician, the court properly excluded references to the physician's participation as a defendant as irrelevant under this rule and as contravening the strong public policy favoring settlement of controversies out of court. Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273, appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition allowed as to additional issues, 319 N.C. 458, 356 S.E.2d 2 (1987).

In trial on charge of first degree rape, which was tried on the theory that defendant was the principal and two other men were aiders and abettors, evidence of previous convictions of the other men was irrelevant under G.S. 8C-1, Rule 401, and being irrelevant, was not admissible. Further, the admission of such evidence violated defendant's U.S. Const., Amend. VI right to confront the witnesses against him with regard to this charge. State v. Brown, 319 N.C. 361, 354 S.E.2d 225 (1987).

Testimony of a cellmate and a detective that defendant was in jail on a charge of attempted murder of his girlfriend was not relevant where defendant was on trial for an unrelated crime of murder since the court determined that this testimony was not relevant to any fact or issue other than the character of the accused. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Proffered testimony as to the victim's alcohol consumption with other people in party settings has no tendency to prove that the victim consented to sexual activity with the defendant on the day in question. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

A trial court did not err by excluding medical records and preventing cross-examination of the State's witness regarding her mental and emotional condition and treatment where the trial court examined the medical records in camera, found no good cause to violate the confidentiality of the physician-patient relationship, preserved those records sealed for review by the appellate court, and found that the records revealed no evidence bearing on the witness's credibility. State v. Adams, 103 N.C. App. 158, 404 S.E.2d 708 (1991).

Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of G.S. 47C-4-110, for failure to put money in escrow, is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Where plaintiff in paternity case did not contend that an operation which could produce the effects of recanalization was performed on defendant who had vasectomy, nor was there any evidence that such an operation was performed, the testimony on the procedure was irrelevant. Brooks v. Hayes, 113 N.C. App. 168, 438 S.E.2d 420 (1993).

Photographs of witness used to corroborate her allegations that defendant used the photographs to blackmail her to prevent her from testifying were admissible, but it was error to admit other photographs into evidence, not used for any purpose during the trial. State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (1994), cert. denied and appeal dismissed, 336 N.C. 75, 445 S.E.2d 39 (1994).

The fact that a pipe, which according to the State's eyewitnesses was neither used nor noticed by anyone prior to shooting, was on the ground under the victim's automobile did not serve to establish that these eyewitnesses were part of an earlier fight or that it had any relevance with respect to the events which occurred at the time of the shooting; the fact that the chrome pipe was underneath victim's automobile before the shooting did not tend to make it more or less probable that defendant had no specific intent to kill victim because he could not premeditate and deliberate and, thus, the pipe itself was not relevant and was properly excluded as an exhibit. State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995).

Whether child of codefendant was abused by codefendant was irrelevant to the charges of first degree sexual offense and taking indecent liberties with a child against defendant and was properly excluded pursuant to this rule. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

Defendant's testimony that his Intoxilyzer reading did not accurately reflect his blood alcohol level was not admissible and the trial court correctly excluded this evidence. State v. Cothran, 120 N.C. App. 633, 463 S.E.2d 423 (1995).

Testimony of codefendant's cell mate, which defendant sought to introduce to prove codefendant's manipulative hold over defendant, did not concern defendant's motives or any actions taken by defendant in relation to proving his guilt or innocence, and as such was collateral and irrelevant. State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997).

Trial court properly did not permit into evidence at defendant's murder trial the plea agreement of a witness who acted in concert with defendant, because the plea agreement did not show that the witness received any type of consideration for his testimony, and was, therefore, irrelevant. State v. Lambert, 149 N.C. App. 163, 560 S.E.2d 221, 2002 N.C. App. LEXIS 123 (2002).

Trial court properly excluded as irrelevant evidence regarding the income and assets of an ex-wife's current husband, who was not a party, because a prior out-of-state court order determined the obligations of the ex-wife and her ex-husband for their sons educational and medical expenses and that order, by its plain and unambiguous language, obligated only the parties to pay for their sons' expenses and mandated that only the parties' income, assets, and liabilities be considered. Helms v. Schultze, 161 N.C. App. 404, 588 S.E.2d 524, 2003 N.C. App. LEXIS 2202 (2003).

Co-defendant's guilty plea was properly excluded under G.S. 8C-1, N.C. R. Evid. 201(d), because it was not an adjudicative fact; the co-defendant did not testify at defendant's trial for breaking or entering a motor vehicle with intent to commit larceny and the plea was irrelevant. It was improper to place irrelevant facts before a jury, by judicial notice or otherwise under G.S. 8C-1, N.C. R. Evid. 402. State v. Baskin, 190 N.C. App. 102, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Subsequent Payment on Taxes Irrelevant Evidence. — Trial court could have properly excluded evidence that defendant filed amended tax returns following defendant's arrest for attempting to evade or defeat tax because, whether or not defendant subsequently satisfied defendant's tax liability to the State of North Carolina had no bearing on whether defendant willfully evaded defendant's tax obligations at the times when those taxes were due. Such evidence was therefore irrelevant and properly excluded under G.S. 8C-1, N.C. R. Evid. 402. State v. Howell, 191 N.C. App. 349,

662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (2008).

Testimony Which Opens the Door to Otherwise Inadmissible Evidence. — When defendant testified that he loved his wife and did not intend to kill her, the door was opened to questions by the State as to matters which would show the defendant did not love his wife, as evidenced by his affairs with other women. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

Trial court did not err in ruling that defense counsel opened the door to introduction of evidence regarding the prior killing of a cat by defendant. State v. Cagle, 346 N.C. 497, 488 S.E.2d 535 (1997), cert. denied, 522 U.S. 1032, 118 S. Ct. 635, 139 L. Ed. 2d 614 (1998).

Evidence Improperly Excluded. — In a murder trial, where guilt was based on circumstantial evidence, the trial court committed reversible error in refusing to admit into evidence defendant's proposed exhibit, a drawing found by law enforcement officers among the victim's personal effects, which included a rough map of the area surrounding defendant's North Carolina home and numerous written notations indicating a possible larceny scheme. The exhibit was clearly relevant to a crucial issue in the case, namely, whether this defendant, and not some other person, was in fact the perpetrator of the crime, and it therefore should have been admitted into evidence at trial. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

The defendant was entitled to a new trial because a different result might have been reached had the trial court not excluded relevant and admissible evidence which cast doubt upon the State's evidence that defendant was the perpetrator of the murder of an elderly victim and which further implicated another person as that perpetrator beyond conjecture or mere implication. State v. Israel, 353 N.C. 211, 539 S.E.2d 633, 2000 N.C. LEXIS 912 (2000).

While a corporation and its principal were properly held liable for breaching an option agreement with a consultant, it was error to exclude evidence as to whether the consultant ever intended to exercise the option; the corporation and the principal were entitled to a new trial so that a jury could determine whether the consultant was ready, willing, and able to exercise the option and, if not, the consultant was entitled to only nominal damages. Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

Exclusion of Evidence Held Not Prejudicial. — Court's refusal to permit witness to testify that, based upon his personal knowledge of the State's only eyewitness, he would not believe the State's witness under oath was not prejudicial, where immediately before that evidence was offered, the same witness testified without objection that in his opinion the State's witness was a liar and had told him he would take a bribe to change his testimony. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Admission of Evidence Held Prejudicial. — In prosecution for rape, first-degree kidnapping, sexual offense, and common law robbery, the admission of the officer's testimony that the defendant had a rifle in his car when he was arrested, if error, was not prejudicial, where there was no intimation by the officer that the defendant attempted to use the rifle when he was arrested, that it was used in the commission of any crime or that possession of the rifle was otherwise unlawful. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Where the challenged evidence that defendant was in custody for assault with a deadly weapon with intent to kill his girlfriend was especially prejudicial because of its similarity to the charge at issue, which was murder and assault with a deadly weapon with intent to kill, and the similarity of the charges was compounded by the additional "verification" evidence of a detective, such admissions constituted prejudicial error and defendant was entitled to a new trial. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Admission of Evidence Held Harmless. — Trial court's error in admitting irrelevant evidence of co-attacker's robbery and attack of another person following victims' deaths constituted harmless error. State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (1999).

Even though the trial court erred in admitting evidence of defendant's passport showing travel to Colombia, that error alone did not mandate a new trial where it was unlikely that a different result would have occurred at trial but for the introduction of the passport. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

Cross-Examination Held Proper. — Where State did not cross-examine defendant in murder case about an unrelated rape accusation to show defendant was unworthy of belief because of this alleged bad act, but for purpose of establishing defendant's motive for crime for which he was on trial, cross-examination was proper. State v. Meekins, 326 N.C. 689, 392 S.E.2d 346 (1990).

Evidence Properly Admitted. — Admission into evidence of defendant's offer of $150,000 to plaintiff to terminate lease, which was an effort on part of defendant to satisfy a condition of sale of restaurant property, was not violative of G.S. 8C-1, Rule 408, nor was it barred by this rule, as offer was evidence of value of lease and was therefore relevant to issue of damages. Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990).

Trial court did not commit reversible error when it allowed introduction of hair and fiber evidence removed from defendant's pants with a lint brush, even though defendant maintained that he could have picked up the incriminating hair and fibers by riding in the same police car in which the victim had ridden earlier in the day. Argument that defendant may have picked up the fibers somewhere else would go to the weight of such evidence, not to its admissibility. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

The trial court did not err by admitting the finger of a murder victim burned beyond recognition as evidence, because its probative value as to the issue of identity of the victim was not substantially outweighed by any danger of unfair prejudice. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Knife which was found in a pond around three months after murder was admissible evidence. State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996), cert. denied, 519 U.S. 896, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996).

A hacksaw frame and three hacksaw blades were admissible based on the proximity of the hacksaw frame to the location of the victim's severed hand and the expert witness' conclusions that the victim's right hand was severed by a hacksaw blade similar to those seized from the residence of defendant's parents. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Trial court did not err by admitting without editing or redacting letters that defendant and his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Where the State presented substantial evidence of guilt of second-degree sexual offense through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts. State v. Locklear, 174 N.C. App. 547, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Because a trial court had discretion to admit all relevant evidence under N.C. R. Evid. 402, as well as to exclude evidence under N.C. R. Evid. 403, based on confusion or unfair prejudice, it had discretion to admit testimony of plaintiff former employee's coworkers, who suffered symptoms similar to that of the employee, who sought to recover damages based on his exposure to an allegedly toxic workplace. Absent an abuse of discretion, which was not shown, that ruling would not be overturned. Cameron v. Merisel Props., 187 N.C. App. 40, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Trial court's denial of creditor's and auctioneer's motion to exclude any evidence that they failed to escrow the auction funds in violation of an agreement made between the parties was not an abuse of discretion as that evidence was highly relevant to the secured creditor's claims, and was not substantially outweighed by any prejudice to the creditors and the auctioneer. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Evidence Improperly Admitted. — Exhibit listing defendant's prior convictions was erroneously admitted; defendant stipulated that his license had been revoked and that he knew that it was revoked, and the State offered no justification for admission of the prior convictions, as opposed to just the license suspension. State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443, 2005 N.C. App. LEXIS 21 (2005).

Expert Testimony. — Professional engineer's testimony as to the structure and appearance of the stairway on which plaintiff was injured was based on direct personal knowledge; therefore, this testimony was admissible so long as it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996).

A robbery report containing statements regarding the seizure, at a bus station, of defendant's luggage which police suspected contained marijuana was relevant evidence; the statements made to the investigating officer were vital to the identification of the defendants as the suspects in the armed robbery and admissible for non-hearsay purposes. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Admissibility of Records. — School records of minor son were not inadmissible hearsay, but were admissible under an exception to the hearsay rule as business records since the school records were not offered to prove the truth of what was contained in them but were used to impeach the mother's testimony. Sterling v. Gil Soucy Trucking, Ltd., 146

N.C. App. 173, 552 S.E.2d 674, 2001 N.C. App. LEXIS 868 (2001).

Trial court's admission of victim's testimony from a domestic violence protective order hearing did not violate his right to confront the witness against him, nor did it violate G.S. 8C-1, Rules 403, 404(b), and 803(3) of the North Carolina Rules of Evidence, where the hearsay statements constituted, and were admissible as, statements of the declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Testimony Relevant to Negate Self-Defense And Establish State of Mind And Intent. — The testimony of four witnesses about victim's screams during murder, the appearance of the crime scene, and defendant's behavior and demeanor immediately following the murder was relevant to negate the defendant's claim of self-defense as well as to establish his state of mind and intent to kill. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Error Alleged on Appeal Not Preserved. — Defendant's claim that certain testimony was erroneously admitted was not preserved for purposes of appeal because defendant claimed, on appeal, that the testimony was irrelevant, under G.S. 8C-1, N.C. R. Evid. 401 and 402, and that the testimony was unduly prejudicial, under G.S. 8C-1, N.C. R. Evid. 403, but defendant did not make these specific objections at trial, nor were such objections apparent from the context, under N.C. R. App. P. 10(b)(1), from which it appeared that defendant made a hearsay objection. State v. Hueto, — N.C. App. —, 671 S.E.2d 62, 2009 N.C. App. LEXIS 62 (2009).

Applied in Sawyer v. Carter, 71 N.C. App. 556, 322 S.E.2d 813 (1984); State v. Price, 313 N.C. 297, 327 S.E.2d 863 (1985); Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985); State v. Barnes, 77 N.C. App. 212, 334 S.E.2d 456 (1985); Wagner v. Barbee, 82 N.C. App. 640, 347 S.E.2d 844 (1986); Ward v. Zabady, 85 N.C. App. 130, 354 S.E.2d 369 (1987); State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987); Hogsed v. Ray, 88 N.C. App. 673, 364 S.E.2d 688 (1988); State v. Welch, 89 N.C. App. 135, 365 S.E.2d 190 (1988); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988); Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989); State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989); State v. Davis, 101 N.C. App. 409, 399 S.E.2d 371 (1991); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797; State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995); State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995); State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996); State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Bethea, 167 N.C. App. 215, 605 S.E.2d 173, 2004 N.C. App. LEXIS 2150 (2004); State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007); State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007); State v. Cunningham, 188 N.C. App. 832, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008); State v. Cowan, — N.C. App. —, 669 S.E.2d 811, 2008 N.C. App. LEXIS 2248 (2008).

Cited in Kapp v. Kapp, 336 N.C. 295, 442 S.E.2d 499; State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986); State v. Hillard, 81 N.C. App. 104, 344 S.E.2d 54 (1986); McNabb v. Town of Bryson City, 82 N.C. App. 385, 346 S.E.2d 285 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332 (1987); State v. Austin, 320 N.C. 276, 357 S.E.2d 641 (1987); State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987); Matthews v. James, 88 N.C. App. 32, 362 S.E.2d 594 (1987); Smith v. Starnes, 88 N.C. App. 609, 364 S.E.2d 442 (1988); State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988); State v. Barber, 93 N.C. App. 42, 376 S.E.2d 497 (1989); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Levan, 32 N.C. 155, 388 S.E.2d 429 (1990); State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990); State v. Odom, 99 N.C. App. 265, 393 S.E.2d 146 (1990); State v. Franklin, 327 N.C. 162, 393 S.E.2d 781 (1990); State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991); State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991); State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992); State v. Suddreth, 105 N.C. App. 122, 412 S.E.2d 126 (1992); State v. Mebane, 106

N.C. App. 516, 418 S.E.2d 245 (1992); State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992); Wilson ex rel. Wilson v. Bellamy, 105 N.C. App. 446, 414 S.E.2d 347 (1992); State v. Hart, 105 N.C. App. 542, 414 S.E.2d 364 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993); State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994); State v. McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. King, 343 N.C. 29, 468 S.E.2d 232 (1996); State v. Bruton, 344 N.C. 381, 474 S.E.2d 336 (1996); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997); State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997); State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Dennis, 129 N.C. App. 686, 500 S.E.2d 765 (1998); State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000); State v. Lytch, 142 N.C. App. 576, 544 S.E.2d 570, 2001 N.C. App. LEXIS 188 (2001); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. McDonald, 151 N.C. App. 236, 565 S.E.2d 273, 2002 N.C. App. LEXIS 725 (2002); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002); State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483, 2004 N.C. App. LEXIS 1519 (2004); State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133, 2004 N.C. App. LEXIS 2333 (2004); State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005); State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006); State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006); State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Parker, 187 N.C. App. 131, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007); State v. Beatty, 189 N.C. App. 464, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (2008); State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009); State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009); State v. Madures, — N.C. App. —, 678 S.E.2d 361, 2009 N.C. App. LEXIS 1077 (July 7, 2009).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 403. The Advisory Committee's Note states:

"The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *** The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick G.S. 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually 'coupled with the danger of prejudice and confusion of issues'. *** While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. *** Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate."

The rule is substantially in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 77 *et seq.* (1982). In North Carolina, unfair surprise appears to be a ground for exclusion of evidence. *Id.* § 77, p. 287. However, as the Advisory Committee states, the rule does not enumerate surprise as a ground for exclusion. Nonetheless, surprise may be covered by unfair prejudice, confusion of issues, or undue delay. See Wright and Graham, *Federal Practice and Procedure: Evidence* § 5218, at 298.

The Advisory Committee's Note states that:

"In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor."

Legal Periodicals. — For note on the future of character impeachment in North Carolina, in light of State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984), see 63 N.C.L. Rev. 535 (1985).

For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?," see 21 Wake Forest L. Rev. 93 (1985).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For comment, "Admissibility of DNA Evidence: Perfecting the 'Search for Truth'," see 25 Wake Forest L. Rev. 591 (1990).

For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

For note, "The Admissibility of Prior Acquittal Evidence — Has North Carolina Adopted the 'Minority View'? — The Effect of State v. Scott," see 16 Campbell L. Rev. 231 (1994).

For article, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence," see 21 N.C. Cent. L.J. 1 (1995).

For article, "DNA Profiling in North Carolina," see 21 N.C. Cent. L.J. 300 (1995).

For note, "State v. Alston: North Carolina Continues to Broaden its Mind to Admissibility of a Victim's Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases," see 32 Wake Forest L. Rev. 1327 (1997).

CASE NOTES

I. General Consideration.
II. Photographs and Videotapes.
III. Prejudicial Evidence, Evidence Excluded Based on Confusion, Etc.
IV. Admission or Exclusion of Evidence Not Prejudicial.

I. GENERAL CONSIDERATION.

Test for determining whether evidence of crimes, wrongs or acts other than those specifically at issue is admissible is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the balancing test of this rule. State v. Shultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987); State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

In deciding whether evidence of insurance should be received under G.S. 8C-1, N.C. R. Evid. 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully; (2) If so, is the evidence relevant to show that other purpose; and (3) If so, is the probative value of the relevant evidence substantially outweighed by the factors set forth in G.S. 8C-1, N.C. R. Evid. 403. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Although admissible under § 8C-1, Rule 404(b), the probative value of evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under this rule. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 326 N.C. 777, 392 S.E.2d 391 (1990).

Even if testimony is admissible as corroborative, the trial court still must determine whether its probative value outweighs the danger of unfair prejudice to defendant. State v. Coffey, 345 N.C. 389, 480 S.E.2d 664 (1997).

"Unfair prejudice," as used in this rule, means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986); State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Unfairness of Prejudice Is Determinative. — All evidence favorable to plaintiff will be, by definition, prejudicial to defendants; however, the test under this rule is whether that prejudice to defendants is unfair. Matthews v. James, 88 N.C. App. 32, 362 S.E.2d 594 (1987), cert. denied, 322 N.C. 112, 367 S.E.2d 913 (1988); Screaming Eagle Air, Ltd. v. Airport Comm'n, 97 N.C. App. 30, 387 S.E.2d 197 (1990).

Question of Prejudice Is One of Degree. — Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree. State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986).

Whether to exclude evidence on the ground that its probative value is substantially outweighed by the danger of unfair prejudice is a matter left to the sound discretion of the trial court, and the question is one of degree, because evidence that is probative of the state's case necessarily will have a prejudicial effect on the defendant. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

Probative Value Must Be Substantially Outweighed. — Most evidence tends to prejudice the party against whom it is offered; to be excluded, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be substantially outweighed. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Once a trial court determines that other crimes evidence is properly admissible under G.S. 8C-1, Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under G.S. 8C-1, Rule 403. State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Trial court did not abuse its discretion by admitting evidence of other break-ins alleged to have been perpetrated by defendant nine and 12 months after the break-in for which defendant was on trial because the lapses of time were not too remote considering the great similarity between the subsequent incidents and the one for which defendant was on trial where the perpetrator in each case had broken glass to enter a store and had used a large, white bag to carry away cartons of cigarettes and where defendant was identified by police officers as the perpetrator in the two subsequent break-ins; hence, the probative value of such evidence was not substantially outweighed by any prejudice resulting from its admission. State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

Specific Finding Not Required So Long as Balancing Test Occurred. — The court's failure to make a specific finding as to whether the probative value of the evidence of defendant's prior assault on murder victim outweighed its prejudicial effect did not constitute reversible error where the court conducted the balancing test required by this rule outside the presence of the jury. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

As long as the procedure followed by the trial court when admitting prejudicial evidence demonstrates that a balancing test, weighing the prejudicial impact of the evidence against its probative value, has been conducted, a specific finding is not required. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Where the State presented substantial evidence of guilt of second-degree sexual offense through the testimony of a cellmate, which was corroborated by two other inmates who heard defendant bragging about the sexual assault, the trial court did not commit plain error in admitting evidence of defendant's prior acts, despite defendant's claim that the trial court failed to use a balancing test. State v. Locklear, 174 N.C. App. 547, 621 S.E.2d 254, 2005 N.C. App. LEXIS 2465 (2005).

Factors to Consider in Determining Admissibility. — Although no definitive test for the admissibility of photographs alleged to be inflammatory and unduly prejudicial has been developed, factors that courts have looked to in the past include: (1) the number of the photographs; (2) whether the photographs were unnecessarily duplicative of other testimony; (3) whether the purpose of the photographs was aimed solely at arousing the passions of the jury; and (4) the circumstances surrounding the presentation of the photographs. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Although the trial court did not state its reason(s) for refusing to allow the persons who made statements regarding defendant's prior acts to testify, the court could have concluded that such testimony would have merely wasted time; thus, defendant's contention that the prosecutor's argument regarding the statements was improper because the evidence was necessarily prejudicial was unpersuasive to the appellate court. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Passage of Time Should Be Weighed in Admitting Evidence. — A process that allows for the passage of time to be weighed in a court's initial decision to admit such evidence is the better reasoned approach and one that ensures that an accused is tried only for the acts for which he has been indicted. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Effect of Remoteness in Time. — Remoteness in time is most important where evidence of another crime is used to show that both crimes arose out of a common scheme or plan; remoteness in time is less important when the other crime is admitted because its modus operandi is so strikingly similar to the modus operandi of the crime being tried as to permit a reasonable inference that the same person committed both crimes. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987).

Generally, remoteness in time goes to the weight of the evidence and not to its admissibility. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987).

Prior Bad Act. — Where the testimony tended to prove that defendant's prior acts of sexual abuse occurred continuously over a period of twenty-six years, the prior bad acts were not too remote in time to be considered evidence of defendant's common plan or scheme to sexually abuse female family members. State v. Frazier, 344 N.C. 611, 476 S.E.2d 297 (1996).

Prior acts evidence was properly admitted under both G.S. 8C-1, N.C. R. Evid. 404(b) and G.S. 8C-1, N.C. R. Evid. 403 where notable similarities existed between defendant's prior drug related acts and the crimes he was charged with, the prior acts were not too remote in time, and the trial court guarded against prejudice by giving a limiting instruction. State v. Stevenson, 169 N.C. App. 797, 611 S.E.2d 206, 2005 N.C. App. LEXIS 791 (2005).

Trial court did not err in admitting the testimony of a witness that defendant had touched the witness, a minor at the time, in a sexual manner without the consent of the witness. The evidence pursuant to the balancing test of G.S. 8C-1, N.C. R. Evid. 403 was not more prejudicial than probative since there was a similarity and temporal proximity regarding that incident and the present charges against defendant. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Evidence of a party's mental or physical condition at a time remote from the execution of a document is generally not admissible, but where he has a progressive degenerative illness, evidence of his condition some years prior to and after the date of execution may be admissible to show the onset of the disorder and the gradual deterioration of the party's mind and will. Matthews v. James, 88 N.C. App. 32, 362 S.E.2d 594 (1987), cert. denied, 322 N.C. 112, 367 S.E.2d 913 (1988).

Evidence of decedent's mental condition over a year before the critical time was admissible, and was not too remote. Caudill v. Smith, 117 N.C. App. 64, 450 S.E.2d 8 (1994).

Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will confuse or mislead the jury. State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Regardless of a statement's relevancy, the court retains discretionary authority to exclude it if its probative value is substantially outweighed by its unfairly inflammatory effect. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

The admissibility of demonstrative or experimental evidence depends, as does any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant's case. State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Foundation for Courtroom Demonstration. — In the case of a courtroom demonstration, the demonstrator may not need to be qualified as an expert in the same way as an experimenter, but a proper foundation must still be laid as to the person's familiarity with the thing he or she is demonstrating. State v. Hunt, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Evidence of Psychological Trauma. — The trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under this rule. It should also determine whether admission of this evidence would be helpful to the trier of fact under Evidence Rule 702. State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992).

In a trial on rape charges, evidence that the victim has suffered a conversion reaction may be admitted for corroborative purposes to the same extent as evidence that she has suffered from post-traumatic stress syndrome; however, admission of evidence on these two psychological phenomena constituted error where it was offered for the substantive purpose of proving that a rape did in fact occur. State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992).

Evidence of Intent. — Evidence of robbery of a restaurant committed by defendants one week prior to the attempted robbery in case at issue was sufficiently similar to show intent. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

The fact that victim had in his possession videotapes which depicted violent homosexual acts had little tendency to show that the victim was the aggressor with intent to sodomize the defendant. State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

Where defendant, who was convicted of strangling his pregnant high school girlfriend testified that his action was impulsive and that he tore off the "skirt" part of the apron after the strangulation, it was proper to allow a detective, using a mannequin at trial, to demonstrate how the apron was tied around the victim's neck as the demonstration was relevant as to whether defendant acted with premeditation and deliberation and the demonstration was not excessively inflammatory. State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637, 2003 N.C. App. LEXIS 1511 (2003).

Waiver of Objection. — Where arresting officer's opinion that defendant possessed marijuana was of minimal probative value since the purposes for admitting "chain of circumstances" evidence could have easily been accomplished without the arresting officer's opinion, defendant waived any objection under this rule on appeal since defendant admitted during his direct examination the truth of the State's allegation that he possessed marijuana at the time of his arrest. State v. Agee, 93 N.C. App. 346, 378 S.E.2d 533 (1989), aff'd, 326 N.C. 542, 391 S.E.2d 171 (1990).

Discretion of Trial Judge. — Whether or not to exclude evidence under this rule is a matter within the sound discretion of the trial judge. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986); State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810 (1987); State v. Frazier, 319 N.C. 388, 354 S.E.2d 475 (1987); State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182 (1987); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987); State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

Whether to exclude evidence under this rule is a matter within the sound discretion of the trial court; however, where the trial court has discretion, but erroneously fails to exercise it and rules as a matter of law, the prejudiced party is entitled to have the matter reconsidered. State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987).

Whether or not to exclude evidence under this rule because its probative value is substantially outweighed by the danger of unfair prejudice is a matter within the sound discretion of the trial judge. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987).

Whether or not to exclude evidence under this rule is a matter within the sound discretion of the trial court, and his ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Whether evidence should be excluded under this Rule is ordinarily a decision within the trial court's discretion. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

Trial court's decision to admit evidence under this rule was not to be grounds for relief on appeal unless it was manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision; in a case involving a charge that defendant performed a sex act on a minor girl, the trial court did not err in allowing the girl's mother to testify that defendant had performed a sex act on the mother nearly 20 years before. State v. Love, 152 N.C. App. 608, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 66 (2003).

Whether to exclude relevant evidence under G.S. 8C-1, N.C. R. Evid. 403, is in the trial court's discretion; the appellate court reviews the trial court's decision for an abuse of that discretion. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

Because the issue of whether to exclude evidence under G.S. 8C-1, N.C. R. Evid. 403 was within the sound discretion of the trial court, and the plain error standard of review did not apply to issues that fell within the realm of the trial court's discretion, defendant's assertion of error based on a stipulation was overruled. State v. Cunningham, 188 N.C. App. 832, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008).

The appellate court will not intervene where the trial court has properly weighed both the probative and prejudicial value of evidence and made its ruling accordingly. Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, 136 N.C. App. 493, 524 S.E.2d 591, 2000 N.C. App. LEXIS 52 (2000).

Error Not Properly Preserved. — Although defendant challenged the trial court's decision allowing a detective to testify concerning his ongoing investigation of defendant prior to his arrest, contending that the testimony should have been excluded under G.S. 8C-1-403, defendant failed to properly object to the proffered testimony, and therefore appellate review was for plain error only under N.C. R. App. P. 10(b)(1) and (c)(4); but because defendant did not specifically and distinctly allege plain error, he was not entitled to plain error review of the issue. State v. McDougald, 181 N.C. App. 41, 638 S.E.2d 546, 2007 N.C. App. LEXIS 90 (2007), discretionary review granted, 361 N.C. 689, 653 S.E.2d 152 (2007); rev'd, in part, remanded 362 N.C. 224, 657 S.E.2d 351 (2008,.

Trial court did not err by excluding evidence of a sexual assault victim's allegedly delinquent child support payments as not relevant to the sexual assault trial under G.S. 8C-1, N.C. R. Evid. 403; however, defendant had abandoned his argument because he only referenced it in a heading of his brief and did not provide a reason, argument, or authority to support his claim, as required by N.C. R. App. P. 28(b)(6). State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Defendant's claim that certain testimony was erroneously admitted was not preserved for purposes of appeal because defendant claimed, on appeal, that the testimony was irrelevant, under G.S. 8C-1, N.C. R. Evid. 401 and 402, and that the testimony was unduly prejudicial, under G.S. 8C-1, N.C. R. Evid. 403, but defendant did not make these specific objections at trial, nor were such objections apparent from the context, under N.C. R. App. P. 10(b)(1), from which it appeared that defendant made a hearsay objection. State v. Hueto, — N.C. App. —, 671 S.E.2d 62, 2009 N.C. App. LEXIS 62 (2009).

Clearly False Statement. — The admission of a statement that is so clearly false and that is made by a witness who is unavailable to testify or be cross-examined would be misleading to a jury. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

In a trial before a judge without a jury, it is presumed that the judge disregarded any incompetent evidence and did not draw inferences from testimony otherwise competent which would render such testimony incompetent. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), cert. denied, 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Admission of expert testimony regarding memory factors is within trial court's discretion, and appellate court will not intervene where trial court properly appraises probative and prejudicial value of evidence under G.S. 8C-1, Rule 403. State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990), aff'd, 329 N.C. 764, 407 S.E.2d 514 (1991).

Factors Entering into Expert's Opinion. — Although court was not required to conduct a balancing test under this section in the sentencing proceeding, it correctly allowed admission of evidence of list of serial killers defendant possessed near the time of two murders as relevant for cross-examination of mental health expert, because jury was entitled to know to what extent, if any, these materials entered into the expert's opinion regarding defendant's state of mind. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Evidence of Common Malpractice Carrier. — Trial court did not abuse its discretion by granting motion in limine which suppressed evidence that defendant and two of his expert witnesses shared a common malpractice carrier. Warren v. Jackson, 125 N.C. App. 96, 479 S.E.2d 278 (1997).

Terminology of Expert. — Doctor's use of the term "homicidal assault" was not a legal term of art, nor correlated to a criminal offense and the testimony related a proper opinion for an expert in the field of forensic pathology; thus, the trial court did not err in allowing the testimony. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996).

Applied in Booe v. Shadrik, 85 N.C. App. 230, 354 S.E.2d 305 (1987); State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988); State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988); State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988); State v. Roberson, 93 N.C. App. 83, 376 S.E.2d 486 (1989); Crump v. Board of Educ., 93 N.C. 168, 378 S.E.2d 32 (1989); State v. McDowell, 93 N.C. App. 289, 378 S.E.2d 48 (1989); Lowery v. Love, 93 N.C. App. 568, 378 S.E.2d 815 (1989); Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989); State v. Moore, 94 N.C. App. 55, 379 S.E.2d 858 (1989); In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Everett, 98 N.C. App. 23, 390 S.E.2d 160 (1990); State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990); State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990); State v. Lopez, 101 N.C. App. 217, 398 S.E.2d 886 (1990); State v. Davis, 101 N.C. App. 409, 399 S.E.2d 371 (1991); State v. Shubert, 102 N.C. App. 419, 402 S.E.2d 642 (1991); State v. White, 101 N.C. App. 593, 401 S.E.2d 106; State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991); State v. Cotton, 329 N.C. 764, 407 S.E.2d 514 (1991); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991); State v. Ferguson, 105 N.C. App. 692, 414 S.E.2d 769 (1992); State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992); State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992); State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993); State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Morgan, 111 N.C. App. 662, 432 S.E.2d 877 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. McHone, 334 N.C. 627, 435 S.E.2d 296

(1993); State v. Moore, 335 N.C. 567, 440 S.E.2d 797; State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994); State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994); State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995); Capitol Funds, Inc. v. Royal Indem. Co., 119 N.C. App. 351, 458 S.E.2d 741 (1995); State v. Serzan, 119 N.C. App. 557, 459 S.E.2d 297 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995); State v. Vick, 341 N.C. 569, 461 S.E.2d 655 (1995); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); Lumley v. Capoferi, 120 N.C. App. 578, 463 S.E.2d 264 (1995); Carrier v. Starnes, 120 N.C. App. 513, 463 S.E.2d 393 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996); State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999); State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (1999); State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999); State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999); State v. Lathan, 138 N.C. App. 234, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000); State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000); In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553, 2000 N.C. App. LEXIS 820 (2000); Carpenter v. Brooks, 139 N.C. App. 745, 534 S.E.2d 641, 2000 N.C. App. LEXIS 1033 (2000); State v. Johnson, 145 N.C. App. 51, 549 S.E.2d 574, 2001 N.C. App. LEXIS 553 (2001); State v. Ward, 354 N.C. 231, 555 S.E.2d 251, 2001 N.C. LEXIS 1097 (2001); State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001); State v. Diehl, 147 N.C. 646, 557 S.E.2d 152, 2001 N.C. App. LEXIS 1260 (2001); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745, 2002 N.C. App. LEXIS 1179 (2002); State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003); State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348, 2003 N.C. App. LEXIS 1667 (2003); Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004); State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133, 2004 N.C. App. LEXIS 2333 (2004); State v. Petro, 167 N.C. App. 749, 606 S.E.2d 425, 2005 N.C. App. LEXIS 16 (2005); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005); State v. Davis, 168 N.C. App. 321, 608 S.E.2d 74, 2005 N.C. App. LEXIS 256 (2005); State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005); State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005); State v. Goblet, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005); State v. Anderson, 177 N.C. App. 54, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006); State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006); State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006); State v. Teate, 180 N.C. App. 601, 638 S.E.2d 29, 2006 N.C. App. LEXIS 2515 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Erickson, 181 N.C. App. 479, 640 S.E.2d 761, 2007 N.C. App. LEXIS 262 (2007); State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007); State v. Wiggins, 185 N.C. App. 376, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007); State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

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McDougald, 336 N.C. 451, 444 S.E.2d 211 (1994); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); Robertson v. Nelson, 116 N.C. App. 324, 447 S.E.2d 488 (1994); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994); Richardson v. Patterson, 116 N.C. App. 661, 448 S.E.2d 861 (1994); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281 (1995); State v. King, 343 N.C. 29, 468 S.E.2d 232 (1996); State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996); State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (1996); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996); State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996); Jones v. Rochelle, 125 N.C. App. 82, 479 S.E.2d 231 (1996); State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997); State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997); State v. Cagle, 346 N.C. 497, 488 S.E.2d 535 (1997); State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997); State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998); State v. Stinnett, 129 N.C. App. 192, 497 S.E.2d 696 (1998); State v. Corpening, 129 N.C. App. 60, 497 S.E.2d 303 (1998); State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); Russell v. Buchanan, 129 N.C. App. 519, 500 S.E.2d 728 (1998); State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998); State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998); State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999); State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000); State v. Fluker, 139 N.C. App. 768, 535 S.E.2d 68, 2000 N.C. App. LEXIS 1026 (2000); State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000); State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000); State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000); State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000); State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001); State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223, 2002 N.C. App. LEXIS 714 (2002); State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002); State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002); State v. Bartlett, 153 N.C. App. 680, 571 S.E.2d 28, 2002 N.C. App. LEXIS 1247 (2002); State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592, 2002 N.C. App. LEXIS 1263 (2002); State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776, 2002 N.C. App. LEXIS 1274 (2002); State v. Bethea, 156 N.C. App. 167, 575 S.E.2d 831, 2003 N.C. App. LEXIS 68 (2003); Dunn v. Custer, 162 N.C. App. 259, 591 S.E.2d 11, 2004 N.C. App. LEXIS 112 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Oakley, 167 N.C. App. 318, 605 S.E.2d 215, 2004 N.C. App. LEXIS 2185 (2004); Barham v. Hawk, 165 N.C. App. 708, 600 S.E.2d 1 (2004); State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483, 2004 N.C. App. LEXIS 1519 (2004); State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443, 2005 N.C. App. LEXIS 21 (2005); State v. Blizzard, 169 N.C.

App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005); State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005); State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005); State v. Anderson, 175 N.C. App. 444, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006); State v. Jones, 176 N.C. App. 678, 627 S.E.2d 265, 2006 N.C. App. LEXIS 589 (2006); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Christian, 180 N.C. App. 621, 638 S.E.2d 470, 2006 N.C. App. LEXIS 2518 (2006); State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007); State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008); State v. Hope, 189 N.C. App. 309, 657 S.E.2d 909, 2008 N.C. App. LEXIS 544 (2008); State v. Davis, 191 N.C. App. 535, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (2008); State v. Washington, — N.C. App. —, 665 S.E.2d 799, 2008 N.C. App. LEXIS 1625 (2008); State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009); State v. Herrera, — N.C. App. —, 672 S.E.2d 71, 2009 N.C. App. LEXIS 126 (2009); State v. Madures, — N.C. App. —, 678 S.E.2d 361, 2009 N.C. App. LEXIS 1077 (July 7, 2009).

II. PHOTOGRAPHS AND VIDEOTAPES.

Photographs Held Relevant. — Color autopsy photographs, although gruesome, were relevant to illustrate the testimony of the pathologist and were illustrative of testimony regarding the number and nature of the victim's wounds and were therefore admissible. State v. Rose, 335 N.C. 301, 439 S.E.2d 518, cert. denied, 512 U.S. 1246, 114 S. Ct. 2770, 129 L. Ed. 2d 883 (1994), overruled in part on other grounds, State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001).

Autopsy photographs, photographs of the victim's car after she was shot, testimony regarding the amount of blood at the scene, and blood stained material were all properly admitted at defendant's murder trial in accordance with G.S. 8C-1, N.C. R. Evid. 401, 402, and were not overly prejudicial in violation of G.S. 8C-1, N.C. R. Evid. 403. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Photographs which showed numerous gunshot wounds were relevant to show not only the cause of death, but were also relevant as a means of proving the premeditation and deliberation elements of first-degree murder. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Photographs of the decedent admitted into evidence that were illustrative of testimony regarding the nature and number of the victim's wounds and the condition of the body upon discovery and of the crime scene were properly admitted. State v. Williams, 341 N.C. 1, 459 S.E.2d 208 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996).

The relevance of fifty-one photographs was upheld where these photographs, albeit numerous, were unique in subject matter and in detail in that they (1) depicted the exceedingly large number of wounds inflicted upon different parts of the victim's body by various weapons, including a knife, a drill bit, a pipe, an ax head, and a limb or pruning saw, (2) depicted the condition of the body, its location, and the crime scene, (3) corroborated defendant's confession by demonstrating that the victim was attacked in his bedroom, that he fell to the floor with his head toward the closet, that he was stabbed while on the floor, and that his neck was cut with a saw while on the floor. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

A photograph depicting blood in victim's grocery store, which resulted from a head injury defendant inflicted on victim when he struck him with a gun during robbery, and the accompanying testimony were relevant to support the existence of the aggravating circumstance that defendant had been previously convicted of a felony involving the use of violence to the person. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Admission of photos of guns found in defendant's home in a case charging defendant with drug trafficking and possession was proper because such evidence was relevant, and because guns were often used for protection in illegal drug trade, probative value was not substantially outweighed by danger of unfair prejudice. State v. Lakey, 183 N.C. App. 652, 645 S.E.2d 159, 2007 N.C. App. LEXIS 1093 (2007).

There was no abuse of discretion in the admission under G.S. 8-97 of eight autopsy photographs in defendant's criminal trial that arose from the murder of a victim in a gunfight, as there was an issue as to whether defendant shot the victim in self-defense and the photographs depicted the location of the wounds and illustrated the manner of the killing; the photographs were probative and any prejudicial effect under G.S. 8C-1, N.C. R. Evid. 403 was outweighed. State v. Early, — N.C. App. —, 670 S.E.2d 594, 2009 N.C. App. LEXIS 49 (2009).

Discretion of Court. — What represents an excessive number of photographs and whether the photographic evidence is more probative than prejudicial are matters within the sound discretion of the trial court. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996).

In defendant's trial on charges of first-degree murder and robbery with a firearm, the trial court did not abuse its discretion by admitting photographs of the location where the victim was killed, even though those photographs depicted a cross and memorial flowers at the scene. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Proper Inquiry Regarding Admissibility of Photographs. — Critical to the trial court's inquiry into the admissibility of a photograph is the determination that it does not unduly reiterate illustrative evidence already presented. When a photograph adds nothing to the State's case, then its probative value is nil, and nothing remains but its tendency to prejudice. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies — these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the State against its tendency to prejudice the jury. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

The test for excess in the use of photographs is not formulaic; the trial court's task is to examine both the content and the manner in which photographic evidence is used, and to scrutinize the totality of circumstances composing that presentation. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

Repetitive photographs may be introduced, even if they are gruesome or revolting, as long as they are used for illustrative purposes and are not offered solely to arouse prejudice or passion of the jury. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996).

When the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

Photographs Held Not Excessive. — Photographs of the murder victim, including one illustrating the visible wounds on the decedent's body, were not excessive. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Two photographs of a dead police officer in the emergency room were properly admitted into evidence at defendant's trial for second-degree murder in the death of a law enforcement officer during a high speed pursuit of defendant, because the photographs were introduced during another police officer's testimony to provide a chain of causation between the accident and the victim's death and to illustrate the testifying officer's observations of the state of the victim's body; the photographs were not introduced in an excessive or repetitious manner in order to arouse the passions of the jury but, rather, were introduced to allow the State to prove the chain of causation, which was an essential element of the case. State v. Bethea, 167 N.C. App. 215, 605 S.E.2d 173, 2004 N.C. App. LEXIS 2150 (2004).

Where a party introduces photographs for illustrative purposes and not solely to arouse prejudice or passion, they are admissible even if revolting and repetitious. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), cert. denied, 516 U.S. 1079, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

Where defendant conceded that the autopsy photographs of the victim were used to illustrate the testimony of the medical examiner, the defendant failed to show that the photographs were unduly prejudicial or that their admission was not proper. State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (1996), cert. denied, 520 U.S. 1158, 117 S. Ct. 1341, 137 L. Ed. 2d 500 (1997).

The admission of two photographs depicting the victim's damaged car did not result in unfair prejudice to defendant where the court instructed the jury that the photographs were being admitted only for the purpose of illustrating the investigating trooper's testimony; although blood was visible in both photographs, and prominent in one, the photographs were not gruesome, horrifying, or revolting. State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Videotape taken of the murder victim's body found sitting beside a road was admissible as the videotape was offered and received solely for illustrative purposes and not to inflame the passions of the jury; furthermore, a proper foundation was laid for the admission of the videotape. State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Defendant's Photograph Admissible to Contradict Self-Defense Theory. — A photograph of defendant which only illustrated his facial features and showed he looked like a "mean kind of fellow" was admissible to demonstrate that defendant was neither injured nor disheveled and to contradict defendant's theory of self-defense. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Trial court did not err in allowing child sexual molestation victim to describe photos she took of defendant and her mother, even though the trial court refused to admit the photos themselves; the testimony was not significantly different than the daughter's prior testimony about the sexual relationship between her mother and defendant. State

v. Pendleton, 175 N.C. App. 230, 622 S.E.2d 708, 2005 N.C. App. LEXIS 2743 (2005).

Photographs Held Properly Admitted. — Photographs of decedent's body after he had been shot illustrated testimony with respect to the crime scene in general, the location and position of the body when found, and the wounds suffered by the deceased, and it was therefore within the trial court's discretion to allow these pictures into evidence. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

While some photographic evidence at issue was gruesome, there was no suggestion slide projections were done unfairly, there was no needless repetition of photographs and presentation of each photograph or slide was accompanied by competent testimony of witnesses, which photographic evidence illustrated; thus, trial court did not abuse its discretion in permitting photographic evidence to be used. State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

The defaced photographs of victim's wife given to murder victim by defendant, considered with the original photographs defendant gave to the wife moments before the shooting, were important, highly probative evidence for the state. This evidence tended to show defendant's hostility toward the victim and his bizarre preoccupation with the victim's wife during the four months immediately before the shooting. The probative value of this evidence to show malice was not outweighed by the potential for unfair prejudice. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

Admission in murder trial of color photographs and slides picturing the victim's body and of testimony about the condition of the body when found including the fact that it was infested with maggots, did not constitute an abuse of discretion. State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Where doctor who performed autopsy used one photograph showing victim's bare breast to illustrate his testimony about the cause of death and the nature and location of the wound, the danger of redundant and excessive use of potentially inflammatory photographs was not present, and the trial court acted within its sound discretion in ruling under G.S. 8C-1, Rule 403 that the probative value of the unaltered photograph was not substantially outweighed by any prejudice. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Defendant failed to show that the trial court abused its discretion in denying his motion to exclude gun and photograph of gun from evidence. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Where photographs of a homicide victim's body were not excessive in number and were used solely for the purpose of illustrating a medical examiner's testimony, the trial court did not err in admitting them into evidence. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Photograph of rape victim was properly admitted for the limited purpose of illustrating witness medical examiner's testimony as to cause of death. State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993), cert. denied, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895, reh'g denied, 512 U.S. 1278, 115 S. Ct. 26, 129 L. Ed. 2d 924 (1994).

There was no abuse of discretion in the admission of photographs where each photograph related to material events and facts to which each identifying witness was testifying and further, the testimony of each witness whose testimony the photographs illustrated related to different aspects of the case and served different purposes. State v. Gray, 337 N.C. 772, 448 S.E.2d 794 (1994).

Photographs of defendants' home were properly admitted for the purpose of illustrating four witnesses' testimony. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, rev'd on other grounds, 342 N.C. 159, 463 S.E.2d 72 (1995).

Photographs which depicted the victim's fatal wound may have been prejudicial to the defendant, but they were not unfairly so. They were not excessive in number, repetitious or peculiarly gruesome, were properly used to illustrate the testimony of deputy sheriff, and as such, their admission by the trial court did not amount to an abuse of discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

Where there was no evidence that photograph was used solely to arouse the passions of the jury but was used to illustrate testimony concerning defendant's possession and control of the murder weapon, because the photograph had probative value and there was minimal potential for any unfair prejudice, the trial court did not abuse its discretion; this assignment of error was overruled. State v. Thibodeaux, 341 N.C. 53, 459 S.E.2d 501 (1995).

Admission of photo was not error where the photograph was used for illustrative purposes during nephew's testimony to describe his aunt and uncle while alive. State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

Videotape and photographs of crime scene and autopsy photographs of child who had been brutally raped and murdered were properly admitted. State v. Kandies, 342 N.C. 419, 467 S.E.2d 67 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

The State may introduce photographs into evidence although the defendant stipulates the cause of death. State v. French, 342 N.C. 863, 467 S.E.2d 412 (1996).

The probative value of the gruesome photographs outweighed the prejudice where they were used to show the circumstances of the killing and to establish the extent of the victim's head wound. State v. Ocasio, 344 N.C. 568, 476 S.E.2d 281 (1996).

Seven photographs of the victim were properly admitted where they were used during the testimony of a police officer to show the location, position, and condition of the body when it was discovered and used to illustrate a pathologist's testimony. State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998).

Photographs of the victims' bodies at the crime scene, and the victims' bodies during autopsy were admissible in a prosecution for aiding and abetting first-degree murder, since the photographs depicted the condition and location of the bodies at the time they were found or showed a unique perspective or contained unique details or subject matter. State v. Goode, 350 N.C. 247, 512 S.E.2d 414 (1999).

Court properly allowed photographs of victims before and after their deaths where it gave due consideration to counsel's objection and arguments and found the photos relevant, not repetitive, and no more gruesome than photos from other murders of the same nature, and where the probative value of the photos outweighed the danger of any prejudice to the defendant. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Photographs of defendant's victims were not too gory or gruesome to show to the jury. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Photographs of two murder victims were properly admitted into evidence where they were not excessively gruesome and were used to identify one of the victims and to indicate the relative location of the victims to each other. State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Trial court did not err in ruling that 10 autopsy photos of the murder victim were more probative than prejudicial and in allowing admission of them into evidence. State v. Gladden, 168 N.C. App. 548, 608 S.E.2d 93, 2005 N.C. App. LEXIS 351 (2005), appeal dismissed, cert. denied, — N.C. —, 614 S.E.2d 312 (2005).

Trial court's ruling admitting enlarged autopsy photographs that were projected onto a screen was proper for the purpose of illustrating the extent of the victim's wounds; thus, the probative value of the photographs outweighed any potential unfair prejudice due to the nature of the photographs. State v. Snider, 168 N.C. App. 701, 609 S.E.2d 231, 2005 N.C. App. LEXIS 395 (2005).

Two photographs of defendant's foster daughters were not unduly prejudicial where they were not necessarily sexually suggestive as alleged by defendant but could have been viewed as relatively benign. State v. Whitman, — N.C. App. —, 635 S.E.2d 906, 2006 N.C. App. LEXIS 2167 (2006).

In an action in which defendants appealed from a judgment of the Wayne County Court, which convicted defendants of first degree murder, the state had shown that inflaming the jury was not the sole purpose of the evidence; the photographic evidence introduced was offered to illustrate its witnesses' testimony. State v. Sloan, 180 N.C. App. 527, 638 S.E.2d 36, 2006 N.C. App. LEXIS 2517 (2006), appeal dismissed, cert. denied, 361 N.C. 367, 644 S.E.2d 560 (2007), aff'd, 650 S.E. 2d 594, 2007 N.C. LEXIS 1011 (2007).

Photographs of victim's frontal injuries were not cumulative or excessive, as other photographs shown were of the crime scene and defendant while defendant was lying face down in the position in which officers found defendant; thus, they showed a different view of the body, a different injury inflicted, and different pieces of evidence found around the body. State v. Bowman, — N.C. App. —, 644 S.E.2d 596, 2007 N.C. App. LEXIS 1099 (2007).

In a trial in which the state sought to show that defendant pressured her daughter to shoot defendant's husband so that defendant could be with a boyfriend she met at a swingers party, the admission of sexually suggestive photographs of defendant and the boyfriend was proper under G.S. 8C-1-401, G.S. 8C-1-403, and G.S. 8C-1-404(b) because the photographs corroborated the existence of a sexual relationship between defendant and the boyfriend, the photographs illustrated the chain of events leading up to the murder, and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Trial court did not abuse its discretion by overruling defendant's objection to the admission of photographs showing the murder victim's dismembered and decomposed body, where the photographs were introduced to illustrate the testimony by a special agent about the condition of victim's body, having exposed bone and being in a state of mummification, when it was discovered. State v. Bare, — N.C. App. —, 669 S.E.2d 882, 2008 N.C. App. LEXIS 2238 (2008).

Photographs and videotape were properly admitted where each photograph at issue illustrated, in some unique respect, the manner in which the victim was killed, including depiction of electrical wire used to bind the victim at the wrists, knees, and ankles, and the videotape uniquely depicted the condition and location of the victim's body in the context of the crime scene; both illustrated witness testimony. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Admission of Photographs Held Error. — The admission into evidence of 26 photographs taken at the victims' autopsies which added nothing to the State's case as already delineated in crime scene slides and their accompanying testimony, was error; given the absence of additional probative value, these photographs—grotesque and macabre in and of themselves—had potential only for inflaming the jurors. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

The prejudicial effect of photographs used repetitiously in a murder case was compounded by the manner in which the photographs were presented, where an unusually large screen was erected on a wall directly over defendant's head such that the jury would continually have him in its vision as it viewed the slides. This was a manner of presentation that in itself quite probably enhanced the prejudicial impact of the slides themselves. State v. Hennis, 323 N.C. 279, 372 S.E.2d 523 (1988).

Admittance of Videotape Recordings. — The basic principles governing the admissibility of photographs apply also to motion pictures. Videotape recordings may be admitted into evidence where they are relevant and have been properly authenticated. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

A relevant videotape may be played for a jury even if gory and gruesome if not used solely to arouse the passions of the jury. State v. French, 342 N.C. 863, 467 S.E.2d 412 (1996).

A videotape of capital murder defendant's stepdaughter made 49 days before her death was properly admitted, where the videotape of the two-year-old, thirty pound victim was probative of the State's case to show why it would be especially heinous, atrocious, or cruel for a man as large and powerful as defendant to murder the child with his hands while she was in his care. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998), cert. denied, 526 U.S. 1135, 119 S. Ct. 1813, 143 L. Ed. 2d 1015 (1999).

Where defendant was accused of inviting teenage girls to his home, giving them alcohol and drugs, and encouraging them to undress as he photographed them, the trial court did not err in allowing portions of a 17 year old videotape of defendant engaging in sexual activity with a minor to be played for the jury, as the probative value of the videotape was not outweighed by the prejudicial effect upon defendant. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Videotape of the crime scene was properly admitted into evidence, as it provided a unique perspective into the layout of the area in question that still photographs admitted into evidence did not depict; the record reflected that the videotape was not used excessively or solely to inflame the passions and prejudices of the jury against defendant, and in light of the distinctive perspective that the videotape afforded and the limiting instruction given by the trial court its admission was not an abuse of discretion. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Defendant's conviction of robbery with a firearm was proper; the State set a proper foundation for the admission of a videotape of the robbery under G.S. 8-97 by presenting testimony that the tape came from a store security camera, and had been in police custody and had not been altered, and the probative value of the videotape was not outweighed by any undue prejudice under G.S. 8C-1, N.C. R. Evid. 403. State v. Ayscue, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005).

Admission of videos did not violate G.S. 8C-1, N.C. R. Evid. 403, since the portions of the tape that defendant contended were inflammatory were not shown at trial. State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Failure to View Videotape Prior to Admission. — Trial court did not violate G.S. 8C-1, N.C. R. Evid. 403 by failing to view the DVD recording of defendant's police interview before ruling on its admissibility as the trial court made its ruling on admissibility based on forecasts provided by both parties as to what was contained in the DVD. Given that the trial court gave a limiting instruction with regard to the evidence in dispute, it followed that it recognized the potential for prejudice and exercised its discretion in permitting its introduction. State v. Miller, — N.C. App. —, 676 S.E.2d 546, 2009 N.C. App. LEXIS 805 (May 19, 2009).

Inability to View Lost Videotape. — That jurors were unable to view a lost videotape did not, per se, result in a violation of G.S. 8C-1, Rule 403; G.S. 8C-1, Rule 1004 permits admissibility of secondary evidence where the original is lost or destroyed. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Statements of Defendant on Videotape. — If a videotape contains incriminating statements by the defendant, upon his objection, the judge must conduct a voir dire to determine the admissibility of any in-custody statements or admissions in the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

Sequence of Events Video. — Admission of videotape showing the sequence of events at issue in the defendant's murder trial, even if shown in slow motion, was not an abuse of discretion because of the videotape's probative value. State v. Brewington, 343 N.C. 448, 471 S.E.2d 398 (1996).

Conduct of Defendant on Videotape. — Where a videotape depicts conduct of a defendant in a criminal case, the trial judge should grant a request from the defense to preview the tape. State v. Billings, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

Compact disc presentation on shaken baby syndrome, used to illustrate the State's expert's testimony on the manner in which shaking an infant causes the severity of injuries sustained in the typical shaken baby syndrome case, was not unduly prejudicial to defendant accused of felony murder for shaking a child; the trial court limited the jury's consideration of the video to its use as illustrative evidence only. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

Condensed videotape which included footage of a body being turned over, placed in a body bag and on a stretcher, then transported to elevator for removal was relevant to illustrate the crime scene prior to the arrival of medical personnel and was neither excessive nor cumulative evidence. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

Motion Pictures. — The principles that govern the admissibility of photographs apply to motion pictures as well. State v. French, 342 N.C. 863, 467 S.E.2d 412 (1996).

III. PREJUDICIAL EVIDENCE, EVIDENCE EXCLUDED BASED ON CONFUSION, ETC.

Refusal to Exclude Evidence of Other Killings Held Prejudicial. — In trial for murder of defendant's husband, rulings of the trial judge denying defendant's motion in limine to exclude evidence implicating her in other killings was held to have impermissibly chilled her right to testify in her own defense. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Evidence of One Murder in Support of Another. — The defendant failed to show that the trial court abused its discretion in permitting evidence of one murder to show opportunity and identity in support of another murder. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Evidence of Offense for Which Defendant Acquitted Not Admissible. — The State may not introduce in a subsequent criminal trial evidence of a prior alleged offense for which defendant had been tried and acquitted in an earlier trial. Where the probative value of such evidence depends upon defendant's having in fact committed the prior alleged offense, his acquittal of the offense in an earlier trial so divests the evidence of probative value that, as a matter of law, it cannot outweigh the tendency of such evidence unfairly to prejudice the defendant. State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992).

Evidence Improperly Admitted. — In prosecution charging defendant with being an accessory before the fact to second degree murder, where the real effect of questions about devil worship, satanic bibles, graveyard seances, and the like could only have been to arouse the passion and prejudice of the jury, and where relative veracity of the State's two accomplice witnesses and the defendant was critical, the trial court committed reversible error in permitting the district attorney, over objection, to ask defendant questions about devil worshipping activities. State v. Kimbrell, 320 N.C. 762, 360 S.E.2d 691 (1987).

It was reversible error for the trial court to allow extrinsic evidence of prior inconsistent statements to impeach defense witness' testimony when that testimony concerned matters collateral to the issues in the case (what he did or did not tell his parole officer), and had that evidence not been erroneously admitted there was a reasonable possibility of a different result. See State v. Williams, 322 N.C. 452, 368 S.E.2d 624 (1988).

There can be no question that prejudice resulted from the testimony that defendant had returned to witness's motel room three hours after the murder occurred with "mud or grass" stains on the knees of his pants, and that he was "very nervous and upset" and wanted to "get drunk" and did so, and the prejudicial effect of this testimony far outweighed the need to show witness to be less than credible (especially where the remainder of her testimony included little of value in the state's case) or the need to bolster officer's credibility. State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989).

In a first-degree murder case evidence that insulation particles in defendant's clothing had apparently come from the attic used to gain access to the victim's apartment did not prove that he killed her, but was relevant to the State's case since evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue, and certainly a fact of consequence was the presence of fiber on the defendant's clothing consistent with that found in the victim's apartment. State v. Crandell, 322 N.C. 487, 369 S.E.2d 579 (1988).

Evidence that approximately two weeks before he killed victim the defendant threatened to kill him, or to kill a group of which he was a member, was relevant and admissible as evidence tending to show premeditation and deliberation and to negate self-defense. State v.

Groves, 324 N.C. 360, 378 S.E.2d 763 (1989).

Where defendant was accused of sexually abusing his 14-year-old adopted daughter, the trial court erred in admitting testimony of alleged prior bad acts committed by defendant; namely, defendant's alleged frequent nudity, his alleged frequent fondling of himself, and an adulterous affair in which he was allegedly involved, as under the circumstances of this case, the admission of such evidence was highly prejudicial and of questionable relevance. State v. Maxwell, 96 N.C. App. 19, 384 S.E.2d 553 (1989), cert. denied, 326 N.C. 53, 389 S.E.2d 83 (1990).

Because doctor explicitly implicated defendant in her testimony regarding post traumatic stress disorder, the effects of alleged sexual assault on victim, and because doctor specifically named defendant twice and repeatedly implicated defendant as "friend" who caused victim's post traumatic stress disorder by unexpected and "unjust" attack, probative value of doctor's testimony was outweighed by danger of unfair prejudice. Therefore its admission violated this rule. This testimony not only directly implicated defendant, but also encouraged jury's outrage about injustice of defendant's alleged act. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

The trial court erred in allowing the State to cross-examine defendant charged with a sexual offense in the first degree concerning the following items on cross-examination: photographs, a dildo, a catalogue of condoms, lubricant, and two books entitled "Sexual Intercourse" and "The Sex Book," all of which were found in his home. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied, 329 N.C. 273, 407 S.E.2d 846 (1991).

The probative value of defendant's convictions in 1986 was substantially outweighed by the potential for prejudice; and the convictions should have been excluded under this rule upon defendant's motion in limine and his objection at trial. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

The appellate court agreed with 14-year-old defendant that allegations of a subsequent sexual assault on a four-year-old were not admissible since the incident was not sufficiently similar to the one at issue involving a nine-year-old; the admission of such evidence tended only to show the propensity of the defendant to commit sexual acts against young female children, an improper purpose, and therefore entitled defendant to a new trial. State v. White, 135 N.C. App. 349, 520 S.E.2d 70 (1999).

Although the trial court properly admitted a police officer's testimony about the underlying facts of defendant's prior 1995 conviction for assault inflicting serious injury, the trial court committed reversible error by admitting the state's exhibit of a copy of defendant's criminal conviction for that assault because admitting the bare fact of a non-testifying defendant's prior conviction after testimony had been elicited to establish the factual basis underlying that conviction violated G.S. 8C-1, N.C. R. Evid. 404(b), and 403; the bare fact of the prior conviction was inherently prejudicial. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Admission of evidence that defendant hid from police under a pile of clothing was not an abuse of discretion because it showed defendant's guilty conscience, and thus was probative as circumstantial evidence of guilt and not unduly prejudicial. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Evidence Properly Excluded. — In an action against an insurer in which plaintiff sought to recover the cost of chiropractic services rendered to her and her two minor children as a result of injuries sustained in an automobile collision, where plaintiff testified to the extent and type of damage to her automobile as a result of the collision, the court, in the exercise of its discretion under this rule, could properly exclude the automobile repair bill by which plaintiff sought to corroborate her testimony, as this evidence was cumulative and its probative value was weak, and moreover, the potential for confusion of issues by its admission was clear. Brown v. Allstate Ins. Co., 76 N.C. App. 671, 334 S.E.2d 89 (1985).

For case in which exclusion of expert testimony of a professor of psychology, by whom defendant had sought to provide expert evidence on memory variables affecting eyewitness identification, but who had not interviewed the victim, was upheld, see State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Where the trial court's rulings which excluded some testimony about slander plaintiff's background excluded only a small portion of the evidence presented by defendants concerning plaintiff's background, the trial court properly exercised its discretion under this rule excluding the testimony because its probative value was substantially outweighed by a danger of unfair prejudice. Raymond U v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, cert. denied, 323 N.C. 629, 374 S.E.2d 590 (1988).

The evidence defendant sought to introduce in his trial for first-degree sexual offense of his two daughters, which primarily involved his marital dispute over their property would only have muddled the evidence worthy of the jury's consideration, and the trial court committed no error in precluding the introduction of evidence regarding defendant's theory that the victim's mother devised this scheme for her financial benefit. State v. Knight, 93 N.C. App. 460, 378

S.E.2d 424, cert. denied, 325 N.C. 230, 381 S.E.2d 789 (1989).

In paternity action, trial court did not err by excluding the child's birth certificate in which the name of the father was left blank. The absence of a named father on the birth certificate had little probative value and was misleading because, under G.S. 130A-101(f), the name of the father of an illegitimate child may not be entered on the child's birth certificate without the father's sworn consent. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

The trial court did not err by excluding hospital records which purported to show that the mother, a father and child were "bonding"; the hospital records had little probative value and were misleading because no evidence was presented identifying the male person who could have been a relative or friend. State v. McInnis, 102 N.C. App. 338, 401 S.E.2d 774, cert. denied, 329 N.C. 274, 407 S.E.2d 848 (1991).

Because the document was remote in time, failed to specify to whom the document was referring, and failed to show a definite susceptibility of propounder to influence testatrix, its probative value was substantially outweighed by its danger of prejudice, and the trial court properly exercised its discretion in excluding the evidence. In re Will of Prince, 109 N.C. App. 58, 425 S.E.2d 711 (1993).

Where officer saw two small bottles of liquor in a purse but had no reason to believe that alcohol consumption contributed to car accident, the probative value of this evidence was outweighed by its prejudicial potential. Browning v. Carolina Power & Light Co., 114 N.C. App. 229, 441 S.E.2d 607 (1994), aff'd, 340 N.C. 254, 456 S.E.2d 307 (1995).

Trial court acted within its sound discretion as required by this rule and properly excluded testimony of three defense witnesses regarding defendant/wife's claims of domestic violence and mysogynistic behavior of husband. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

The trial court made a meticulous effort to perform the balancing test pursuant to this rule while redacting statements from defendant's interview and did not abuse its discretion in doing so; while the court redacted statements which contain the child-victim's observations about sexual activity around her home and which the defendant claimed might have been relevant in determining why she made certain statements involving him, the trial court also carefully excluded from the jury's consideration statements by defendant regarding his murder conviction in the State of Tennessee and his sexual relationship with his half-sister. State v. Campbell, 142 N.C. App. 145, 541 S.E.2d 803, 2001 N.C. App. LEXIS 36 (2001).

The trial court properly refused to permit plaintiff to offer insurer's original answer, admitting liability as evidence to contradict its amended answer denying liability, where the probative value of the answers was substantially outweighed by the danger of prejudice and confusion of the issues by the jury. Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001).

Trial court properly excluded from the defendant's murder trial the testimony of a man whom the victim had shot earlier because that man admitted that he was the aggressor in the shooting incident, whereas, the defendant was claiming at his trial that the victim was the aggressor in the shooting; thus, the trial court did not abuse its discretion in excluding the testimony because the testimony was not relevant to the victim's aggressiveness or propensity for violence as pertaining to the defendant. State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003).

Trial court did not err in holding that evidence of defendant's prior conviction for driving while impaired was of little probative value because the evidence of the prior conviction in an unrelated matter was highly prejudicial in nature. Headley v. Williams, 162 N.C. App. 300, 590 S.E.2d 443, 2004 N.C. App. LEXIS 131 (2004), cert. denied, 358 N.C. 375, 598 S.E.2d 136 (2004).

In a cardiologist's action for breach of an employment contract, though testimony from another doctor regarding what the employers said in regard to that doctor's contract was admissible as an admission by a party opponent under G.S. 8C-1, N.C. R. Evid. 801(d), the trial court did not abuse its discretion in excluding the evidence as misleading since the jury might impermissibly have found that the employer breached the contract with the cardiologist based purely on the evidence of the employer's possible breach of a contract with the other doctor. Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005).

Trial court did not abuse its discretion by excluding the statements of defendant's psychiatrist as to the basis for her opinion that defendant could not form the requisite state of mind for murder; the court found that the statements, although relevant to show the basis for her expert opinion, were likely to confuse the jury due to the danger of the statements prejudicing, confusing, or misleading the jury and thus outweighing the statements' probative value. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Where defendant, after resting defendant's case, moved to reopen the evidence to allow a child witness to rebut defendant's son's testimony that the victim had a bad bicycle wreck, corroborating defendant's story as to why the victim's buttocks were bruised, the trial court did not abuse its discretion under G.S. 15A-1226(b) in denying the motion; the trial court was permitted to exclude the testimony on grounds of undue delay, waste of time, or needless presentation of cumulative evidence under G.S. 8C-1-403, as defendant could have asked defendant's son before trial whether anyone else had seen the victim wreck on the bicycle and could have cross-examined the son about this, and the child's testimony was cumulative and would have only possibly served to corroborate defendant's testimony or facts brought to the jury's attention during the son's cross-examination. State v. Phillips, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Because no evidence proffered at an in camera hearing supported an inference that a victim's prior sexual activity was forced or caused any injuries, evidence of the victim's prior sexual activity was properly excluded under the rape shield statute, G.S. 8C-1, N.C. R. Evid. 412(b)(2); the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness under G.S. 8C-1, N.C. R. Evid. 403. State v. Harris, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005).

Trial court in a condemnation proceeding did not err in excluding opinion testimony as to property value offered by four witnesses, where the opinions were based upon prior condemnation sales, which were an improper basis for valuing property in a current condemnation proceeding, or based on sales of property which was insufficiently similar to the property in question. City of Charlotte v. Ertel, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

Testimony that defendant was found with marijuana and a pistol was not admissible because it was considered unfairly prejudicial in a trial for robbing and shooting a marijuana supplier. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Testimony of an expert who did not interview the witnesses, observe their testimony, or visit the crime scene was properly excluded, as the probative value of the testimony, considered in the light most favorable to defendant, was "marginally weak," and evidence would have confused the jury, unnecessarily delayed the proceeding, and would not have been of significant assistance to the jury. State v. McLean, 183 N.C. App. 429, 645 S.E.2d 162, 2007 N.C. App. LEXIS 1097 (2007).

Trial court properly excluded mental health expert's testimony as to the likelihood of defendant's release from the hospital if the jury found defendant not guilty by reason of insanity after finding that the expert's testimony could confuse the issues of the case with the possible consequences, and the expert's testimony would not assist the jury in regard to any matter in issue or fact. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

It was error to exclude under G.S. 8C-1, N.C. R. Evid. 403, testimony that in a questionnaire the victim had stated that she sometimes saw herself as if she were looking at someone else, that she was sometimes not sure whether something that happened was real or a dream, and that she sometimes heard voices inside her head; the evidence should have been admitted under G.S. 8C-1, N.C. R. Evid. 611(b), because it went to the credibility of the victim, whose testimony was crucial to the state's case, because the victim's testimony was contradicted by two eyewitnesses, and because attacking the victim's credibility was the defense's main theory. State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

Trial court properly sustained the State's objection under G.S. 8C-1, N.C. R. Evid. 403, on the basis that the prejudicial effect of testimony, that defendant and his sexual assault victim previously had rented motel rooms together, outweighed its probative benefit. The evidence was not relevant and admissible under G.S. 8C-1, N.C. R. Evid. 412(b)(1) because defendant had not raised the victim's consent as a defense. State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Trial court did not abuse its discretion in ruling that the probative value of a plastic baggie, which contained an undetermined white powder and was found on the accident victim following an automobile accident in which the victim was a passenger in the automobile that crashed, was substantially outweighed by the danger of unfair prejudice. Robinson v. Trantham, — N.C. App. —, 673 S.E.2d 771, 2009 N.C. App. LEXIS 245 (2009).

Trial court did not abuse its discretion in excluding evidence of a child's prior sexual conduct with her boyfriend under G.S. 8C-1, N.C. R. Evid. 403: (1) the temporal sequence created a risk of jury confusion, (2) a doctor had indicated that the child's internal scarring likely resulted from penetration by a penis; and (3) although defendant did not contend, and the evidence did not support, that the child's intercourse with her boyfriend could have caused the scarring, a jury could have been confused and mistakenly believed that the evidence was offered as an alternative explanation for the scarring. State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Claim Estimates by Insurer Properly Excluded. — In personal injury action against plaintiff's UIM insurer, admitting claim estimates prepared by the insurer would unduly prejudice the defense and circumvent the policy of having the jury focus on the facts and not the existence of liability insurance. Braddy v. Nationwide Mut. Liab. Ins. Co., 122 N.C. App. 402, 470 S.E.2d 820 (1996).

Medical Record Properly Excluded. — In a case arising from an automobile accident which plaintiff testified resulted in injury to her neck, shoulder and thoracic spine, the court properly excluded evidence from her 10-year-old medical record indicating "longstanding mid-thoracic pain" and "paraspinal muscle pain" along with the testimony of defense witness/doctor regarding disputed medical record. Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739, 1999 N.C. App. LEXIS 1186 (1999).

Evidence of subsequent remedial measures in the form of written instructions to security guards was properly excluded since it could not be used to impeach testimony and since its probative value tended to be outweighed by the danger of unfair prejudice. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53, 1999 N.C. App. LEXIS 1296 (1999).

Evidence Held Prejudicial. — Evidence of prior sexual assaults against a witness, which happened seven years before a similar sexual assault for which defendant was charged, was prejudicial to defendant's fundamental right to a fair trial because the prior acts were too remote in time. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Where counsel for the defendant asked over 60 questions referencing an action arising out of events occurring some 12 to 14 years earlier and these inquiries related to an extremely remote event, they were minimally probative when compared to their prejudicial effect, and were therefore proscribed by this rule; further, the continued repetitive questioning reflected the harassment and "needless consumption of time" that Rule 611(a) prohibits. Weston v. Daniels, 114 N.C. App. 418, 442 S.E.2d 69 (1994), cert. denied, 336 N.C. 785, 447 S.E.2d 433 (1994).

Where the probative value of witness's testimony to prove intent, common scheme, plan, modus operandi, or absence of mistake directly depended on defendant having committed the crime about which she testified, defendant's acquittal of the offense in an earlier trial so divested the evidence of probative value that, as a matter of law, it could not outweigh the tendency of such evidence to unfairly prejudice the defendant. State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

Interjecting evidence which would allow the jury to infer the defendant's immaturity so that the jury could infer that he lacked capacity to form the requisite intent would have unnecessarily confused the issues; therefore, even if this evidence was relevant and admissible, its exclusion was within the trial court's discretion. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

Trial court acted within its discretion in ruling that defendant could not inquire of a witness about sexual paraphernalia found in the murder victim's home, in that its probative value was substantially outweighed by the danger of unfair prejudice, G.S. 8C-1, Rule 403. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Exclusion of Evidence Held Harmless. — Trial court's decision to prevent defendant's expert from relating statements made by defendant to him and used by him to form the basis of his expert opinion of defendant's mental state at the time of the homicide, if an abuse of discretion, was harmless error since the same information was related in answers given by the expert to other questions. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Character of Victim. — Defendant failed to show that the trial court abused its discretion by excluding the testimony of witnesses where his theory that the testimony was relevant because it showed that the victim had been involved in a shooting incident a few hours prior to his death, providing someone other than the defendant with a motive to kill him, was pure conjecture, and the proffered testimony was prejudicial to the state in that it suggested the victim was himself a violent person. State v. McCray, 342 N.C. 123, 463 S.E.2d 176 (1995).

The trial court did not abuse its discretion in finding that evidence was being offered to unfairly prejudice the State, to confuse the issues, and to mislead the jury by inflaming the jury's passions against murder victim by implying that she was involved in an interracial relationship and that she was a drug user. State v. Julian, 345 N.C. 608, 481 S.E.2d 280 (1997).

Admission of Prejudicial Evidence within the Discretion of the Court. — The court determined within its discretion that the probative value of the admission of the unredacted version of the incident report, obtained through a subpoena duces tecum, when the redacted version had previously been introduced into evidence, outweighed its tendency to prejudice the defendant. Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000).

Evidence Improperly Excluded. — Where the trial court erred by not allowing the defendant to question the complainant in the presence of the jury regarding the allegation of rape made five months earlier and subsequently withdrawn, defendant was entitled to a new trial because there was a reasonable probability that the outcome of the trial would have been different. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

Probative Value of Evidence Outweighed Danger of Unfair Prejudice. — The prosecutor's cross-examination of defendant about a specific prison infraction was properly allowed in light of defendant's extensive testimony on direct examination regarding the amount of time that defendant was confined to lockup at various institutions throughout the prison system. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Evidence Properly Admitted. — Trial court did not abuse its discretion in balancing the probative value of detective's testimony about the contents of a lost surveillance video tape against its prejudicial effect because the testimony provided evidence of the identity of the perpetrator, who was disguised with sunglasses and wore a dark covering over his face; although prejudicial, defendant made no showing that the prejudice was unfair or had the undue tendency to suggest a decision on an improper basis. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Trial court did not abuse its discretion in admitting evidence of a prior robbery under G.S. 8C-1-404(b) because the similarities between the prior robbery and the current offense, which occurred within one week of each other, were sufficient to support a finding that the probative value of the evidence of the prior robbery was not substantially outweighed by the danger of unfair prejudice. State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Because a trial court had discretion to admit all relevant evidence under N.C. R. Evid. 402, as well as to exclude evidence under N.C. R. Evid. 403, based on confusion or unfair prejudice, it had discretion to admit testimony of plaintiff former employee's coworkers, who suffered symptoms similar to that of the employee, who sought to recover damages based on his exposure to an allegedly toxic workplace. Absent an abuse of discretion, which was not shown, that ruling would not be overturned. Cameron v. Merisel Props., 187 N.C. App. 40, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Trial court's denial of creditor's and auctioneer's motion to exclude any evidence that they failed to escrow the auction funds in violation of an agreement made between the parties was not an abuse of discretion as that evidence was highly relevant to the secured creditor's claims, and was not substantially outweighed by any prejudice to the creditors and the auctioneer. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Evidence of defendant's extra-marital affair was admissible because the evidence was relevant and helped explain why the child victim waited to come forward and report what was happening. State v. Tadeja, 191 N.C. App. 439, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

Admission of evidence identifying defendant as Muslim was not error since defendant could not show that, without such evidence, a different result would likely have been reached; the subject testimony was provided by defendant's prior girlfriend and indicated that the girlfriend provided a false alibi for defendant after defendant asked the witness to do so and the witness felt that such help was what the girlfriend was supposed to do for defendant. State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Testimony of a trooper and a witness regarding an employee's actions in fleeing the scene of a motor vehicle accident was relevant and properly admitted to show the employee's motivation for leaving the scene as the evidence related to the possibility that the employee was acting as an agent for the employee's employer. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Letter from defendant to defendant's mother was properly admitted, because it was not needlessly cumulative given that it was the only piece of evidence originating directly from defendant reflecting defendant's acute memory of significant details of the crime scene, and it was not unfairly prejudicial. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Admission of defendant's nursing board records and defendant's use of prescription pain medications was not unduly prejudicial under G.S. 8C-1, Rule 403 as in defendant's self-report, defendant disclosed that defendant's history of prescription drug abuse resulted in the loss of defendant's job and financial problems, that defendant's family and financial issues/relationships were strained but slowly improving, and that defendant's spouse, whom defendant allegedly murdered, was more supportive, all of which demonstrated motive. State v. Lawson, — N.C. App. —, 669 S.E.2d 768, 2008 N.C. App. LEXIS 2259 (2008).

IV. ADMISSION OR EXCLUSION OF EVIDENCE NOT PREJUDICIAL.

Cumulative Character Evidence. — It was not error for the trial judge, in a trial for first degree sexual offense, after the defendant had called and examined six character witnesses, to ask him to list his seven remaining character witnesses and have them stand and state their names and addresses, where the jury was informed by the comments of the court and counsel that these witnesses were present to attest to the defendant's good character and reputation in the community. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

The probative value of defendant's prior conviction for involuntary manslaughter was not outweighed by its prejudicial effect in a capital murder case and was, therefore, clearly admissible as an aggravating factor in the sentencing phase of defendant's trial where defendant admitted the conviction and stipulated to it. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990) in light of State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264.

Where the trial court, by sustaining the prosecutor's objection to a question, did nothing more than exclude cumulative evidence, the trial court's action did not constitute error. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Evidence of Prior Conviction Properly Admitted After Character Put at Issue. — Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon had been granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Evidence of Sexual Activity in Paternity Case. — Character evidence is generally not admitted in civil cases unless it is character which is in issue because this evidence is often more prejudicial than probative. Where, however, evidence of sexual activity and promiscuity goes to a central element of the case, i.e., opportunity to impregnate plaintiff, whether or not other men had the opportunity to father child born out of wedlock is of ultimate relevance to the issue of paternity. In addition, this nongenetic outside information, as a factor in the probability of paternity calculation, must be received in order for the jury to weigh the expert's assumptions underlying the calculation of numerical probability of paternity. State ex rel. Williams v. Coppedge, 105 N.C. App. 470, 414 S.E.2d 81, rev'd on other grounds, 332 N.C. 654, 422 S.E.2d 691 (1992).

Evidence from Sexual Assault Kit. — The results of a test based on the "Phadebas methodology" were not excludable under this section, where the test confirmed the presence of saliva on the vaginal swab taken from the victim's sexual assault kit, which served to corroborate the victim's testimony that the defendant had placed his mouth on her vagina. State v. Dennis, 129 N.C. App. 686, 500 S.E.2d 765 (1998).

Evidence regarding victim's cash advances to defendant and the victims real estate dealings with defendant shed light on their relationship at the time of the victim's death and was relevant; thus, the trial court did not abuse its discretion by declining to exclude this evidence pursuant to this Rule. State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997).

Evidence of Prior Shooting. — Trial court did not err in admitting evidence of a prior shooting committed by defendant since the prior shooting was similar to the shooting with which defendant was accused at trial and the prior shooting was not too remote in time; further, the trial court did not have to consider the years defendant served in prison for the prior shooting in determining remoteness. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Repressed Memory of Evidence of Prior Crime. — Repressed memory evidence of sexual offense committed by defendant was not unfairly prejudicial where the evidence's value in proving a common plan or scheme outweighed the danger of such prejudice. State v. Williamson, 146 N.C. App. 325, 553 S.E.2d 54, 2001 N.C. App. LEXIS 945 (2001).

Cross-Examination Upheld. — The defendant on trial for nine murders was not prejudiced by the cross-examination of expert witnesses concerning two additional murders he had committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Cross-Examination to Establish Motive Proper. — Where State did not cross-examine defendant in murder case about an unrelated rape accusation to show defendant was unworthy of belief because of this alleged bad act, but for purpose of establishing defendant's motive for the crime for which he was on trial, the cross-examination was proper. State v. Meekins, 326 N.C. 689, 392 S.E.2d 346 (1990).

Admission of Improper Evidence Not Prejudicial. — The admission of evidence concerning the defendant's convictions of failure to follow a truck route and improper turning was improper under G.S. 8C-1, Rule 609, but the error was not prejudicial to the defendant in prosecution for driving while his license was revoked, where the defendant admitted driving the van while his license was revoked. State v. Gainey, 84 N.C. App. 107, 351 S.E.2d 819 (1987).

Watch and ring taken from victim of rape and kidnapping were "relevant" in defendant's trial for those offenses, because they tended to make the existence of a fact of consequence — defendant's connection to the offenses with which he was charged — more probable than it would be without the evidence, and their admission was not unduly prejudicial. State v. Mercer, 317 N.C. 87, 343 S.E.2d 885 (1986).

State's exhibits, which included $5,900 in United States currency, rolling papers and pipe, electric digital scales, a triple beam balance scale, a water bong, a plastic bag containing white powder, an airline bag in which the white powder was found and a briefcase with documents, with the exception of the briefcase, were relevant to the crime of trafficking in cocaine, in that they intended to show that defendant knowingly possessed cocaine and was trafficking in it, and the briefcase, which was in defendant's possession at the time of arrest, tended to explain or illustrate the circumstances surrounding his arrest. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied, 318 N.C. 701, 351 S.E.2d 759 (1987).

In prosecution for incest, evidence tending to show that defendant had had prior sexual contact with the prosecuting witness was reasonably probative of defendant's knowledge, opportunity, intent, and plan, and was not so prejudicial as to outweigh its probative value and render it inadmissible; moreover, even if there was error in the admission of such evidence, absent a showing of a reasonable possibility that a different result would have been reached had the evidence been excluded, any possible error would be considered harmless. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

The admission into evidence of the defendant's prior convictions for driving while impaired and for hit and run did not unfairly prejudice the defendant in prosecution for driving while his license was revoked, where the defendant admitted driving the van while his license was revoked. State v. Gainey, 84 N.C. App. 107, 351 S.E.2d 819 (1987).

Evidence merely disclosing the subsequent pregnancy of the rape victim was admissible as tending to prove penetration, an essential element of the crime of forcible rape; moreover, the victim's simple statement that she had an abortion served the purpose of corroborating both the fact of penetration and the fact of her pregnancy, and the mere fact that an abortion took place was not so inflammatory as to render it inadmissible. State v. Stanton, 319 N.C. 180, 353 S.E.2d 385 (1987).

In a prosecution for rape and sexual offense committed against a mentally defective female, the trial court did not err in allowing a pediatrician to testify on the credibility of children in general who report sexual abuse. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Where improperly admitted evidence merely corroborated testimony from other witnesses, the Supreme Court found no reasonable possibility that the jury would have reached a different result absent the doctor's testimony. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

In view of the entire body and weight of relevant evidence presented by the State against defendant, and the utter irrelevance of a prior sex act to the charges on which defendant was ultimately convicted, the erroneous admission of a statement concerning the sex act did not constitute prejudicial error. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Where a defendant made a general objection to a police officer's testimony and not a specific objection to the officer's qualification as an expert, the admissibility of the officer's testimony was not preserved for review, and because the testimony was in the form of an opinion based on the officer's expertise and was likely to assist the jury, the testimony was not patently inadmissible and prejudicial. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Defendant argued that the trial court erred in allowing the State to cross-examine defendant about convictions that were more than 10 years old; however, while the admission of convictions was an error, defendant failed to demonstrate that defendant was prejudiced by the admission. State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618, 2002 N.C. App. LEXIS 1636 (2002), cert. denied, 357 N.C. 255, 583 S.E.2d 287 (2003).

When taxpayers sued county commissioners for entering into a contract which benefitted one of the commissioners, while the probative value of a witness's "testimony," during which he consistently asserted his Fifth Amendment privilege, did not substantially outweigh the prejudicial effect of allowing the jury to improperly speculate and draw inappropriate conclusions, there was no showing that this testimony was prejudicial. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

In defendant's prosecution for trafficking in cocaine by possession, the admission of testimony about defendant's alleged gang affiliation was erroneous under G.S. 8C-1-403 because such testimony was irrelevant under G.S. 8C-1-401 as to whether defendant trafficked in or possessed cocaine under G.S. 90-95(h)(3), but the error was harmless because the evidence of defendant's guilt was overwhelming, so defendant could not show that defendant was prejudiced. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

Defendant's assignment of plain error to the admission into evidence of a photograph of the victim when she was alive, the victim's bloody eyeglasses, and the victim's key chain was overruled because the evidence against defendant was substantial and any prejudice arising from the admission of this physical evidence was de minimis. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Potentially Prejudicial Testimony with Limiting Instruction. — Where the court gave a limiting instruction, the probative value of the testimony evidence of defendant's former girlfriend describing defendant's prior bad acts was not substantially outweighed by its prejudicial impact. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Evidence of prior drug sales was admissible under G.S. 8C-1, N.C. R. Evid. 403 and 404(b), as the drive-by, street-level drug sale that occurred between defendant and an undercover female officer was not a general substantive crime in and of itself, but was a modus operandi by which defendant carried out the sale or distribution of drugs. The trial court guarded against the possibility of prejudice by conducting voir dire and by instructing the jury that it could only consider that evidence for the limited purposes of identity, intent, and common plan or scheme. State v. Welch, — N.C. App. —, 666 S.E.2d 826, 2008 N.C. App. LEXIS 1741 (2008).

Jury Instructions. — Allowance of the testimony of defendant's robbery and kidnapping victim at his trial for the kidnapping, robbery, rape, and murder of two victims was not unduly prejudicial as the jury was instructed to consider the testimony only for the limited purpose of motive, intent, identity, or common plan, and the jury was specifically admonished not to consider the testimony on the issue of defendant's character. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Trial court guarded against the possibility of unfair prejudice resulting from the admission of evidence relating to a prior crime by instructing the jury to consider such evidence for the limited purposes allowed by G.S. 8C-1-404(b). State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

Evidence Properly Admitted. — In a murder trial involving a 60-year-old victim who was beaten and kicked about the head in June, 1983 and died in December, 1983 of complications resulting from injury to the brain received in the incident, admission of evidence regarding victim's physical appearance at the scene and in the hospital was relevant under G.S. 8C-1, Rule 401 on the issue of excessive force, was not prejudicial under this rule, and was not inflammatory under the old rules. State v. Moxley, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

In a prosecution charging defendant with making harassing, embarrassing and annoying telephone calls in violation of G.S. 14-196(a)(3), the actual contents of the statements attributed to defendant were relevant to show whether the intent of the telephone calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls, and the trial court did not err in allowing witnesses to testify about the actual contents of the calls. State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527, cert. denied, 317 N.C. 708, 347 S.E.2d 442 (1986).

In prosecution for first degree rape and intercourse by a substitute parent, the trial court did not commit prejudicial error in admitting into evidence, over objection, a letter which the defendant wrote to the victim's mother, in which defendant promised not to "bother" victim again, despite defendant's contention that what he had meant was that he would not discipline the victim anymore. State v. Moses, 316 N.C. 356, 341 S.E.2d 551 (1986).

In a first degree sexual offense case, evidence of defendant's similar attempted offense some 10 weeks after his attack on victim was not unfairly prejudicial, especially since the trial judge issued limiting jury instructions regarding this evidence. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

Whether or not building met the standards of the Building Code, though not determinative of the issue of negligence, had some probative value as to whether or not defendant failed to keep his store in a reasonably safe condition, and expert testimony on this issue could properly be introduced in a negligence action against store owner. Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

In trial for possession with intent to sell and deliver cocaine and marijuana and for sale and delivery thereof, admission of evidence that on a previous occasion, when officers went to defendant's admitted residence to purchase controlled substances from another person, an officer saw defendant inside the apartment did not constitute prejudicial error. State v. Fielder, 88 N.C. App. 463, 363 S.E.2d 662 (1988).

Where defendant was charged with raping his stepdaughter in her bunk-bed while her mother was working late at night, mother's testimony tending to show that defendant similarly took advantage of her cousin when the child was left in his custody, while in his stepdaughter's bunk-bed, while she was working late at night was admissible under the exception of G.S. 8C-1, Rule 404(b), and trial judge did not abuse his discretion by failing to exclude this testimony under the balancing test of this rule, since the alleged incident was sufficiently similar to the act charged and not too remote in time. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988).

Where young victim's testimony clearly tended to establish the relevant fact that defendant took sexual advantage of her availability and susceptibility at times when she was left in his care, victim's testimony concerning her father's other acts of sexual intercourse with her was admissible under G.S. 8C-1, Rule 404, and the trial court did not abuse its discretion in failing to exclude such testimony under this rule. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Where defendant in a capital murder case testified that he had not robbed or injured the victim or anyone else, he "opened the door" to cross-examination designed to rebut his assertion, which produced evidence of prior instances of violent conduct by defendant that resulted in injury to others; there was no abuse of discretion in the refusal of the court to prohibit the cross-examination on the ground that the probative value of the evidence produced thereby was outweighed by the danger of unfair prejudice. State v. Darden, 323 N.C. 356, 372 S.E.2d 539 (1988).

Evidence detailing factual circumstances of prior conviction was neither excessive nor repetitious, and the trial judge exercised the necessary discretion to prevent the hearing from degenerating into a mini-trial of the prior crime. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where victim testified defendant stated "they are never going to take me in again alive," the statement was probative of defendant's knowledge of his guilt, and defendant made no showing that the probative value of the statement was substantially outweighed by its prejudicial effect. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Where detective testified that defendant had told television crew that she had killed her son, the trial court did not err in admitting the detective's testimony; the evidence was not unfairly prejudicial since officer had previously testified without objection that defendant stated "It's my fault. I killed him." State v. France, 94 N.C. App. 72, 379 S.E.2d 701 (1989).

There was no abuse of discretion where the trial judge admitted evidence of prior sexual misconduct since the judge allowed the evidence for a limited purpose and specifically instructed the jury before their deliberations that they could consider this evidence only for the limited purposes of considering (i), whether or not the defendant had the necessary intent required to commit the crimes charged and (ii), whether or not there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in these cases; moreover, the evidence was not grossly shocking or so cumulative as to mislead the jury away from the offenses for which defendant was being tried. State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383, cert. denied, 325 N.C. 435, 384 S.E.2d 545 (1989).

In a prosecution for felonious possession of stolen property, testimony of son of property owner, who allegedly furnished defendant with the property, that he was indebted to defendant (for purchase of cocaine) was properly admitted to illustrate a possible motive, and its probative value substantially outweighed the danger of unfair prejudice against defendant. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

In capital murder trial for the murder of a 10-year-old girl, this rule and G.S. 8C-1, Rule 404(b) did not require the exclusion of evidence concerning an earlier incident when defendant had masturbated in the presence of a three-year-old girl. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Evidence of defendant's cocaine and marijuana possession occurring eight days after the last crime of sale of LSD and cocaine charged under G.S. 90-95 was relevant and had a probative value that substantially outweighed the danger of unfair prejudice. State v. Goldman, 326 N.C. App. 457, 389 S.E.2d 281, cert. denied, 327 N.C. 434, 395 S.E.2d 691 (1990).

In trial for first degree burglary and first degree rape, circumstantial evidence showing that defendant was the perpetrator of a rape committed five months earlier, which included both fingerprint evidence and pattern of perpetration similar to the crime charged at trial, demonstrated a potent, logical pertinence to the question of the assailant's identity in the offense on trial; thus, under the circumstances of the crime charged and those of the offense admitted, for the purpose of proving identity under G.S. 8C-1, Rule 404(b) the trial court did not err in admitting evidence of the other, similar offense, which shared strong circumstantial indicia that defendant had been the perpetrator. State v. Jeter, 326 N.C. 457, 389 S.E.2d 805 (1990).

Murder victim's statements to her son and sister regarding defendant's threat revealed her then-existing fear of defendant, further explaining why she did not want defendant visiting her home. The prohibition of visits to the home by defendant was relevant to prove defendant's state of mind, that is, that he knew he was entering victim's home without consent. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

Evidence that an arson defendant had previously solicited or attempted to solicit youths to commit other crimes was admissible under G.S. 8C-1, Rule 404(b) for the purpose of showing defendant's intent, plan, design, or mode of operation and that its probative value outweighed its prejudicial effect. State v. Richardson, 100 N.C. App. 240, 395 S.E.2d 143 (1990).

The trial court did not err by admitting the finger of a murder victim burned beyond recognition, because its probative value as to the issue of identity of the victim was not substantially outweighed by any danger of unfair prejudice. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Where a defendant showed, to the brother of a sexual-offense victim, condoms to be used "whenever they were going to make love," the prosecution's questions to defendant concerning the condoms were admissible to show proof of intent, preparation, plan, knowledge and absence of mistake. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied, 329 N.C. 273, 407 S.E.2d 846 (1991).

During murder prosecution, where victim was a young woman, rebuttal testimony by a woman previously assaulted by defendant, concerning the prior assault, was admissible to clarify defendant's admission that he "beat this girl," as the jury reasonably could infer, in light of the witness' testimony, that defendant, in a "hysterical state" shortly after an aggressive sexual encounter with the victim, was referring to the victim rather than the witness when he made his admission. State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991).

In case in which defendant was convicted of second degree sexual offense and first degree burglary, evidence that defendant committed a similar break-in and sexual offense approximately one month earlier, about two blocks from victim's house was admissible under G.S. 8C-1, Rule 404(b), to show intent, identity, common scheme, plan or design, and under this rule in that the probative value of the evidence substantially outweighed the danger of unfair prejudice to defendant's case and the court's charge to the jury correctly stated the limited purpose of the evidence. State v. Whitaker, 103 N.C. App. 386, 405 S.E.2d 911 (1991).

In a trial for assault with a deadly weapon in which defendant claimed self-defense, the trial court did not err in admitting evidence that prior to wounding the victim, defendant placed a gun to the head of a fourteen year old boy and questioned him regarding stolen cocaine. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

In a case of first degree sexual offense and taking indecent liberties with two young boys, defendant's statement to detective concerning prior incidents of taking indecent liberties with two young girls was relevant to show defendant's unnatural lust, intent, or state of mind. State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580, cert. denied, 331 N.C. 290, 417 S.E.2d 68 (1992).

Tape recorded statements regarding defendant's prior crimes including a statement from defendant's own mouth that he had killed various people by sundry methods of his own volition in the past were sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in this rule. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992).

In capital murder trial, trial court did not err by permitting the jury to listen to an audio tape recording of the defendant's telephone conversation with county sheriff because the tape recording was extremely probative. During the conversation, the defendant discussed problems he had experienced with his stepson, whom he shot, the defendant admitted the shooting of his stepson and the "other fellow" and stated that he told the "other guy" that he would "blow (them) away" if "the law comes out here." State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Trial court's admission of the testimony of kidnapping victim regarding a prior incident during which defendant struck the murder victim in the back of the head with a pole and threatened to cut her throat with a butcher knife was upheld. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

No error in the trial judge's discretionary ruling allowing the introduction of a note indicating that the victim was scared of defendant because he had threatened to kill her with a gun earlier that evening into evidence at defendant's first-degree murder trial. State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993).

The trial court did not err in admitting evidence that defendant had previously sexually assaulted another daughter pursuant to Rule 404(b) and this rule. State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994).

Court did not err in allowing testimony concerning defendant's threats to the state's principal witness, these threats were a strong indication of defendant's awareness of his own guilt. State v. Mason, 337 N.C. 165, 446 S.E.2d 58 (1994).

Where, during her account of how she was sexually assaulted, the victim testified that defendant put his hand over her mouth and told her that if she told anybody what he was going to do he was going to "hurt her like he hurt Koda", the trial court did not err in allowing defendant's statement. State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994).

There was no error where the defendant was required to place over his head a stocking recovered from co-defendant's car because the demonstration was relevant to aid the jury in assessing the credibility of the store clerk's identification of defendant. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

In a murder prosecution, evidence of a prior murder was properly admitted by the trial court to show identity, plan, and the existence of a common modus operandi between the two murders. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Chain-of-events evidence leading up to murder was properly admitted to establish defendant's intent and motive for the murders at issue, the evidence was more probative than prejudicial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

In a prosecution for murder, testimony that a witness saw defendant dancing with the victim and that the witness called the police was relevant and properly admitted as evidence of defendant's character. Also, evidence that witness called the police because he recognized defendant only after seeing on television that defendant had been charged with another murder was not irrelevant, inflammatory, or improperly prejudicial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Bloody clothing of a victim that is corroborative of the state's case, is illustrative of the testimony of a witness, or throws any light on the circumstances of the crime is relevant and admissible evidence at trial. State v. Knight, 340 N.C. 531, 459 S.E.2d 481 (1995).

Questions on alcohol use were not so prejudicial as to be improper where incident took place in a club in which alcohol was served, the prosecutrix and another witness, as well as defendant, were questioned on cross-examination as to whether they were drinking that night and defendant was not singled out by the questioning but was subjected to the same type of limited questioning on alcohol use as were the other witnesses. State v. Alkano, 119 N.C. App. 256, 458 S.E.2d 258, appeal dismissed, 341 N.C. 653, 467 S.E.2d 898 (1995).

Trial court did not abuse its discretion by concluding that the probative value of the interwoven evidence of defendant's confession to murder of stepson and involvement in her husband's murder outweighed any prejudicial effect such evidence might have had against her. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Trial court did not abuse its discretion in admitting a rape kit and emergency room records where they were relevant to corroborate the victim's testimony that the defendant raped her and showed trauma to the victim's vaginal area tending to establish penetration. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

Where victim testified that she loved her father before the alleged sexual abuse, but that she no longer loved him, the change in her affection was relevant to show that it is likely that he committed these acts. State v. Woody, 124 N.C. App. 296, 477 S.E.2d 462 (1996).

Demonstration by doctor which used colored dowels and mannequins to illustrate testimony about the angles at which bullets entered the bodies of murder victims was probative, helpful, and not unfairly prejudicial. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Trial court did not abuse its discretion in admitting three letters which expressed the victim's love for his wife and his pain and anguish that she had left him. State v. Moody, 345 N.C. 563, 481 S.E.2d 629 (1997), cert. denied, 522 U.S. 871, 118 S. Ct. 185, 139 L. Ed. 2d 125 (1997).

Trial court did not abuse its discretion under this rule in determining the testimony of defendant's girlfriends not to be unduly prejudicial. Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997), cert. denied, 346 N.C. 178, 486 S.E.2d 204 (1997).

Doctor's statement about victim's pain being "excessive" which followed testimony about victim's extensive injuries in the upper abdomen, was not unfairly prejudicial. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Evidence that victim, her family members, and a friend had threatened defendant's life was relevant to explain why defendant had a gun and to explain defendant's behavior and was not unfairly prejudicial. State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (1997).

Evidence of prior instances when the murder defendant beat the victim was not more prejudicial than probative in showing the escalating nature of the attacks and to rebut the claim that the killing was accidental. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Where defendant and his stepson kidnapped two boys and put them in the trunk of a car while they murdered the boys' father and then murdered the two boys, evidence regarding the murder of the father was so intertwined with evidence of the murder of the boys that it was admissible and was not an abuse of discretion. State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997), cert. denied, 523 U.S. 1097, 118 S. Ct.

1583, 140 L. Ed. 2d 797 (1998).

Testimony from witness about her dreams and diary entry when first incarcerated was relevant under Rule 401 and admissible under this rule; however, references to later bad dreams were properly excluded. State v. Jones, 347 N.C. 193, 491 S.E.2d 641 (1997).

Court did not err in admitting doctor's opinion that victims wound was consistent with the victim leaning over a chair when he was shot. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

The state had no alternative but to introduce evidence of defendant's prior convictions in order to meet its burden of showing an element of possession of a firearm by a felon; thus, the trial did not commit error by the admission of the evidence. State v. Faison, 128 N.C. App. 745, 497 S.E.2d 111 (1998).

In a prosecution for stalking, evidence which related to events occurring before defendant was warned to stay a away from the victim was not irrelevant and prejudicial. State v. Ferebee, 128 N.C. App. 710, 499 S.E.2d 459 (1998).

Admission of a letter written by the defendant to the murder victim did not unfairly prejudice him, where he wrote the letter to the mother of his child promising not to physically harm her again, in that the letter tended to shed light on both his state of mind and the nature of his relationship with the victim, and although it implied that he had been violent with the victim in the past, it did not indicate that he would be in the future. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

Testimony by the wife of an eyewitness to a murder that he was restless and unable to sleep prior to his identification of the defendant as the perpetrator but that he slept much better after doing so was admissible in the defendant's prosecution for second degree murder, where the eyewitness' credibility was in issue, and the wife's testimony was relevant to the reliability of his identification, and the defendant failed to show any prejudice resulting from the testimony. State v. Smith, 130 N.C. App. 71, 502 S.E.2d 390 (1998).

The probative value of the murder victim's statements to her friends concerning defendant's abuse of the victim and his threats against her was not substantially outweighed by the danger of unfair prejudice. State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998), aff'd, 350 N.C. 79, 511 S.E.2d 302 (1999).

Testimony by the murder victim's mother was admissible in defendant's murder prosecution, despite the defendant's contention that the testimony was irrelevant, prejudicial evidence of prior bad acts, where the mother testified that the defendant cursed her when she went to talk to him, and further testified as to her daughter's attempts to "work things out" herself, in reference to the defendant's threats to kill her if she left him or refused to marry him. State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998).

Evidence that defendant had been convicted in the shooting death of his first wife was properly argued to the jury as making more incredulous his claim of accident in the shooting death of his second wife, particularly as defendant had made incriminating remarks regarding his role in the death of his first wife to threaten his second one. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

The probative value of testimony by experts that they had seen children with the same condition as the defendant's child but never one in such poor condition outweighed any prejudicial effect in the mother's prosecution for child abuse and involuntary manslaughter, as it was relevant to show that the defendant had not provided adequate care to the child. State v. Fritsch, 132 N.C. App. 262, 511 S.E.2d 325, 1999 N.C. App. LEXIS 120 (1999), cert. granted, 350 N.C. 841, 538 S.E.2d 576 (1999), aff'd in part and rev'd in part, 351 N.C. 373, 526 S.E.2d 451 (2000).

The decedent/wife's statements that her husband was jealous and had repeatedly threatened to kill her were admissible, although arguably no more than recitations of fact, where the facts that she recited tended to show her state of mind as to her marriage, indicated her relationship with the defendant and, therefore, were relevant under this rule, and rebutted testimony by the defendant that they had a good marriage. State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000).

Court properly allowed testimony about a letter written by defendant to rape victim's mother who later destroyed it, because any prejudicial effect the letter may have had was outweighed by its probative value. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Where State introduced evidence of defendant's assaultive behavior prior to a brain injury which he claimed partially caused his violence, the court correctly determined that the probative value of the evidence of defendant's prior violent acts was not substantially outweighed by the danger of unfair prejudice under this rule. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Evidence of defendant's participation in several robberies was properly admitted in murder trial under G.S. 8C-1, Rule 404 to corroborate the accounts of other witnesses or for the purpose of showing defendant's motive, intent or plan to commit the instant crime and presented with limiting jury instructions could not fairly be characterized as arbitrary and unreasonable under this rule. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Evidence of a prior robbery and a prior attempted robbery was correctly admitted after court determined that the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, as required by G.S. 8C-1, Rule 404, and that it was more probative than prejudicial, as required by this rule. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Evidence of defendant's molestation of a fourth sister had probative value to show the existence of intent, plan or design which, in light of the direct evidence presented by the other three sisters/victims and the investigator, was not outweighed by any unfair prejudice. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590, 1999 N.C. App. LEXIS 1145 (1999).

Witness testimony regarding statements made by murder victim, regarding the presence of drugs and money in the hotel room where she was staying with a drug dealer, were admissible to show what the hearer did based on the victim's statements. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Statements made by victim approximately six months prior to murder, to the effect that she and defendant were not getting along well, that she no longer wanted to be married, that if defendant had not left by May, 1997, she would "push the issue" for him to leave, that defendant told her that one day he would come home and find her dead with her throat cut, and that she believed defendant wanted her to sell her house so he could get some of her money, were admissible under this rule. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000), cert. denied, 353 N.C. 269, 546 S.E.2d 114 (2000).

The court rejected defendant state trooper's argument that evidence of his alleged crimes, wrongs, and acts was admitted in violation of the Rules of Evidence and his due process rights; testimony that defendant asked one witness to ride in the floor of his patrol car before the shooting, that another witness and defendant had violated or circumvented numerous automobile title transfer procedures, and that, upon searching defendant's patrol car, a third witness had found licenses and registrations that should have been turned over to a magistrate under highway patrol policy, was admissible to chronicle the murder, and its probative value was not outweighed by the danger of prejudice. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

The description of a pocketknife which the defendant usually carried with him and the admission of a hacksaw frame and several hacksaws were not unfairly prejudicial to the defendant so as to require exclusion pursuant to this section. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Where arresting officer's testimony about defendant's demeanor shortly after committing murder was probative of the circumstances surrounding the murder and defendant's intent, the trial court did not abuse its discretion in permitting the testimony and ruling that the probative value of the testimony was not substantially outweighed by unfair prejudice. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Where defendant was accused of inviting teenage girls to his home for parties, giving them alcohol and drugs, and photographing them as they undressed, the trial court did not err in admitting into evidence defendant's prior convictions for similar conduct, as the acts for which defendant was on trial were sufficiently similar to the previous acts, and the prior incidents, occurring 10 to 15 years earlier, were not too remote in time as to no longer be more probative than prejudicial. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

Murder defendant was not prejudiced by the testimony of defendant's case manager as to defendant's frustration and desire to leave a homeless shelter and that defendant was irritated and argumentative. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Failure to exclude evidence, under G.S. 8C-1, Rule 403, that a defendant used drugs shortly before a fire he was accused of starting was not an abuse of discretion. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court (1) properly admitted the videotaped statement that defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial, (2) properly admitted letters one of defendant's co-conspirators wrote to a girlfriend urging her to lie about her involvement in the co-conspirator's attempt to conceal evidence of the crime, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(3), (b)(5), and (3) properly admitted evidence of similar crimes that defendant committed shortly after the murder, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b). State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

Testimony by a discharged employee's wife that the wife's husband just wanted to be heard and that the wife knew until the day that the wife died that her husband would not have lost the husband's job, if the husband had been heard, was probative on the issues of emotional distress and mental anguish, and was not substantially outweighed by the danger of unfair prejudice; exclusion of evidence was left to the sound discretion of the trial court, and to show an abuse of that discretion required a showing that the decision was so arbitrary that it could not have been the product of a reasoned decision. Hummer v. Pulley, Watson, King & Lischer, P.A., 157 N.C. App. 60, 577 S.E.2d 918, 2003 N.C. App. LEXIS 375 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 758 (2003).

Where defendant had sexually explicit conversations with a 15-year-old former karate student in violation of G.S. 14-202.1, the trial court's admission of evidence of defendant's subsequent conduct with another student where there were certain similarities was not prejudicial under the circumstances. State v. Every, 157 N.C. App. 200, 578 S.E.2d 642, 2003 N.C. App. LEXIS 538 (2003).

Trial court did not err in denying the defendant's motion in limine seeking to exclude from cross-examination his prior conviction for malicious wounding, as the trial court had no discretion under G.S. 8C-1, Rule 609 to conduct a balancing test as the admission of the evidence was mandatory under Rule 609(a) and a balancing test was only required under Rule 609(b) if the conviction was more than 10 years old, which it was not. State v. Brown, 357 N.C. 382, 584 S.E.2d 278, 2003 N.C. LEXIS 834 (2003), cert. denied, 540 U.S. 1194, 124 S. Ct. 1447, 158 L. Ed. 2d 106 (2004).

Trial court did not abuse its discretion in admitting into evidence a rag and scientific analysis of it, which revealed the victim's blood and traces of defendant's semen, as its probative value was not substantially outweighed by its prejudicial effect under G.S. 8C-1, N.C. R. Evid. 403; the evidence was relevant to defendant's claim that he had no knowledge of the kidnapping, corroborated an accomplice's testimony that defendant participated in the crimes, and the trial court properly stated several times that there was no evidence of sexual assault, and instructed the jury that the rag and the test results could not be used as evidence of a sexual assault given that there was no other evidence that any sexual assault occurred. State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55, 2003 N.C. App. LEXIS 2044 (2003).

Defendant's conviction for second-degree sexual assault was affirmed because the defendant's videotaped statement made in the back of a patrol car during a conversation with an officer was admissible as the defendant was not being interrogated by the officer at the time, so Miranda warnings were not required, the statement was relevant to the crime, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. State v. Gantt, 161 N.C. App. 265, 588 S.E.2d 893, 2003 N.C. App. LEXIS 2055 (2003).

Testimony from an inmate that shared a jail cell with one of two defendants accused of robbery, burglary, and kidnapping that one defendant told him that defendants were going to claim that they were forced to commit the crimes was properly admitted because the evidence tended to prove that defendant and his co-defendant concocted a scheme to avoid liability for their criminal actions; furthermore, the evidence was not unfairly prejudicial because defendant failed to demonstrate how the testimony was so unfair that a different result at trial would have been likely. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Evidence of events occurring after defendant left a patrol car was not inadmissible under G.S. 8C-1, N.C. R. Evid. 403 and 404(b) as the evidence was part of a single, continuing transaction beginning with defendant's insertion of herself into the events at a school and continuing through her arrest; evidence of what occurred after she left the patrol car was part of the chain of events leading to defendant's arrest and, therefore, was admissible, and the evidence of events occurring after defendant left the patrol car provided added evidentiary support for the charge of obstructing and delaying an officer. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Audiotape of a conversation defendant had with his wife and stepson, which the wife's relatives found 10 months after the wife and stepson were killed, was properly authenticated, and the state supreme court held that the trial court did not err when it admitted the tape for the limited purpose of showing defendant's malice, intent, and ill will towards the victims. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Defendant's threats to a holding cell officer that he "already killed one" and "I got one up under my belt" could have been interpreted as statements of guilt and used as direct evidence to prove that defendant acknowledged guilt in the death of his victim, as what was "up under his belt" was a human life, that he had already "killed one" was a woman like the officer, and "belt" was meant to imply that defendant had a black belt; accordingly, the statements were relevant and they were not subject to exclusion. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Defendant's objection to recorded phone calls with his mother based on N.C. R. Evid. 403 was not preserved for appellate review because the objection referred to the evidence as a whole; it did not request anything but a suppression of the evidence in its entirety, and the evidence that was allegedly inflammatory was not identified. State v. Price, — N.C. App. —, 611 S.E.2d 891 (2005).

Although defendant failed to preserve an evidentiary issue for appellate review, pursuant to G.S. 8C-1-103(a)(2), a review under G.S. 8C-1-403 indicated that the probative value of a letter that he wrote to his daughter, who was the victim of his unlawful sexual conduct, was not outweighed by the potential prejudice, as the meaning and intent of the letter were for the jury to decide. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Trial court did not err by admitting without editing or redacting letters that defendant and his accomplice wrote into evidence, as the letters were relevant under G.S. 8C-1-401 and G.S. 8C-1-402, and the probative value of the letters was not outweighed by prejudice under G.S. 8C-1-403. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Defendant was not prejudiced by the trial court admitting into evidence testimony as to defendant's prior acts of being a passenger in a car where an officer smelled marijuana and being found asleep in a car with a bag of marijuana and a scale in plain view to support the case against defendant and his co-defendants for conspiring to possess, manufacture, and distribute marijuana, as the evidence showed that defendant had a propensity to commit the crime. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Trial court properly admitted various evidence in defendant's trial pursuant to G.S. 8C-1, Rule 404(b), because the various evidence was not admitted to prove the character of defendant in order to show that he acted in conformity therewith and was not overly prejudicial. State v. Matthews, 175 N.C. App. 550, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).

In a drug case, the testimony of a probation officer regarding defendant's residence was admissible under G.S. 8C-1, Rule 404(b) because they evidence was only used to establish that defendant occupied a dwelling where drugs were located; moreover, the danger of unfair prejudice was outweighed by the probative value of the evidence. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Use of the descriptive term, "the Last Supper tapestry," by witnesses and the prosecution to describe a tapestry on the victim's wall was proper, and the trial court did not abuse its discretion by so ruling; nothing in the record suggested that the description was used excessively and solely to inflame the passions and prejudices of the jury against defendant. As a result, the trial court's ruling was not so arbitrary that it could not have been the result of a reasoned decision. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Testimony of a state witness, made after the trial judge conducted voir dire of the witness, was properly admitted as it was relevant to show plan, modus operandi, and identity. Admission of the evidence was upheld under G.S. 8C-1-403 since it did not have an undue tendency to suggest a decision on an improper basis when offered for the limited purpose of showing a common plan or scheme. State v. Summers, 177 N.C. App. 691, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188, appeal dismissed, cert. denied, 637 S.3.2d 192 (N.C. 2006).

Evidence that defendant who shot a police officer with a shotgun possessed an assault rifle was relevant and was not more prejudicial than probative; evidence showed why defendant was in a field and why he used the shotgun rather than the rifle, and it was also highly probative of defendant's motive for the shooting: not wanting the victim to discover that defendant was violating his probation by possessing firearms. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Defendant's statement concerning prison while defendant was fleeing from police was admissible because the trial court's ruling was the product of a reasoned decision in the weighing of the probative value of the testimony against its prejudicial effect. State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006).

In defendant's murder trial, the trial court did not err in admitting evidence pursuant to G.S. 8C-1-403 regarding an individual close to defendant who 17 years prior to the victim's death was found dead at the bottom of a set of stairs; there was little doubt that the evidence of the individual's death was useful to the state for challenging defendant's sole defense, namely, that the victim's death was an accident. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

In defendant's prosecution for robbery with a dangerous weapon and first-degree kidnapping, evidence of defendant's prior armed robbery conviction and the facts underlying that conviction were properly admitted under G.S. 8C-1-404(b) and G.S. 8C-1-403 because, inter alia: (1) the evidence of defendant's involvement in another robbery tended to show defendant was one of three men involved in a similar pattern of robberies occurring over a short period of time; and (2) the robbery being prosecuted shared similarities with one of the other robberies defendant was convicted of because, in each of the robberies, a perpetrator brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Detective's statements as to other businesses that had reported break-ins was not inadmissible hearsay as: (1) defendant's objection was overruled only as to what the detective did, and the evidence offered was both relevant, in that it explained the chain of events in the police investigation, and was not hearsay as it precluded the further admission of statements regarding the reported break-ins; (2) the statements were offered to explain the chain of events and were not offered for the truth of the matter asserted; and (3) the probative value of the statements was not substantially outweighed by their prejudicial effect as the detective's testimony did not directly accuse defendant of other crimes, and was not offered to prove defendant's conformity with character to commit wrongs, but was offered to explain the sequence of events. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Admission of the transcript of defendant's guilty plea to three robberies that occurred about two moths before the instant event was not prejudicial; the document was more than evidence of a bare conviction but was an admission that defendant participated in the robberies, a limiting instruction was given, and the actual judgment was not admitted in evidence. State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007).

Trial court properly allowed defendant's alleged co-conspirator to testify that defendant and another person had sent him threats and to read to the jury three threatening letters that he testified he had received while in prison, as defendant could not show that without them a different result would likely have been reached, and thus exclusion was not required under N.C. R. Evid. 403. State v. Carter, 186 N.C. App. 259, 650 S.E.2d 650, 2007 N.C. App. LEXIS 2089 (2007).

Evidence that the murder victim's last words were "I'm not scared of you. I'm a Christian," was admissible because it was offered not to show the good character of the victim, but instead it was offered as circumstantial evidence of defendant's state of mind when he was approaching the victim before he shot and killed the victim. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Trial court neither erred nor abused its discretion by allowing witnesses to testify to the victim's statements concerning her and defendant's financial situation and defendant's alleged acts of domestic violence against the victim. Furthermore, the evidence of the victim's state of mind was relevant and related directly to the victim's relationship with defendant before she was killed and his motive, intent, plan, or absence of mistake or accident in the victim's death. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

Trial court did not abuse its discretion by permitting testimony of evidence of defendant's financial dealings with other people, depletion of the victim's bank accounts, violent acts toward the victim, and his adulterous relationships because the evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge under N.C. R. Evid. 404(b). Moreover, the relevancy of the evidence outweighed its danger of unfair prejudice under N.C. R. Evid. 403. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

Evidence of a later incident between defendant and a witness was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b) and 403 as: (1) the later incident occurred 20 days after the incident with a victim, (2) the two incidents occurred in the early morning hours, (3) defendant told both victims that defendant's vehicle would not start, (4) defendant told the victim defendant would let the victim live if the victim stopped struggling, and told the witness that the defendant would kill the witness if the witness made any noise, and (5) defendant tried to restrain and silence the victim and the witness, and defendant ceased defendant's efforts when the victim and the witness forcefully resisted defendant's advances; the prejudicial effect of the witness's testimony did not substantially outweigh its probative value. State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, 189 N.C. App. 705, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Trial court did not err when it overruled defendant's objection to the admission of a red notebook containing gang information found in defendant's brother's room. As the jury did not find that gang involvement was an aggravating factor of the crime, there was no undue prejudice from the introduction of the notebook into evidence. State v. Beatty, 189 N.C. App. 464, 658 S.E.2d 508, 2008 N.C. App. LEXIS 651 (2008).

Victim's testimony regarding the shiny object in defendant's hand was relevant to the first-degree rape charge and admission of the testimony was not unfairly prejudicial; any question as to the testimony's speculative nature went to the weight of the evidence. State v. Lawrence, 191 N.C. App. 422, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Admission of the testimony of three witnesses that the alleged assault against each witness took place within one year of the attack on a victim, and that defendant used substantially the same method of restraining each witness during the attack, employing defendant's greater size and strength, limiting the witness's breathing, making dire threats against the witness, and calling each witness after the attack was not plain error under N.C. R. App. P. 10(c)(4), and was proper under G.S. 8C-1, N.C. R. Evid. 403 and 404(b). State v. Simmons, 191 N.C. App. 224, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (2008).

In equitably distributing the martial property between a former husband and a former wife, a trial court did not abuse its discretion in admitting evidence of the husband's criminal activity because the majority of the trial court's findings of fact concentrated on the extent and nature of the damage the husband's actions inflicted on the marital home; the trial court referred to the husband's treatment of the wife only as necessary to explain the sequence of events. Troutman v. Troutman, — N.C. App. —, 667 S.E.2d 506, 2008 N.C. App. LEXIS 1803 (2008).

Trial court did not err in not redacting questions in a DVD recording of defendant's police interview containing purported statements made by non-testifying witnesses on the ground that the probative value was substantially outweighed by its unfairly prejudicial effect and violated G.S. 8C-1, N.C. R. Evid. 403. The trial court sufficiently instructed the jury as to how it was to treat the statements attributed to non-testifying third parties, and the questions to which defendant objected comprised only a small portion of defendant's one-hour interview. State v. Miller, — N.C. App. —, 676 S.E.2d 546, 2009 N.C. App. LEXIS 805 (May 19, 2009).

Testimony concerning a prior assault on another victim was a major identity piece of evidence, relevant to showing that defendant was in possession of and fired a gun that was used in the subject murder less than 48 hours before the murder, and thus, its probative value outweighed any prejudice to defendant. State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

DNA Evidence Properly Admitted. — Where DNA evidence was highly probative of the identity of the victim's killer, it did not unfairly prejudice defendant, confuse the issues, or mislead the jury; the trial court properly allowed forensic serologist to testify about the results of DNA analysis and the statistical significance thereof. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), cert. denied, 516 U.S. 1079, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

The admission of testimony regarding the source of the DNA in the DNA data bank which led to the conviction of the defendant for a murder committed 4 years earlier was not plain error under this section. State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001), review denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

Testimony Based on Blood-Alcohol Analyzer. — Court did not abuse its discretion in admitting Blood-Alcohol Analyzer as a reliable scientific method of proof under G.S. 8C-1, Rule 702(a), nor should it have been excluded under this rule, since the probative value of its results were not substantially outweighed by the danger of unfair prejudice or jury confusion and since both parties had opportunity to either attack or support its reliability. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Testimony on Chain of Custody Procedures by SBI Not Prejudicial. — Admission of testimony referring to the chain of custody procedures followed by the state bureau of investigation (SBI), stating that the evidence from a crime scene is transferred back to the local police department once the district attorney clears the police officer of any wrongdoing, was not prejudicial since defendant failed to show a reasonable possibility that, had the testimony not been allowed, the result would have been different; the testimony referred to all items collected for evidence and was allowed only to show the SBI's general procedure regarding evidence. State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Admission of a tape recording of a 911 call made by murder victim's children was properly admitted. State v. Jordan, 128 N.C. App. 469, 495 S.E.2d 732 (1998), cert. denied, 348 N.C. 287, 501 S.E.2d 914 (1998).

Defendant failed to show that the decision of the trial court to admit 911 tape recording of his daughter telling dispatchers that he was "trying to kill" her mother was not the result of a reasoned choice in conformity with the requirements of this rule. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Admission of 911 Statements Held Proper. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Evidence of Victim's State of Mind Admissible. — Testimony by the victim's friend was admissible to show the victim's state of mind prior to a meeting with defendant and revealed her fear of defendant and of an imminent encounter with him; the probative value of the testimony outweighed any prejudicial effect. State v. Williams, 151 N.C. App. 535, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 214 (2002).

Evidence Properly Excluded. — Defendant's testimony that his Intoxilyzer reading did not accurately reflect his blood alcohol level was not admissible and the trial court correctly excluded this evidence. State v. Cothran, 120 N.C. App. 633, 463 S.E.2d 423 (1995).

Expert testimony was properly excluded where it would have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force the officers used in attempting to apprehend defendant. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Trial court did not err by excluding doctor's testimony regarding his opinion that defendant did not act with a cool state of mind. State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996), cert. denied, 519 U.S. 1096, 117 S. Ct. 778, 136 L. Ed. 2d 722 (1997).

Where plaintiffs introduced records of 911 calls from January 1988 through July 1993 concerning incidents at a restaurant where the subject murder occurred, and where their crime analyst testified as to the type of offenses that prompted the calls in 1992 and 1993 as well as crimes that occurred within a one-half mile radius of the restaurant in those years, the trial court did not err in excluding data pertaining to criminal activity from 1988 to 1991, some of which was probably cumulative; if such exclusion did constitute error, such error was, in the face of the plaintiffs' contributory negligence, harmless. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53, 1999 N.C. App. LEXIS 1296 (1999).

The trial court properly excluded expert testimony that was not case specific, lacked probative value and presented a danger of prejudice. State v. Lee, 154 N.C. App. 410, 572 S.E.2d 170, 2002 N.C. App. LEXIS 1469 (2002).

Trial court did not abuse its discretion by excluding testimony by a mental health expert retained by the State that in 10 prior cases she had never found a defendant insane at the time of his crime; although the trial court might properly have admitted such evidence, the trial court's determination to exclude such testimony was not manifestly unsupported by reason. State v. Durham, 175 N.C. App. 202, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

Trial court did not abuse its discretion by excluding testimony by defendant's brother about the brother's own mental illness, which was similar to defendant's mental illness, even though two mental health experts had previously testified that mental illnesses tended to run in families and a mental health expert retained by the State specifically testified that mental illness ran in defendant's family; defendant's claim that the brother's testimony was more compelling evidence that a type of mental illness ran in defendant's family and bolstered defendant's claim of insanity was rejected. State v. Durham, 175 N.C. App. 202, 623 S.E.2d 63, 2005 N.C. App. LEXIS 2752 (2005).

Exclusion of Evidence Held Not Prejudicial. — Court's refusal to permit witness to testify that, based upon his personal knowledge of the State's only eyewitness, he would not believe the State's witness under oath was not prejudicial where immediately before that evidence was offered, the same witness testified without objection that in his opinion the State's witness was a liar and had told him he would take a bribe to change his testimony. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Where doctor who performed autopsy used one photograph showing victim's bare breast to illustrate his testimony about the cause of death and the nature and location of the wound, the danger of redundant and excessive use of potentially inflammatory photographs was not present, and the trial court acted within its sound discretion in ruling under this rule that the probative value of the unaltered photograph was not substantially outweighed by any prejudice. State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992).

Because a steamroller driver's convictions for driving without a license and driving with a revoked license were admissible under G.S. 8C-1, N.C. R. Evid. 609(a), and because the trial court had no discretion to exclude such evidence under G.S. 8C-1, N.C. R. Evid. 403, the trial court erred in granting the driver's motion in limine, but defendants had not demonstrated how they were specifically prejudiced by the trial court's error, nor had they alleged the jury verdict would have been different had the convictions been admitted. Therefore, the trial court's error was harmless. Outlaw v. Johnson, 190 N.C. App. 233, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Trial court did not err in ruling that co-defendants would not be called to testify due to the fact that they would invoke their Fifth Amendment privilege without conducting the balancing inquiry required by this rule, where defendant did not submit an offer of proof as to their testimony outside the presence of the jury; his testimony on his own behalf indicated his version of the incident but did not qualify as an offer of proof as to his co-defendants's testimony. State v. Harris, 139 N.C. App. 153, 532 S.E.2d 850, 2000 N.C. App. LEXIS 809 (2000).

Exclusion of Evidence Held Prejudicial. — Where defendant sought to reveal that two years ago witness had deceived a person he was investigating in an effort to obtain a confession for that crime, the evidence was probative of the witness's character for untruthfulness, was not too remote and was unfairly prejudicial; thus, the defendant was entitled to a new trial. State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (1997), cert. granted, 345 N.C. 756, 485 S.E.2d 299 (1997), discretionary review improvidently allowed, 347 N.C. 348, 492 S.E.2d 354 (1997).

Statements Regarding Prior Similar Actions. — Trial court did not abuse its discretion in admitting certain statements by a town mayor regarding previous actions of a chief building official where the statements were relevant to the claim for negligent supervision and the trial court thrice gave a limiting instruction as to their applicability. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

Evidence of defendant's prior assault on another victim admitted for the limited purposes of proving a common scheme and defendant's intent, was not unfairly prejudicial; the prior assault and the current charges were similar in nature; in both instances the victims, similar in age, visited various residences or places in which they were unfamiliar and then were taken by automobile to isolated areas at night; where the defendant told the victims something was wrong with the automobile, asked the victims to get out of the automobile, and then proceeded to sexually assault them. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Admission of defendant's inculpatory admissions made to a sex offender evaluator in another case did not violate G.S. 8C-1, N.C. R. Evid. 403 where the trial court's ruling that the value of the statements outweighed any prejudicial effect was the result of the exercise of sound discretion. State v. Maney, 151 N.C. App. 486, 565 S.E.2d 743, 2002 N.C. App. LEXIS 754 (2002).

Trial court did not abuse its discretion by ruling that the evidence regarding a second impersonation of a police officer and robbery incident was admissible in a defendant's trial for a similar incident because the prior incident occurred two days after the first, involved the assailants' entry into the victim's residences under the auspices of legitimate law enforcement activity, and each assailant displayed a bogus search warrant and firearms in an effort to gain entry into the respective residences. State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005), vacated in part, rev'd in part, on other grounds, 361 N.C. 565, 648 S.E.2d 841 (2007).

Other crimes evidence was properly admitted under G.S. 8C-1-404(b), as defendant's statement that if someone did not call him back he was going to "burn you all up," was admissible to prove a number of the listed purposes, namely defendant's motive, intent, plan, common scheme, as well as defendant's identity as the arsonist; the trial court guarded against the possibility of prejudice under G.S. 8C-1-403 by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan. State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Evidence that first-degree murder defendant had robbed drug dealers and hit a drug dealer during a robbery was relevant to refute his contention that he shot a police officer without premeditation and deliberation, while evidence about his illegal acquisition of weapons and his curfew violation was relevant as part of the chain of circumstances leading up to the shooting. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Professional engineer's testimony as to the structure and appearance of a stairway that plaintiff was injured on was based on direct personal knowledge; therefore, this testimony was admissible so long as it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996).

Photographs of Other Houses' Cracks in Structural Defect Case. — Photographs of cracks in the foundations and floors of other houses constructed by the defendant/construction company were properly admitted into evidence because the probative value of the photographs was not outweighed by unfair prejudice. Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000).

Demonstration of Weaponry. — Where defense counsel commented in his opening statement that the state could present no evidence of the existence of shell casings from the revolver allegedly used by the defendant, the state's demonstration of semi-automatic weapons to explain that shell casings are not ejected by revolvers was relevant in light of defense counsel's statement. State v. Reaves, 132 N.C. App. 615, 513 S.E.2d 562 (1999).

Demonstration of Effects of Pepper Spray. — Trial court properly allowed the State, during its presentation of rebuttal evidence, to demonstrate the effects of pepper spray in an experiment under circumstances dissimilar to those that actually occurred and with the use of law enforcement officers trained in the use of pepper spray; defendant was given, but chose not to take, the opportunity to present his own demonstration on lay witnesses. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Admission of Prior Misconduct with Gun. — Defendant was not prejudiced by admission of testimony that witness remembered a gun, similar to that used in two murders, because defendant had playfully held it to his head. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Admission of Prior Voluntary Manslaughter Conviction. — Trial court did commit prejudicial error under this rule in rejecting defendant's tendered limiting stipulation and admitting evidence of an earlier prior voluntary manslaughter conviction, where defendant was not charged with any attendant offenses similar to his prior conviction and where the jury was not informed that his prior conviction in any way involved use of a firearm. State v. Jackson, 139 N.C. App. 721, 535 S.E.2d 48, 2000 N.C. App. LEXIS 1039 (2000), aff'd in part and rev'd in part on other grounds, 353 N.C. 495 546 S.E.2d 570 (2001).

Admission of Prior Murder Conviction. — Evidence of defendant's conviction for second-degree murder 27 years earlier was properly admitted in defendant's murder trial where the trial court found similarities between the two murders, and the 18 years defendant spent in prison were excluded when the trial court ruled on whether the previous crime was too remote; the probative value of the previous conviction upon the issues for which it was offered, defendant's intent to kill and his identity as the perpetrator, far outweighed the possibility of unfair prejudice. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

Admission of Prior Sexual Offenses. — In defendant's prosecution for sexual offenses against a student, his prior offenses against other students were admissible against him because, in light of the similarities between the alleged acts, the probative value of admitting the evidence exceeded any unfair prejudice to defendant. State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002).

Evidence of defendant's prior assault on the victim, a few months before the act which caused victim's death, was not prohibited, because it tended to show a common plan or scheme and absence of accident, and tended to negate self-defense, and was, thus, more probative than prejudicial. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

In defendant's trial on a charge of murder in the first degree, the trial court properly admitted testimony which showed that defendant assaulted the victim, his girlfriend, on prior occasions and that defendant's girlfriend had asked defendant to leave her residence on the day he shot her, because the testimony was relevant to defendant's claim that he discharged his gun accidentally and the prejudicial effect of the evidence did not outweigh its probative value. State v. Latham, 157 N.C. App. 480, 579 S.E.2d 443, 2003 N.C. App. LEXIS 743 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Evidence of Other Drug Transactions. — In defendant's trial on charges of maintaining a vehicle to keep and sell a controlled substance, trafficking by possession of oxycodone, trafficking by sale of oxycodone, and trafficking by transportation of oxycodone, the trial court did not abuse its discretion by allowing an informant and other witnesses to testify that they met with defendant at various locations over a five-week period to buy oxycodone because, although the evidence described drug transactions that were not charged, it showed knowledge, plan, scheme, design, opportunity, and absence of mistake or entrapment, and was not so remote that its prejudicial impact outweighed its probative value. State v. McCracken, 157 N.C. App. 524, 579 S.E.2d 492 (2003).

Confidential police informant's testimony as to prior, uncharged drug transactions with defendant was admitted for a proper purpose under G.S. 8C-1, N.C. R. Evid. 404(b), and the trial court did not act arbitrarily in allowing the testimony under G.S. 8C-1, N.C. R. Evid. 403 because the testimony was offered to show intent, knowledge, and common plan or scheme as well as to explain the relationship between the informant and defendant; additionally, an appropriate limiting instruction to that effect was given to the jury both at the time the informant testified and in the jury instructions. State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Evidence of defendant's offenses subsequent to burglary, namely, shoplifting, breaking, entering and larceny, and car theft, were admissible to show intent and motive (the defendant wanted money for drugs) and was not unfairly prejudicial where the judge gave a limiting instruction. State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000).

Admission of testimony that defendant viewed sexually explicit photos on his home computer was relevant, and any prejudice that might have been caused by allowing the jury to see the photos was addressed by the trial court's decision not to show the photos to the jury. State v. Quinn, 166 N.C. App. 733, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004).

Admission of expert testimony regarding memory factors is within trial court's discretion, and appellate court will not intervene where trial court properly appraises probative and prejudicial value of evidence under this rule. State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990), aff'd, 329 N.C. 764, 407 S.E.2d 514 (1991).

Witness testimony in which he stated he was "pretty sure" that defendant had admitted to killing victim was relevant to the issue of the identification of defendant and not unfairly prejudicial. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Trial court's admission of victim's testimony from a domestic violence protective order hearing did not violate his right to confront the witness against him, nor did it violate G.S. 8C-1, Rules 403, 404(b), and 803(3) of the North Carolina Rules of Evidence where the hearsay statements constituted, and were admissible as, statements of declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Evidence from Myspace Page. — Trial court did not err in excluding a police report and a minor child's Myspace website pursuant to G.S. 8C-1, N.C. R. Evid. 412, during an adjudicatory and disposition hearing because it was permissible for a trial judge in a civil case to use Rule 412 as a basis for excluding irrelevant evidence about a plaintiff's prior sexual behavior; pursuant to Rule 412, evidence of the prior sexual history of the victim is irrelevant in most instances, but upon a finding by the trial court that certain evidence is relevant because it falls into one of the exceptions under Rule 412, or if the evidence falls outside of the rule, a G.S. 8C-1, N.C. R. Evid. 403 balancing of probative value versus unfair prejudice should be utilized in the trial court's discretion. In re K.W., — N.C. App. —, 666 S.E.2d 490, 2008 N.C. App. LEXIS 1655 (2008).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* — Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* — Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* — Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to

rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* — Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult. (1983, c. 701, s. 1; 1994, Ex. Sess., c. 7, s. 3; 1995, c. 509, s. 7.)

COMMENTARY

This rule is identical to Fed. Evid. Rule 404, except for the addition of the word "entrapment" in the last sentence of subdivision (b).

Subdivision (a) deals with the basic question whether character evidence should be admitted. The Advisory Committee's Note states:

"Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as 'character in issue.' Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as 'circumstantial.' Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof."

The rule is consistent with North Carolina practice in that character evidence is generally not admissible as circumstantial evidence of conduct.

Subdivision (a)(1) creates an exception which permits an accused to introduce pertinent evidence of good character, in which event the prosecution may rebut with evidence of bad character. The exception is consistent with North Carolina practice except that subdivision (a)(1) speaks in terms of a "pertinent trait of his character". This limits the exception to relevant character traits, whereas North Carolina practice permits use of evidence of general character. Professor Brandis states that:

"The North Carolina rule on this subject is unique, and appears to have had its origin in a misinterpretation of the earlier opinions.

In a majority of jurisdictions, character evidence must be confined to the particular trait of character involved in the conduct which is being investigated: In the case of a witness, his character for truth and veracity; of a defendant charged with a crime of violence, his peaceable or violent character; of an alleged embezzler, his honesty and integrity, etc.; a few courts will *also* admit evidence of general moral character, and this view was adopted by the North Carolina Court at an early date. For at least eighty years it was permissible to prove either the general character or the specific relevant trait of character of the person in question. When, during this period, the Court stated that only 'general character' could be shown, it meant that the only method of proving character was by general reputation, as distinguished from 'particular facts and the opinion of witnesses.' In *State v. Hairston* the principle of the earlier cases seems to have been misunderstood, and the rule was stated: 'A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad.'***

When the witness is asked whether he knows the general 'reputation' or 'reputation and character' of the subject, if he answers 'No' he should be stood aside; but if he answers 'Yes' it seems that he need not confine his testimony to that reputation, but may testify to reputation for some specific trait of character. This may be highly relevant, as when witness character is at stake and the answer deals with reputation for veracity. However, it may deal with reputation for liquor-selling, or horse trading, or domestic cruelty, even though the trait is wholly irrelevant to any issue in the case.

The Court recently reviewed the history of the rule, but did not change it. It explicitly held that it is proper for counsel to prepare his witness by explaining the rule and that this does not render the specific trait evidence inadmissible unless, at counsel's suggestion, it is false. To this writer this is convincing proof that the rule should be scrapped. When counsel ascertains in advance a trait which the witness will specify, his question to elicit it should surely not merely be allowed, but be required to deal with that trait. In such case, objection may be made to the question and relevance rationally appraised. As it is, the question is foolproof and there is no opportunity to object until the specific trait evidence is actually given and the damage is done." *Brandis on North Carolina Evidence* § 114 (1982) (footnotes omitted): Brandis also notes that:

"At best the present rule requires use of an ambiguous and misleading formula in examining character witnesses. At worst it has positively undesirable consequences. It opens the door to evidence of character traits which are irrelevant and prejudicial, and permits the prosecution, under the guise of impeaching the defendant as a witness, to prove traits having no relation to veracity but which are relevant on the issue of guilt, thus evading the rule (see § 104) prohibiting the State from attacking the defendant's character unless he first puts it in issue. These consequences would be avoided, and logic and symmetry restored, by confining the inquiry to traits relevant for the particular purpose and holding the witness to responsive answers." *Id.* at 114, n. 91.

Subdivision (a)(2) creates an exception to permit an accused to introduce pertinent evidence of character of the victim and to permit the prosecution to introduce similar evidence in rebuttal of the character evidence. The subdivision extends the exception recognized in North Carolina homicide and assault and battery cases to include all criminal cases. See *Brandis on North Carolina Evidence* § 106 (1982).

North Carolina practice permits evidence of the character of the victim tending to show that the defendant had a reasonable apprehension of death or bodily harm. *Id.* Such evidence when introduced to show the reasonable apprehension of death or bodily harm to the accused, rather than to prove that the victim acted in conformity with his character trait on a particular occasion, would not be within the ban created by subdivision (a).

North Carolina practice also permits evidence of the character of the victim tending to show that the victim was the first aggressor. Unlike Rule 404, current North Carolina practice permits such evidence to be introduced only if the State's evidence is wholly circumstantial or the nature of the transaction is in doubt.

Subdivision (a)(2) permits proof of any pertinent trait of the victim. North Carolina practice has confined the evidence to character for violence. *Id.*

Subdivision (a)(2) is consistent with North Carolina practice in that evidence of the character of the victim for peace and quiet would be admissible to rebut evidence of the deceased's character for violence and evidence of the victim's good general character would not. *Id.* at 397.

The second part of subdivision (a)(2) permits introduction of "evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." In North Carolina the prosecution may offer evidence of the deceased's character for peace and quiet only if the defendant has introduced evidence of the deceased's character for violence. See *Nance v. Fike,* 244 N. C. 368, 372 (1956). Thus in North Carolina the accused can apparently claim self-defense without opening the door to character evidence relating to the victim. Subdivision (a)(2) would alter this practice and permit the prosecution to offer evidence of the peacefulness of the victim to rebut any evidence that the victim was the first aggressor.

The North Carolina exception, unlike the rule, applies to cases of civil assault and battery. See *Brandis on North Carolina Evidence* § 106, at 393 (1982). The Advisory Committee's Note states:

"The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character.*** The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission ***:

'Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the the main question of what actually happened on on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.'"

Subdivision (a)(3) creates an exception to the general rule and permits the introduction of evidence of the character of a witness, as provided in Rules 607, 608, and 609, to prove that he acted in conformity therewith on a particular occasion.

Subdivision (b) permits the introduction of specific "crimes, wrongs, or acts" for a purpose other than to prove the conduct of a person. The Advisory Committee's Note states:

"Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."

The list in the last sentence of subdivision (b) is nonexclusive and the fact that evidence cannot be brought within a category does not mean that the evidence is inadmissible.

Subdivision (b) is consistent with North Carolina practice.

Relevance of the complainant's past behavior in a rape or sex offense case is governed by Rule 412.

Legal Periodicals. — For note, "Indelible Ink in the Milk: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in State v. Coffey," see 69 N.C.L. Rev. 1604 (1991).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For note, "The Admissibility of Prior Acquittal Evidence — Has North Carolina Adopted the 'Minority View'? — The Effect of State v. Scott," see 16 Campbell L. Rev. 231 (1994).

For article, "A Six Step Analysis of 'Other Purposes' Evidence Pursuant to Rule 404(b) of the North Carolina Rules of Evidence," see 21 N.C. Cent. L.J. 1 (1995).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For article, "What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence," see 23 N.C. Cent. L.J. 14 (1997).

CASE NOTES

I. General Consideration.
II. Character Evidence Generally.
III. Other Crimes and Wrongs.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Rule 405 Compared. — A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue, and the State in rebuttal can then introduce evidence of defendant's bad character; unlike evidence of prior bad acts being offered under G.S. 8C-1, Rule 404(b), G.S. 8C-1, Rule 405(a) does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Unlike evidence of prior bad acts being offered under subsection (b) of this rule, G.S. 8C-1, Rule 405(a) does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one; rather, a "relevant" specific instance of conduct under Rule 405(a) would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Federal Rule Compared. — This rule is identical to Federal Evidentiary Rule 404, except for the addition of the word "entrapment" in the last sentence of subsection (b). State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

This rule is virtually identical to Federal Rule of Evidence 404, the legislative history of which tends to favor admissibility. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part, 318 N.C. 669, 351 S.E.2d 294 (1987); Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 320 N.C. 513, 358 S.E.2d 521 (1987), aff'd, 320 N.C. 517, 358 S.E.2d 533 (1987).

This rule is consistent with prior North

Carolina practice. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part, 318 N.C. 669, 351 S.E.2d 294 (1987).

Subsection (b) of this rule is consistent with prior North Carolina practice. State v. Belton, 77 N.C. App. 559, 335 S.E.2d 522 (1985), aff'd, 318 N.C. 141, 347 S.E.2d 755 (1986); State v. Spinks, 77 N.C. App. 657, 335 S.E.2d 786 (1985); In re Paul, 84 N.C. App. 491, 353 S.E.2d 254 (1987); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Subsection (b) of this rule permits the introduction of specific "crimes, wrongs, or acts" for a legitimate purpose other than to prove the conduct of a person. In so doing, it is consistent with North Carolina practice prior to its enactment. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Subsection (b) of this rule codifies the longstanding rule in this jurisdiction that evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact, it will not be excluded merely because it also shows him to have been guilty of an independent crime. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

This rule is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. State v. Kennedy, 130 N.C. App. 399, 503 S.E.2d 133 (1998), aff'd, 350 N.C. 87, 511 S.E.2d 305 (1999).

This rule is a general rule of inclusion of evidence, subject to an exception when the only probative value of the evidence is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

This rule addresses the admissibility of evidence; it is not a discovery statute which requires the State to disclose such evidence as it might introduce thereunder. State v. Payne, 337 N.C. 505, 448 S.E.2d 93 (1994), cert. denied, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995).

Construction. — North Carolina's appellate courts have been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in G.S. 8C-1, Rule 404(b), such as establishing the defendant's identity as the perpetrator of the crime charged. State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Probative Value Substantially Outweighs Prejudice. — Once a trial court determines that other crimes evidence is properly admissible under G.S. 8C-1, Rule 404(b), it must still determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice under G.S. 8C-1, Rule 403. State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Evidence that defendant had jokingly scared other employees by pretending to rob them in a manner similar to that used by the robber during the robbery at issue tended to show motive, opportunity, intent, preparation, plan, or knowledge, was more relevant and probative than unduly prejudicial, and was properly admitted at trial. State v. Ingram, 160 N.C. App. 224, 585 S.E.2d 253, 2003 N.C. App. LEXIS 1731 (2003).

Section 8C-1, Rule 608(b) Distinguished. — Although subsection (b) of this rule and G.S. 8C-1, Rule 608(b) concern the use of specific instances of a person's conduct, the two rules have very different purposes and are intended to govern entirely different uses of extrinsic conduct evidence. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

"Extrinsic conduct evidence" refers to evidence of a specific prior or subsequent act, not charged in the indictment, which may be criminal but, as applied in G.S. 8C-1, Rule 608(b), does not result in a conviction. Criminal convictions are included in subsection (b) of this rule. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Section 8C-1, Rule 608(b) governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic evidence. Under subsection (b) of this rule, however, evidence regarding extrinsic acts is not limited to cross-examination and may be provided by extrinsic evidence as well as through cross-examination. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Although evidence of other acts is not permissible under G.S. 8C-1, N.C. R. Evid. 404(b) to show a propensity for violence solely because a defendant raised the claim of self-defense, such evidence may be used to refute specific evidence of a defendant's credibility under G.S. 8C-1, N.C. R. Evid. 608, when such credibility is at issue (such as when a criminal defendant introduces evidence of his good character, thereby placing his character at issue); when the criminal defendant introduces such evidence, the State in rebuttal can then introduce evidence of defendant's bad character, and under G.S. 8C-1, N.C. R. Evid. 405(a), and the State may do so by cross-examining a defendant's character witnesses as to relevant specific instances of conduct. State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005).

Rule 609 Distinguished. — Although the State exceeded the permissible scope of inquiry into defendant's prior criminal conviction under G.S. 8C-1, Rule 609 by delving into his motivation for his "forgery activity," the evidence that defendant previously committed forgery to finance his drug habit could properly be admitted under this section, to show that his need to support his drug habit and his lack of finances were the motive for the robbery and murder of the victim. State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001).

Single Scheme or Plan. — Where there existed an extended interval of as much as several years between sex offenses and where there was a lack of a consistent pattern in defendant's molesting behavior, all of the charged acts perpetrated against three sisters did not constitute part of a single scheme or plan, as a matter of law, and the trial court erred in joining the cases under G.S. 15A-926; however, since evidence of other molestations would have been admissible pursuant to this rule to show "intent, plan or design," at the trial of any one offense, the error was harmless. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590, 1999 N.C. App. LEXIS 1145 (1999).

Evidence Which Was Irrelevant as Substantive Evidence Held Proper When Used for Rebuttal. — While State would not have been allowed to introduce, in the first instance, evidence of defendant's bad conduct toward fellow employees, trial court did not err in allowing State to rebut defendant's evidence of a good employment record. State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990), aff'd, 329 N.C. 764, 407 S.E.2d 514 (1991).

It was error for a trial judge not to conduct a voir dire in order to rule on questions of admissibility and order a tape recording to be edited or redacted as necessary. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Evidence of Victim's State of Mind. — Evidence that the victim was peaceful and unarmed the night of the murder was relevant to prove that the victim did not provoke defendant and that the murder was committed with premeditation and deliberation. State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995).

Evidence of Accused's State of Mind. — In prosecution for assault with a deadly weapon, testimony about defendant's conduct prior to confrontation with deputies and admission of videotape allegedly depicting this conduct would be upheld, as part of the "chain of events" and as showing defendant's state of mind immediately prior to the deputies being called to the scene. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

Evidence of Motive. — The evidence of defendant's drug dealing activities, the victim's desire for a greater cut of the profits and his failure to turn in all the money, was relevant to show defendant's motive for murdering the victim. State v. Lundy, 135 N.C. App. 13, 519 S.E.2d 73 (1999).

Defendant's disturbance at the bank was relevant and admissible to show defendant's need for money and the motivation to commit the kidnapping and ultimate murder. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Factors Affecting Mental State. — Defendant was properly permitted to cross-examine plaintiff about other factors in her life which had a bearing upon her mental state, such as acts of wrong-doing on the part of her children. Pelzer v. UPS, Inc., 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. denied, 346 N.C. 549, 488 S.E.2d 808 (1997).

Premeditation and deliberation are generally not susceptible of direct proof, but are mental processes which may be inferred from circumstantial evidence surrounding a murder, including lack of provocation on the part of the victim. State v. Alford, 339 N.C. 562, 453 S.E.2d 512 (1995).

Failure to Exclude Not Amounting to Plain Error. — Even if the trial court erred in not intervening to exclude the portion of witness's statement which referred to defendant's prior bad act, the court's error did not result in manifest injustice and did not amount to plain error. State v. Ocasio, 344 N.C. 568, 476 S.E.2d 281 (1996).

Defendant's Burden of Proof on Appeal. — Appeal by a defendant, who contended that evidence that he performed oral sex on a minor victim should have been excluded, was denied because, in light of defendant's admissions and other evidence admitted concerning defendant's sexual improprieties with the minor victim, defendant failed to show that in the absence of the evidence a different result would have been reached at the trial. State v. Anderson, 177 N.C. App. 54, 627 S.E.2d 501, 2006 N.C. App. LEXIS 703 (2006).

Evidence Held Admissible to Show Motive. — Follow-up question to first defendant about first defendant's motivation for denying involvement in the subject crime, the fact that if found guilty first defendant would have violated his federal probation for another offense, was admissible for the purpose of showing motive. State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

Evidence in Jury Instruction. — Because an instruction given by the trial court as to the state's G.S. 8C-1-404(b) evidence was substantially similar to that which defendant requested, as the only difference was that the trial court's actual instruction identified the officer as the person who saw defendant in possession of what appeared to be a handgun, the instruction was proper. State v. Junious, 180 N.C. App. 656, 638 S.E.2d 497, 2006 N.C. App. LEXIS 2507 (2006).

Applied in State v. Blalock, 77 N.C. App. 201, 334 S.E.2d 441 (1985); State v. Barnes, 77 N.C. App. 212, 334 S.E.2d 456 (1985); State v. Shipman, 77 N.C. App. 650, 335 S.E.2d 912 (1985); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Roth, 89 N.C. App. 511, 366 S.E.2d 486 (1988); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988); Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988); State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989); State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Everett, 98 N.C. App. 23, 390 S.E.2d 160 (1990); State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991); State v. McCarty, 326 N.C. 782, 392 S.E.2d 359 (1990); State v. Whitted, 99 N.C. App. 502, 393 S.E.2d 590 (1990); State v. Simpson, 327 N.C. 178, 393 S.E.2d 771 (1990); State v. Franklin, 327 N.C. 162, 393 S.E.2d 781 (1990); State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990); State v. Phillips, 328 N.C. 1, 399 S.E.2d 293; State v. Young, 103 N.C. App. 415, 406 S.E.2d 3 (1991); State v. Morgan, 329 N.C. 654, 406 S.E.2d 833 (1991); State v. Gordon, 104 N.C. App. 455, 410 S.E.2d 4 (1991); State v. Maye, 104 N.C. App. 437, 410 S.E.2d 8 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580 (1992); State v. Hammonds, 105 N.C. App. 594, 414 S.E.2d 55 (1992); State v. Suddreth, 105 N.C. App. 122, 412 S.E.2d 126 (1992); State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Harding, 110 N.C. App. 155, 429 S.E.2d 416 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993); State v. Morgan, 111 N.C. App. 662, 432 S.E.2d 877 (1993); State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778 (1993); State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993); State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. Grace, 341 N.C. 640, 461 S.E.2d 330 (1995); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996); State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996); State v. Stinnett, 129 N.C. App. 192, 497 S.E.2d 696 (1998); State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998); State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999); State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000); Allen v. Roberts Constr. Co., 138 N.C. App. 557, 532 S.E.2d 534, 2000 N.C. App. LEXIS 783 (2000); In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553, 2000 N.C. App. LEXIS 820 (2000); State v. Perry, 142 N.C. App. 177, 541 S.E.2d 746, 2001 N.C. App. LEXIS 49 (2001); State v. Johnson, 145 N.C. App. 51, 549 S.E.2d 574, 2001 N.C. App. LEXIS 553 (2001); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003); State v. Maske, 358 N.C. 40, 591 S.E.2d 521, 2004 N.C. LEXIS 18 (2004); Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Cited in State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475; State v. Hyman, 312 N.C. 601, 324 S.E.2d 264 (1985); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985); State v. Brown, 81 N.C. App. 622, 344 S.E.2d 817 (1986); State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986); State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986); State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Hillard, 81 N.C. App. 104, 344 S.E.2d 54 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986); State v. McKoy, 317 N.C. 519, 347 S.E.2d 374 (1986); State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987); State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987); Booe v. Shadrick, 85 N.C. App. 230, 354 S.E.2d 305 (1987); State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987); State v. Poucher, 87 N.C. App. 279, 360 S.E.2d 505 (1987); State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988); State v. Hogan, 321 N.C. 719, 365 S.E.2d 289 (1988); State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988); State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988); State v. Chambers, 92 N.C. App. 230, 374 S.E.2d 158 (1988); State v. Agee, 93 N.C. App. 346, 378 S.E.2d 533 (1989); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); Gregory v. North Carolina, 900 F.2d 705 (4th Cir. 1990); State v. Evans, 99 N.C. App. 88, 392 S.E.2d 441 (1990); State v. Scott, 99 N.C. App. 113, 392 S.E.2d 621 (1990); State v. Wooten, 104 N.C. App. 125, 408 S.E.2d 202 (1991); State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991); State v. Jacobs, 105

N.C. App. 83, 411 S.E.2d 630 (1992); State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993); State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Davis, 110 N.C. App. 272, 429 S.E.2d 403 (1993); State v. Matheson, 110 N.C. App. 577, 430 S.E.2d 429 (1993); State v. Harris, 111 N.C. App. 445, 432 S.E.2d 415 (1993); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995); State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995); State v. Montgomery, 341 N.C. 553, 461 S.E.2d 732 (1995); State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281 (1995); State v. Bostic, 121 N.C. App. 90, 465 S.E.2d 20 (1995); State v. King, 343 N.C. 29, 468 S.E.2d 232 (1996); State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996); State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996); State v. Ocasio, 344 N.C. 568, 476 S.E.2d 281 (1996); State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996); State v. Collins, 345 N.C. 170, 478 S.E.2d 191 (1996); State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996); State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997); State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997); State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997); State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (1997); State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998); State v. Hines, 131 N.C. App. 457, 508 S.E.2d 310 (1998); State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999); State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000); State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000); State v. Moss, 139 N.C. App. 106, 532 S.E.2d 588, 2000 N.C. App. LEXIS 804 (2000); Carpenter v. Brooks, 139 N.C. App. 745, 534 S.E.2d 641, 2000 N.C. App. LEXIS 1033 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Eubanks, 151 N.C. App. 499, 565 S.E.2d 738, 2002 N.C. App. LEXIS 766 (2002); State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002); State v. Bethea, 156 N.C. App. 167, 575 S.E.2d 831, 2003 N.C. App. LEXIS 68 (2003); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003); State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003); State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004); State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005); State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Reber, 182 N.C. App. 250, 641 S.E.2d 742, 2007 N.C. App. LEXIS 589 (2007); State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007); State v. Mitchell, — N.C. App. —, 671 S.E.2d 340, 2009 N.C. App. LEXIS 10 (2009); State v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

II. CHARACTER EVIDENCE GENERALLY.

Subsection (a) is a general rule of exclusion, prohibiting the introduction of character evidence to prove that a person acted in conformity with that evidence of character. State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989).

Under subdivision (a)(1) of this rule an accused may no longer offer evidence of undifferentiated "good character" as permitted by our previous practice; rather, he must tailor the evidence to a particular trait that is relevant to an issue in the case. State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988).

The plain meaning of the "first aggressor" exception is abundantly clear: if a defendant presents evidence that the victim was the first aggressor in the confrontation which led to the victim's death, the State can offer evidence of the victim's peacefulness. State v. Faison, 330 N.C. 347, 411 S.E.2d 143 (1991).

Accused May Introduce Evidence of Specific Traits. — This rule, which became effective on July 1, 1984, is a significant departure from our previous practice under the common law, in that it permits an accused to introduce evidence of specific traits of his character. Under our previous rule, developed under the common law, the only method for introducing evidence of character was by general reputation. State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988).

Defendant, who was on trial for murder, was not entitled to an instruction on his general "good reputation" in the community. State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637, 2003 N.C. App. LEXIS 1511 (2003).

As the trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible as to his self-defense claim, and defendant demonstrated a reasonable possibility that, had the trial court not committed the error, the result at trial would have been different; thus, the defendant was prejudiced by the error. State v. Ledarius Montreal Banks, 191 N.C. App. 743, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

When Evidence of Character Traits Is Admissible. — "Pertinent" in the context of subdivision (a)(1) of this rule is tantamount to relevant. Thus, in determining whether evidence of a character trait is admissible under subdivision (a)(1), the trial court must determine whether the trait in question is relevant; i.e., whether it would make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without evidence of the trait. State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988).

A criminal defendant will be entitled to an instruction on a good character trait as substantive evidence of his innocence when he satisfies the following four-part test: First, the evidence must be of a "trait of character" and not merely evidence of a fact (e.g., "being 'law-abiding' addresses one's character of abiding by all laws, a lack of convictions addresses only the fact that one has not been convicted of a crime"); second, the evidence of the trait must be competent (i.e., in addition to satisfying all other applicable standards, the evidence must be in the proper form as required by G.S. 8C-1, Rule 405); third, the trait must be pertinent (i.e., relevant in the context of the crime charged in that it bears a special relationship to or is involved in such crime); and fourth, the instruction must be requested by the defendant. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Evidence of criminal activity not related to the crime charged must be relevant to some issue in the case to be admissible; such evidence is inadmissible when introduced to prove defendant's "character in order to show that he acted in conformity therewith." State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Where defendant argues he acted in self-defense, evidence of the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable, or to show the victim was the aggressor. State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

Where defendant proffered evidence of his good character, trial court did not abuse its discretion in allowing the State to rebut by introducing evidence of his assaultive behavior prior to his 1976 brain injury. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Trial court did not err in allowing admission of one police officer's testimony that from a confrontation with a young female outside of a residence where defendant had been seen before, that he knew defendant was likely inside the residence, and that he went to the residence to speak with defendant, as the testimony helped to establish the elements of the drug crimes charged against defendant and did not impermissibly place defendant's character at issue even though it tended to show that defendant and the officer knew each other. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

While the bad acts elicited by the prosecution on redirect of the defendant's girlfriend may have been inadmissible on direct examination under G.S. 8C-1, N.C. R. Evid. 404(b) before the defendant "opened the door" during cross-examination, the prosecution's rebuttal of the defendant's evidence of good character through the use of specific instances of conduct was proper under G.S. 8C-1, N.C. R. Evid. 404(a)(1), (b). State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

Testimony that defendant became violent when he was drinking was not offered for the purpose of proving that defendant acted in conformity with a violent disposition, but rather served to provide context for the ensuing fight; as such, its admission does not violate G.S. 8C-1-404's prohibition on character evidence. State v. Beal, 181 N.C. App. 100, 638 S.E.2d 541, 2007 N.C. App. LEXIS 20 (2007).

Trait May Be General in Nature. — While under this rule, an accused must tailor his character evidence to a "pertinent" trait, the trait may be general in nature, provided that it is relevant in the context of the crime charged. State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988).

Such as Trait of Being Law-Abiding. — An example of a character trait of a general nature which is nearly always relevant in a criminal case is the trait of being law-abiding. State v. Squire, 321 N.C. 541, 364 S.E.2d 354 (1988).

Defendant was entitled to an instruction on his character trait of law-abidingness as substantive evidence of his innocence; it was for the jury to assess the weight of this evidence. State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989).

"Pertinent" Trait to Be Restrictively Construed. — The language of the subsection (a) exception permitting the accused to offer evidence of a "pertinent" trait should be restrictively construed. State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989).

In a prosecution for the murder of a child, in which defendant offered evidence of his appropriate behavior around children, while defendant's allegedly peaceable character was pertinent to the charge of first-degree murder, neither his character nor a trait of his character were essential elements of the charge or his defense, so elicitation of evidence about his character during direct testimony had to be accomplished by opinion or reputation testimony rather than specific opinion testimony, pursuant to G.S. 8C-1-404(a)(1) and G.S. 8C-1-405(a). State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Lack of Mental Illness Not Pertinent. — Evidence of the defendant's general "psychological make-up," including evidence of the lack of several mental problems, was not pertinent to the commission of a sexual assault, and, thus, was not admissible under the exception to the general bar against character evidence offered for the purpose of proving conduct in conformity therewith. State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998).

Sexual Orientation Not Pertinent. — Evidence offered by the defendant showing that the victim had a reputation for being a homosexual is not a pertinent character trait within the meaning of subsection (a)(2). State v. Laws, 345 N.C. 585, 481 S.E.2d 641 (1997).

Because an individual's sexual orientation bears no relationship to the likelihood that one would threaten a sexual assault, it therefore can bear no relationship to defendant's claim that he killed in self-defense in response to a threatened sexual assault. State v. Laws, 345 N.C. 585, 481 S.E.2d 641 (1997).

Military Record or Military Service. — A good military record or military service is not relevant to defendant's guilt or innocence in a rape case. State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906, cert. denied, 336 N.C. 613, 447 S.E.2d 409 (1994).

Witness' Beliefs About Defendant Not Evidence of Pertinent Trait. — Defense question to rape defendant's employment supervisor of whether he believed defendant was capable of raping anyone was not allowed as evidence of a pertinent character trait under subdivision (a)(1) of this rule. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

Violent Character. — Evidence of a victim's violent character is irrelevant in a homicide case when the defense of accident is raised. State v. Goodson, 341 N.C. 619, 461 S.E.2d 740 (1995).

Evidence regarding defendant's alleged prior violent acts against his former girlfriend was not properly admitted under Rule 404(a) because the testimony of defendant and the several other defense witnesses was strictly limited to defendant's actions and state of mind on the night of the alleged murder; while much of the testimony focused on defendant's initial unwillingness to respond belligerently to the victim's taunts, there was no instance where defendant interjected his character into the proceedings by proffering testimony tending to show he possessed a generally peaceful or nonviolent disposition. State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Testimony from a witness who saw defendant's victim breaking car windows at an automobile dealership should have been admitted during her murder trial, which ended in her conviction for second-degree murder, as an essential element of her assertion of self-defense under G.S. 8C-1-405(b); the evidence was relevant and admissible as evidence of the victim's violent character to show the jury that defendant's apprehension of death and bodily harm was reasonable. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defendant's murder trial as evidence of the victim's violent character, was prejudicial even though defendant testified to the same incident on direct and redirect examination. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Substance of the testimony was apparent from the context within which the questions were asked under G.S. 8C-1-103(a)(2), the grounds for admitting the testimony as evidence of the victim's violent character pertinent to defendant's assertion of self-defense under G.S. 8C-1-404(a)(2) were apparent from the context under N.C. R. App. P. 10(b)(1), and the issue of the testimony's admissibility was properly preserved for appellate review. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Same — Irrelevant When Victim Unknown. — Defendant did not know victim nor did he know anything about his reputation prior to altercation; thus, evidence of specific instances of victim's violent character was irrelevant in regards to the reasonableness of defendant's apprehension and need to use force, and the trial court properly denied its admission on this basis. State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

Evidence of deceased's criminal record cannot be received for purpose of establishing his reputation for violence. State v. Adams, 90 N.C. App. 145, 367 S.E.2d 362 (1988).

Drug Addiction Is Not Probative of Truthfulness or Untruthfulness. — Cross-examination concerning defendant's drug addiction was improper under G.S. 8C-1, Rule 608(b), because extrinsic evidence of drug addiction, standing alone, is not probative of defendant's character for truthfulness or untruthfulness. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550 (1988).

Prosecution May Introduce Character Evidence. — This rule allows the prosecution to introduce evidence of a victim's character only to rebut defendant's evidence calling it into question. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Self-defense Claim Does Not Interject Defendant's Character Into Proceedings. — Evidence of defendant's alleged prior violent acts towards his former girlfriend was not properly admitted in defendant's murder trial under Rule 405(b); defendant had maintained at trial that he used a knife in striking the victim in self-defense, because the victim had just struck him in the head with a beer bottle. Because raising a self-defense claim does not interject a defendant's character into the proceedings, and a defendant's character is not an essential element of a self-defense claim, evidence of defendant's prior assaultive behavior towards a person other than the victim was not justified under Rule 405(b). State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Admission of Victim's Character Evidence Not Plain Error. — The admission of the evidence concerning decedent/wife's good character before the defendant offered any evidence of her character was error but not plain error. State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000).

Exclusion of Evidence of Character Traits Held Error. — In a close case on the issue of whether homicide was committed in self-defense, where defendant demonstrated that the victim was a violent person who had directed his anger toward him in the past, and also offered a plausible explanation for his fear at the time he shot the victim, which was corroborated by two witnesses, evidence of favorable character traits of defendant other than peacefulness and truthfulness, such as, for example, being law-abiding, might have weighed heavily in the jury's determination of whether the defendant acted in self-defense, or might have influenced the jury to return a verdict of voluntary manslaughter or second degree murder rather than first degree murder, and thus trial court's unwarranted general prohibition of evidence of character traits other than peacefulness and truthfulness constituted reversible error entitling defendant to a new trial. State v. Squire, 341 N.C. 541, 364 S.E.2d 354 (1988).

Evidence Showed More Than Character. — In a first-degree murder case, evidence of defendant's having been charged with driving while impaired explained circumstances under which he was taken into custody, and evidence of defendant's refusal to take a breathalyzer test explained the circumstances under which defendant was kept waiting in the Virginia Public Safety Center where he confessed to the crimes for which he was on trial; all of this evidence tended ultimately to show the circumstances under which that confession was made and was thus relevant on the issues of the confession's voluntariness and credibility. The evidence cast more light on these important questions than it did on defendant's character; therefore, its probative value outweighed its prejudicial effect. State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993).

Admission of Evidence Prejudicial Error. — There was no relevancy for the admission of defendant's past violent behavior toward his wife to prove the character of the defendant in relation to motive, opportunity, or intent and the admission of the evidence constituted prejudicial error requiring a new trial. State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1994).

Witness's statement that defendant was an "asset" to the witness in the witness's drug trafficking was tantamount to identifying defendant as a drug dealer and was improperly admitted; since there was no other conclusive evidence that defendant was a drug trafficker, defendant was granted a new trial on drug trafficking charges. State v. Yancey, 155 N.C. App. 609, 573 S.E.2d 243, 2002 N.C. App. LEXIS 1577 (2002), cert. denied, 356 N.C. 694, 579 S.E.2d 99 (2003).

Admission of Evidence Not Prejudicial. — The trial court erred in admitting officer's testimony as a drug dealer; however, as defendant's testimony alone was enough from which a reasonable juror could conclude that defendant possessed the marijuana and cocaine with the intent to sell and deliver, defendant was not prejudiced by the admission of the character evidence against him. State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995).

Witnesses' testimony regarding defendant's activities hours before murders occurred explained why witness was found walking away from crime scene and provided evidence confirming state of mind, method of operation, and course of conduct of defendant and his cohorts; thus, the testimony was not inadmissible character evidence. State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996), cert. denied, 519 U.S. 896, 117 S. Ct. 241, 136 L. Ed. 2d 170 (1996).

Although it was error for the trial court to permit the State to ask defendant a question about his temper, the error was not prejudicial as there was other evidence at trial that was sufficient to support defendant's first-degree felony murder conviction. State v. Stafford, 150

N.C. App. 566, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002), cert. denied, 357 N.C. 169, 581 S.E.2d 444 (2003).

Evidence of defendant's possession of pornographic magazines and videos was improperly admitted as evidence of defendant's intent to engage in a sexual relationship with the victim, or as evidence of defendant's preparation, plan, knowledge or absence of mistake in defendant's trial for taking indecent liberties with a child and first degree sex offense with a female child under the age of 13; however, the error was not prejudicial under G.S. 15A-1443. State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Although the admission of reputation testimony violated G.S. 8C-1, Rule 404(a), the error was not prejudicial because the evidence regarding one witness's possession of a crack pipe was cumulative and there was ample evidence to convict defendant without the evidence of his brother's reputation as a dealer of drugs. State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

Drug Use to Show Motive. — In a prosecution for common law burglary and first-degree murder, evidence that defendant had been using cocaine was properly admitted to show her motive to commit the robbery. State v. Stephenson, 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 535 (2001).

III. OTHER CRIMES AND WRONGS.

Denial of pre-trial disclosure of § 8C-1, Rule 404(b) evidence did not deprive defendant of a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and N.C. Const., Article I, §§ 19 and 23. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Res Gestae Rationale Survives. — Admission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it "forms part of the history of the event or serves to enhance the natural development of the facts"; and this rationale, established in pre-Rules cases, survives the adoption of the Rules of Evidence. State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990).

Applicability of Subsection (b). — Subsection (b) of this rule has been interpreted as applicable only to parties and, in a criminal case, would usually be applicable only to a defendant. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Evidence of defendant's other crimes was not admitted pursuant to G.S. 8C-1-404(b), but was admitted to establish one of the elements of a crime that the State of North Carolina was required to prove — possession of a firearm by a felon. Thus, a limiting instruction regarding evidence of other crimes admitted pursuant to Rule 404(b) was not appropriate and the trial court did not err in failing to give that instruction. State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

Basis for Exception in Subsection (b). — The exception noted in subsection (b) of this rule is grounded in the logic of inferring from the sequence of events comprising an offense or from its particular features that the same person committed the offense more than once, aware on at least the latter occasion of its consequences. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Defendant's robbery and kidnapping victim was properly allowed to testify at defendant's trial for the kidnapping, robbery, rape, and murder of two victims as the kidnapping, threatening, and robbing of the witness was particularly similar to the murder allegations, indicating the same person committed the crimes charged. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

The use of evidence as permitted under subsection (b) of this section is guided by two constraints: similarity and temporal proximity. When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalties become less striking, and the probative value of the analogy attaches less to the acts than the character of the actor. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

The list of purposes in the second sentence of subsection (b) of this rule is neither exclusive nor exhaustive. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

The list of permissible purposes for admission of other crimes evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

The statutory list of permissible purposes for other crimes evidence is not exclusive and the fact that evidence cannot be brought within a listed category does not necessarily mean that it is inadmissible. State v. Blackwell, 133 N.C. App. 31, 514 S.E.2d 116, 1999 N.C. App. LEXIS 341 (1999), cert. denied, 350 N.C. 595, 537 S.E.2d 483 (1999).

The list of permissible purposes for admission of "other crimes" evidence is not exclusive; thus, testimony from a police officer that defendant was arrested while driving a vehicle that had been reported stolen was properly admitted to explain defendant's presence in a photographic lineup conducted in a separate armed robbery investigation. State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348, 2003 N.C. App. LEXIS 1667 (2003), notice of appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 855 (2003).

Admissibility. — "Other crimes, wrongs, or acts" evidence is admissible only if offered for a proper purpose. A proper purpose includes, among other things, proof of a defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991), cert. denied, 331 N.C. 287, 417 S.E.2d 256 (1992).

The admissibility of "other crimes, wrongs, or acts" evidence is determined through an application of subsection (b) of this rule, and G.S. 8C-1, Rules 402, 401, 403, 104(b), and 105. State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991), cert. denied, 331 N.C. 287, 417 S.E.2d 256 (1992).

For evidence of defendant's prior crimes or bad acts to be admissible to show the identity of the defendant as the perpetrator of the crime for which he is being tried, there must be some unusual facts present in both crimes or particularly similar acts that would indicate that the same person committed both crimes, and while the similarities need not be unique and bizarre, they must tend to support a reasonable inference that the same person committed both the earlier and later acts. State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998).

In a prosecution of defendant for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce evidence that defendant's probationary sentence was revoked because it was relevant to prove defendant's status as a convicted felon, and was therefore admissible under G.S. 8C-1, N.C. R. Evid. 404(b). To the extent that the evidence tended to show that defendant committed inadmissible prior bad acts, the trial court's limiting instructions to the jury were sufficient to cure any prejudice against him. State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004).

Prior acts evidence was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b); notable similarities existed between defendant's prior drug related acts and the crimes he was charged with, the prior acts were not too remote in time, and the trial court guarded against prejudice by giving a limiting instruction. State v. Stevenson, 169 N.C. App. 797, 611 S.E.2d 206, 2005 N.C. App. LEXIS 791 (2005).

Trial court did not err in admitting evidence that defendant was in a gang and had served time in jail; even though such evidence incidentally touched on his bad character, it was also relevant to establish defendant's identity, and was admissible for that purpose. State v. Medina, 174 N.C. App. 723, 622 S.E.2d 176, 2005 N.C. App. LEXIS 2608 (2005), cert. denied, — N.C. —, 630 S.E.2d 448 (2006).

Defendant's statement to officers that he was expected to make a living outside prison showed a motive for the robbery and his statement that he wanted to go back to prison showed a possible motive to commit a crime in order to accomplish that objective; the statements were made by defendant himself shortly after the crime and were distinguishable from other evidence, and as such, the statements were probative of motive and intent, so there was no error in admission of the statements. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

Trial court properly admitted evidence of the defendant's prior conduct to establish malice on a second-degree murder charge where it was clear that the evidence was admitted to show that he had consumed alcohol with two other members of the rescue squad, he responded to a rescue call despite knowing that the squad's bylaws prohibited members from responding after consuming alcohol, he drove erratically, and the jury was given a limiting instruction that the evidence was received solely for the purpose of establishing malice. State v. Hayes, 183 N.C. App. 602, 644 S.E.2d 655, 2007 N.C. App. LEXIS 1160 (2007).

In defendant's criminal trial on a variety of charges, arising from a vehicular incident that resulted in deaths, a trial court properly allowed admission of testimony regarding defendant's prior failure to take a breath test and defendant's conviction for driving while intoxicated, as such was relevant under N.C. R. Evid. 401 and 402 to show defendant's knowledge that the driver's license was suspended and to show malice, which was an element of one of the charged offenses; further, the evidence was properly admitted for the purpose of showing defendant's intent and it was not unfairly prejudicial under N.C. R. Evid. 404(b) and 403. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Trial court did not err in admitting the testimony of a witness that defendant on a previous occasion had sexually touched the witness, who was a minor at the time, without the consent of the witness. The evidence was admitted not to show defendant's character, but, instead was admitted pursuant to G.S. 8C-1, N.C. R. Evid. 404(b) to show absence of mistake of age, specific intent in regard to a kidnapping charge, and an intent for sexual gratification in defendant's current case. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Evidence of defendant's prior conduct was admissible under G.S. 8C-1, N.C. R. Evid. 404(b) to prove motive, intent, knowledge, and absence of mistake, and the appellate court could not say that its admission or the limiting instructions were erroneous or influenced the jury such that, without them, a different verdict would have been reached. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

While the trial court erred when it admitted a witness's testimony that defendant was previously incarcerated and used marijuana while living with the witness and the victim, the witness's daughter and the alleged victim of a sexual assualt, as the evidence was admitted before defendant placed his credibility at issue by testifying, the error did not rise to the level of plain error. State v. Streater, — N.C. App. —, 673 S.E.2d 365, 2009 N.C. App. LEXIS 211 (2009).

Trial court properly admitted a witness's testimony that she walked in on defendant "whooping the victim with a belt pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), because the State's evidence tended to show that the victim began ”wetting the bed“ around the time of the alleged sexual abuse; therefore, the witness's testimony about the ”whooping“ incident tended to establish defendant's intent to conceal the alleged sexual abuse. State v. Streater, — N.C. App. —, 678 S.E.2d 367, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

Although the trial court erred when it admitted a witness's testimony that defendant was previously incarcerated and used marijuana while living with her and the victim because the evidence was admitted before defendant placed his credibility at issue by testifying, the court of appeals was not convinced that absent the error the jury probably would have reached a different verdict in light of other similar evidence property admitted at trial. State v. Streater, — N.C. App. —, 678 S.E.2d 367, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

Failure to Request Limiting Instruction. — In a sexual abuse prosecution, where defendant failed to request a limiting instruction, under G.S. 8C-1, N.C. R. Evid. 105, as to evidence admitted under G.S. 8C-1, N.C. R. Evid. 404(b), he could not complain that the trial court should have intervened ex mero motu to give such an instruction. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Trial Court's Unintentional Misstatement While Giving "Other Crimes" Instruction Was Not Plain Error. — Considered in the context of the entire jury instruction addressing "other crimes" evidence, it was clear that the trial court's misstatement of the law was an unintentional slip of the tongue and did not amount to plain error; the trial court apparently intended to mirror the language of N.C. R. Evid. 404(b), but used the incorrect phrase "but to show," rather than the correct phrase "in order to show." In light of the trial court's previous instruction regarding the only proper use of the evidence, the trial court's subsequent misstatement concerning the purposes for which the jury may have considered the evidence was immaterial, and, when taken as a whole, the jury could not have been misled by the trial court's charge. State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

When prior incidents are offered for a proper purpose, the ultimate test of admissibility is whether they are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in G.S. 8C-1, Rule 403. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

A prior act or crime is "similar" if there are some unusual facts present indicating that the same person committed both the earlier offense and the present one. However, the similarities between the two incidents need not be "unique and bizarre." State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

Evidence of defendant's attempt to burn a second victim's body was admissible where the unusual, unique and bizarre circumstances of the two deaths — the dismemberment of the bodies, the severing of the ears, the saving of those ears, and the building of two bonfires — revealed a contrived, common plan showing the same person committed both crimes. State v. Sokolowski, 351 N.C. 137, 522 S.E.2d 65 (1999).

The "acid test" for whether evidence of other crimes properly falls within the identity provision in subsection (b) of this rule and its common law precursor is its logical relevancy to the particular purpose for which it is sought to be introduced. State v. Jeter, 326 N.C. 457, 389 S.E.2d 805 (1990).

The list of purposes in the last sentence of subsection (b) of this rule is not exclusive, and the fact that evidence cannot be brought within a category does not necessarily mean that the evidence is inadmissible. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

The list in the second sentence of subsection (b) of this rule contains examples of theories of relevancy under which extrinsic conduct evidence may properly be used as circumstantial proof of a controverted fact at trial (for instance, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, etc.). This list is neither exclusive nor exhaustive. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

The second sentence of subsection (b) of this rule contains a list of theories of relevancy which is neither exclusive nor exhaustive. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

The list of other purposes contained within subsection (b) of this rule is nonexclusive, and thus evidence not falling within these categories may be admissible. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989).

Challenges Made Pursuant to This Section Must Follow Proper Procedure. — The court would not hear the defendant's challenge, pursuant to this section, to the introduction of evidence of past acts of domestic and sexual violence against five women in his trial for the murder and dismemberment of victim where his pretrial motion in limine did not preserve the question for appeal; where he failed to object during trial to the admission of the evidence of prior bad acts; and where he offered no explanation, analysis or specific contention in his appellate brief to support his challenge. State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000), cert. denied, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001).

Failure to Object Not Ineffective Assistance of Counsel. — In a sexual abuse prosecution, defendant did not show that he was deprived of the effective assistance of counsel due to his attorney's failure to object to the admission of evidence under G.S. 8C-1, N.C. R. Evid. 404(b), because he did not show that, absent this error, the outcome of his trial would have been different. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Erroneous Admission Cured by Another Proper Purpose. — Trial court's admission of the testimonies of two prior rape victims to show victim's lack of consent was error but not prejudicial error because the evidence was admissible to show a common plan or purpose. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

Witness's testimony about defendant's prior DWI was erroneously admitted; however, the error was harmless because defendant took the stand to testify on his own behalf and revealed his arrest record and prior criminal record, including the DWI, on direct examination. State v. McMillian, 169 N.C. App. 160, 609 S.E.2d 265, 2005 N.C. App. LEXIS 544 (2005).

Trial court did not abuse its discretion in deferring a ruling on motion in limine to suppress subsection (b) evidence of the underlying facts of prior convictions. While it may have been preferable for the court to have ruled on this motion earlier, the court's handling of the matter and its basis for deferred ruling were reasonable and did not constitute an abuse of discretion. State v. Barber, 120 N.C. App. 505, 463 S.E.2d 405 (1995).

Improper Admission Must Be Basis for Assignment of Record. — In a sexual abuse prosecution, defendant's argument that the trial court improperly admitted victim testimony under G.S. 8C-1, N.C. R. Evid. 404(b) without making specific findings of fact as to "sufficient similarity" and "remoteness in time" could not be considered, under N.C. R. App. P. 10(a), because this was not made the basis of any assignment of error in the record. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Court's ruling that defendant's prior drug deals could only come in if he "opened the door" by taking the stand and denying he had ever dealt drugs was upheld where defendant did not show prejudice because he did not make an offer of proof regarding his testimony, and there was no evidence as to what his factual defense would have been had the State revealed to him those acts it intended to prove, under section (b) of this Rule, and those acts it would attempt to elicit, should he testify, under G.S. 8C-1, Rule 608(b). State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

Testimony of a defendant's alleged prior drug sale in order to show motive and intent to possess cocaine was inadmissible and admission of testimony was prejudicial error requiring that defendant be granted a new trial. State v. Williams, 156 N.C. App. 661, 577 S.E.2d 143 (2003).

When evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it also proves defendant guilty of another crime. State v. White, 101 N.C. App. 593, 401 S.E.2d 106, cert. denied and appeal dismissed, 329 N.C. 275, 407 S.E.2d 852 (1991).

Prior Violent Acts of Defendant. — Court did not err in allowing the State to put defendant's character into evidence by presenting specific instances of violent conduct by defendant, where defendant opened the door to the State's subsequent questions by portraying herself as a good mother. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Evidence of defendant's prior assault on another victim was admissible to show common scheme and intent where the prior assault and the current charges were similar in nature; in both instances the victims, similar in age, visited various residences or places in which they were unfamiliar and then were taken by automobile to isolated areas at night, defendant told the victims something was wrong with the automobile, asked the victims to get out of the automobile, and then proceeded to sexually assault them. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Evidence of an assault and attempted robbery involving the defendant that took place two days before murders was admissible where the closeness in both geography and time, the similar nature of the assault, and the connection between the bullets found at both scenes presented sufficient similarities for the evidence's admissibility. State v. Lytch, 142 N.C. App. 576, 544 S.E.2d 570, 2001 N.C. App. LEXIS 188 (2001), aff'd, 355 N.C. 270, 559 S.E.2d 547 (2002).

Evidence of murder defendant's prior assault on the victim, a few months before the act which caused her death, was properly admitted under G.S. 8C-1, Rule 404(b), because it tended to show malice, premeditation, deliberation, intent and ill will on defendant's part, and was thus relevant to an issue other than defendant's character. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Prior Violent Act By Victim. — Where a defendant seeks under subsection (b) to use evidence of a prior violent act by the victim to prove the defendant's state of mind at the time he killed the victim, the defendant must show that he was aware of the prior act and that his awareness somehow was related to the killing. State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997), cert. denied, 522 U.S. 1078, 118 S. Ct. 858, 139 L. Ed. 2d 757 (1998).

Pursuant to subsection (b) of this rule, the trial court properly excluded from the defendant's murder trial the testimony of a man whom the victim had shot earlier because that man admitted that he was the aggressor in the shooting incident, whereas, the defendant was claiming at his trial that the victim was the aggressor in the shooting; thus, the testimony of the prior act was not relevant to the victim's aggressiveness or propensity for violence. State v. Nance, 157 N.C. App. 434, 579 S.E.2d 456, 2003 N.C. App. LEXIS 750 (2003).

Prior Act of Witness. — The trial court did not err by excluding evidence of witness's prior knife threat on a police officer where the record revealed no unusual facts surrounding the knife threat that were also present in the circumstances surrounding the victim's death. State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514, 1999 N.C. LEXIS 1000 (1999), cert. denied, 529 U.S. 1102, 120 S. Ct. 1841, 146 L. Ed. 2d 783 (2000).

Evidence of previous threats is admissible in trials for first degree murder to prove premeditation and deliberation, and the remoteness in time of the threat goes to its weight, but does not make it inadmissible. State v. Cox, 344 N.C. 184, 472 S.E.2d 760 (1996).

Where an accident is alleged, evidence of similar acts is more probative than in cases in which an accident is not alleged. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

When an accused contends a victim's death was an accident rather than a homicide, evidence of similar acts may be offered to show that the act in dispute was not inadvertent, accidental, or involuntary. State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (1998).

The trial court properly allowed the introduction of defendant's prior driving-related crimes to establish that defendant acted with the malice necessary to convict him of second-degree murder; the defendant's convictions, dating back to 1982, were not too remote in time to be relevant. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001).

Trial court properly permitted evidence of defendant's having been convicted of a prior shooting similar to the one with which defendant was accused since the prior crimes evidence showed absence of accident (as defendant claimed), motive, and common plan or scheme for shooting the victim. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Prior bad acts possessed probative value as they served to rebut the defense of accident, one of the bases for admission of evidence under G.S. 8C-1, Rule 404(b), and were probative of whether or not a shooting was accidental. State v. Taylor, 154 N.C. App. 366, 572 S.E.2d 237, 2002 N.C. App. LEXIS 1463 (2002).

This rule includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence exclusively. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Chain-of-events evidence leading up to murder was properly admitted to establish defendant's intent and motive for the murders at issue, the evidence was more probative than prejudicial. State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Defendant's wife was properly permitted to testify as to defendant's threatening actions towards defendant's wife before and after the murder, burglary, and robbery of defendant's landlord because it pertained to the chain of events explaining the context, motive, and set-up of the crime. State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

When Evidence of Other Crimes May Be Admitted. — Subsection (b) of this rule allows the use of extrinsic conduct evidence so long as the evidence is relevant for some purpose other than to show that defendant has the propensity of the type of conduct for which he is being tried. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Subsection (b) of this rule permits evidence that a defendant committed similar offenses when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182, cert. denied, 320 N.C. 796, 361 S.E.2d 84 (1987).

Evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988); State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Even though evidence may tend to show other crimes, wrongs, or acts by the defendant, and his propensity to commit them, it is admissible under subsection (b) of this rule so long as it is also relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

Evidence of other crimes may distract the fact finders and confuse their consideration of the issues at trial. With these considerations bearing great weight, evidence of prior bad acts, admitted to show a common plan under this rule, must be sufficiently similar and not so remote in time before they can be admitted against a defendant. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Subsection (b) allows the admission of evidence of other crimes, wrongs or acts to show motive, opportunity, intent, plan or identity. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

Under subsection (b) of this rule there is a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Under subsection (b) of this rule, it is not the case that evidence of other crimes, wrongs or acts by a defendant falls under a general rule of exclusion subject to certain exceptions. It is clear now that, as a careful reading of subsection (b) clearly shows, evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Evidence is admissible under subsection (b) of this rule if it is substantial evidence tending to support a reasonable finding by the jury that the defendant committed a similar act or crime and its probative value is not limited solely to tending to establish the defendant's propensity to commit a crime such as the crime charged. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Evidence of other crimes committed by a defendant may be admissible under subsection (b) if it establishes the chain of circumstances or context of the charged crime; such evidence is admissible if the evidence of other crimes serves to enhance the natural development of the facts or is necessary to complete the story of the charged crime for the jury. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Because the unusual injuries inflicted on the victim were particularly similar to those inflicted by defendant upon the victim's mother and because the unusual acts which would have caused the victim's injuries were particularly similar those acts defendant committed against the victim's mother, the evidence of defendant's prior misconduct toward regarding his choking her, bruising her with his hands and fingers, and bending her arms behind her back was relevant and admissible to show identity under subsection (b). State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995), cert. denied, 517 U.S. 1123, 116 S. Ct. 1359, 134 L. Ed. 2d 526 (1996).

Evidence of defendant's prior traffic violations—driving 75 mph in a 45 mph zone, 76 mph in a 45 mph zone, 70 mph in a 35 mph zone, and 70 mph in a 55 mph zone—was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least 40 mph over the posted limit. State v. Rich, 351 N.C. 386, 527 S.E.2d 299, 2000 N.C. LEXIS 239 (2000).

Repressed memory evidence of a sexual offense previously committed by the defendant was admissible under G.S. 8C-1, Rule 404(b) to show a common plan or scheme. State v. Williamson, 146 N.C. App. 325, 553 S.E.2d 54, 2001 N.C. App. LEXIS 945 (2001).

As a victim's murder could potentially be seen as evidence of defendant's intent to kill or as part of defendant's preparation in or overall plan for his crime spree, the trial court's instruction to the jury on the permissible uses of this evidence conveyed the correct legal standard to the jury and did not constitute error. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Trial court did not abuse its discretion by ruling that the evidence regarding a second impersonation of a police officer and robbery incident was admissible in a defendant's trial for a similar incident because the prior incident occurred two days after the first, involved the assailants' entry into the victim's residences under the auspices of legitimate law enforcement activity, and each assailant displayed a bogus search warrant and firearms in an effort to gain entry into the respective residences. State v. Jacobs, 174 N.C. App. 1, 620 S.E.2d 204, 2005 N.C. App. LEXIS 2279 (2005), vacated in part, rev'd in part, on other grounds, 361 N.C. 565, 648 S.E.2d 841 (2007).

In defendant's prosecution for robbery with a dangerous weapon and first-degree kidnapping, evidence of defendant's prior armed robbery conviction and the facts underlying that conviction were properly admitted under G.S. 8C-1-404(b) and G.S. 8C-1-403 because, inter alia: (1) the evidence of defendant's involvement in another robbery tended to show defendant was one of three men involved in a similar pattern of robberies occurring over a short period of time; and (2) the robbery being prosecuted shared similarities with one of the other robberies defendant was convicted of because, in each of the robberies, a perpetrator brandished a gun at the victims at public establishments, demanded money, fired a shot, stole property of others, and fled the scene. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Because the admission of defendant's prior felony conviction established an element of the crime charged, it was not inadmissible propensity evidence. State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

Evidence of Husband's Prior Misconduct Toward His Wife. — Evidence that defendant had beaten his wife numerous times during their marriage was admissible to prove motive, opportunity, intent, preparation, or absence of mistake or accident with regard to the subsequent fatal attack upon her. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Trial court properly allowed evidence of defendant's prior conviction for assault and injury to personal property pursuant to this section to show intent, ill will and malice; ten-year time span affected weight of evidence, not admissibility. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Trial court did not err in admitting evidence of prior and expired domestic violence orders against the defendant and the acts which led to the issuance of those orders to show the defendant's intent to kill his estranged wife; the trial court properly limited the purpose in its instruction to showing the defendant's intent to kill the defendant's estranged wife. State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003), cert. denied, 357 N.C. 254, 583 S.E.2d 43 (2003).

North Carolina, to prove the disputed issue of defendant's intent to kill after defendant's forensic psychologist testified that defendant was unable to form the specific intent to kill, elicited testimony on defendant's prior misconduct toward his wife; thus, the psychologist's testimony regarding the statements of defendant's prior bad acts was properly admitted under G.S. 8C-1-404(b). State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Trial court neither erred nor abused its discretion by allowing witnesses to testify to the victim's statements concerning her and defendant's financial situation and defendant's alleged acts of domestic violence against the victim. Furthermore, the evidence of the victim's state of mind was relevant and related directly to the victim's relationship with defendant before she was killed and his motive, intent, plan, or absence of mistake or accident in the victim's death. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

But Hearsay Rules Apply. — If evidence of a defendant's misconduct toward his wife during the marriage is offered to prove motive, opportunity, intent, preparation, or absence of mistake or accident with regard to a subsequent fatal attack on her, and the evidence is used to prove the truth of the matter asserted, it must be admissible under the rules against hearsay. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

The list of permissible purposes for admission of "other crimes" evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Sufficiently Similar Crimes. — Evidence of robbery of a restaurant committed by defendants one week prior to the attempted robbery in case at issue was sufficiently similar to show intent. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Defendant's actions against former girlfriend and those against the victim were sufficiently similar that the ten-year span between the crimes charged and the prior bad acts did not render the evidence too remote to be probative on the issue of common plan or scheme. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Where evidence of defendant's prior assaults were sufficiently similar to evidence in case of first degree murder and intent to commit first degree murder, prior bad act evidence was properly admitted for the limited purposes of showing motive, purpose, intent, and opportunity to commit, and if there existed a scheme, system, or design or preparation for the offense as to the charge of first degree murder, and to establish intent to commit murder as to the charge of second degree burglary. State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996).

Evidence of a prior murder was admissible, where the murder the defendant had committed 17 years earlier for which he was convicted of second-degree murder was committed in the same manner, tending to show that the defendant had both knowledge and intent when he committed the new murder, because the evidence was relevant for reasons other than to show defendant's propensity to commit crime. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

Other crimes evidence was admissible to show the defendant's modus operandi in carrying out another robbery, where both incidents began with a knock at the door at about midnight, two perpetrators were involved, the victims in both cases were told to give up their "stash," and the robberies were committed within ten days of each other. State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

In a rape prosecution, evidence that defendant had been convicted of a rape that occurred six years earlier was properly admitted; the modus operandi in the two rapes was similar and the first rape was not too remote in time as defendant had been paroled after his conviction for the first rape only a few months before the second rape. State v. Barkley, 144 N.C. App. 514, 551 S.E.2d 131, 2001 N.C. App. LEXIS 531 (2001).

Defendant's prior offenses were admissible against him because the ages of the victims, the manner in which he pursued them, and his sexual conduct were similar enough to the current offense to be probative of his intent and common plan or scheme, and as they were continuously performed over 10 years, they were not too remote in time. State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002).

Joinder of a common law robbery charge with a first degree murder charge was upheld on appeal, despite the two offenses being separated in time by several days and involving different victims, because the offenses were based on a series of acts or transactions that commenced with the robbery of a cell phone from the murder victim's girlfriend and then the subsequent murder of the victim after an argument related to the robbery; the robbery events constituted a critical point in the ongoing dispute between the murder victim and defendant, which resulted in the argument and eventual shooting death of the victim, and therefore, a transactional connection existed between the two offenses. State v. Simmons, 167 N.C. App. 512, 606 S.E.2d 133, 2004 N.C. App. LEXIS 2333 (2004).

Evidence of a prior alleged assault on another victim was admissible pursuant to G.S. 8C-1, N.C. R. Evid. 404(b) because the similarities between the events were sufficient to indicate a common plan or design on the part of defendant. State v. Petro, 167 N.C. App. 749, 606 S.E.2d 425, 2005 N.C. App. LEXIS 16 (2005).

Evidence that defendant had an outstanding warrant was admissible under G.S. 8C-1, N.C. R. Evid. 404(b), as a possible motive for his decision to flee from officers after drugs were discovered in a car where he was riding as a passenger; also, evidence of the circumstances surrounding defendant's arrest in another state, where defendant was passenger in a car and attempted to flee in that car after drugs were discovered, was properly admitted under that same rule as the circumstances were sufficiently similar to show defendant's propensity or modus operandi to flee after being caught with drugs. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

In a rape and kidnapping case, evidence of other sexual attacks or attempted sexual attacks were properly admitted under G.S. 8C-1, Rule 404(b) because they showed modus operandi; the crimes were similar in that defendant lured women that he had known for a long period of time into secluded places with the promise of drugs and alcohol before choking and raping them. State v. Moore, 173 N.C. App. 494, 620 S.E.2d 1, 2005 N.C. App. LEXIS 2103 (2005).

The admissibility of evidence of a prior crime must be closely scrutinized since this type of evidence may put before the jury crimes or bad acts allegedly committed by the defendant for which he has neither been indicted nor convicted. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

The use of other crimes evidence under G.S. 8C-1, Rule 404(b) is guided by two constraints: similarity and temporal proximity. State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198, 2001 N.C. App. LEXIS 430 (2001).

Certified Copies of Prior Convictions Inadmissible. — In a first-degree murder trial, certified copies of the victim's prior convictions were not admissible under G.S. 8C-1, N.C. R. Evid. 404(b). State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

Insufficiently Similar Crimes. — The admission of defendant's prior conviction was in error because any similarity between the prior robbery for which defendant was convicted and the subsequent robbery was so slight as to be virtually non-existent. State v. Willis, 136 N.C. App. 820, 526 S.E.2d 191, 2000 N.C. App. LEXIS 148 (2000).

Court did not discern sufficient similarities in the circumstances surrounding a victim's death from knife wounds inflicted by defendant during a fight outside of a bar and those surrounding defendant's violent acts allegedly directed towards his former girlfriend to render evidence regarding the latter admissible for any purpose sanctioned by Rule 404(b). State v. Dennison, 163 N.C. App. 375, 594 S.E.2d 82, 2004 N.C. App. LEXIS 398 (2004).

Defendant's prior conviction for selling cocaine was inadmissible under G.S. 8C-1-404(b) in defendant's prosecution for possession with intent to sell or deliver cocaine; the weight of cocaine rocks and the unpackaged state of the rocks did not make the prior conviction and the current charge similar, the events were eight years apart, and the admission was prejudicial under G.S. 15A-1443(a) when the inference afforded by the amount of drugs in defendant's possession did not outweigh the prejudice caused by the erroneous admission of his prior conviction. State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105, 2007 N.C. LEXIS 596 (2007).

When a specific mental intent or state of mind is an essential element of the charged offense, evidence of previous acts of the same kind is admissible to prove the defendant's intent or state of mind. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Evidence of other misconduct is admissible under the identity exception upon a showing of unusual facts present in both acts, or particularly similar acts which tend to show that the same person committed both. State v. Williams, 82 N.C. App. 281, 346 S.E.2d 315 (1986).

Subsection (b) of this rule must be applied to allow a defendant to introduce evidence of very similar crimes of another person, when such evidence tends to show that the other person committed the crime for which the defendant is on trial. State v. Cotton, 318 N.C. 663, 351 S.E.2d 277 (1987).

Determination by Trial Court Before Extrinsic Conduct Evidence Is Admitted. — Before extrinsic conduct evidence is admissible pursuant to subsection (b) of this rule, the trial court is required, first, to determine whether conduct is being offered pursuant to subsection (b); and second, to make a determination of the evidence's relevancy. If the trial judge makes the initial determination that the evidence is of the type and is offered for a proper purpose under subsection (b), the record should so reflect. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550 (1988).

Probative Value Must Be Weighed Against Potential Prejudice. — If evidence of other acts is offered to prove something other than character, the trial court must determine whether the risk of undue prejudice outweighs the probative value of the evidence, in view of the availability of the other means of proof. State v. Bartow, 77 N.C. App. 103, 334 S.E.2d 480 (1985).

Although admissible under subsection (b) of this rule, the probative value of evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under G.S. 8C-1, Rule 403. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 99 (1990).

While this rule does not offer a mechanical solution, once it is established that evidence is admissible under subsection (b), a determination must be made as to whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under G.S. 8C-1, Rule 403. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

The test for determining whether evidence of crimes, wrongs or acts other than those specifically at issue in the trial is admissible is whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the balancing test of G.S. 8C-1, Rule 403. State v. Shultz, 88

N.C. App. 197, 362 S.E.2d 853 (1987).

The ultimate test for determining whether evidence of other offenses is admissible is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of G.S. 8C-1, Rule 403. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988).

The admission into evidence of a crack pipe was proper to show motive in a robbery, especially since the defendant failed to argue that its probative value outweighed its prejudice to the defendant. State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

Defendant was not prejudiced by the trial court admitting into evidence testimony as to defendant's prior acts of being a passenger in a car where an officer smelled marijuana and being found asleep in a car with a bag of marijuana and a scale in plain view to support the case against defendant and his co-defendants for conspiring to possess, manufacture, and distribute marijuana, as the evidence showed that defendant had a propensity to commit the crime. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to impeach the defendant or to aggravate his sentence. State v. Smith, 96 N.C. App. 235, 385 S.E.2d 349 (1989), cert. denied, 326 N.C. 267, 389 S.E.2d 119 (1990).

Conviction of other crimes is not a prerequisite to their admissibility under this rule. Conduct need not be criminal or unlawful if it sheds light on defendant's character and is relevant to something other than criminal propensity. State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24, cert. denied, 321 N.C. 299, 362 S.E.2d 786 (1987).

Even if evidence is admissible under subsection (b) of this rule, the trial court must still determine whether its probative value outweighs the danger of undue prejudice to the defendant. State v. Frazier, 319 N.C. 388, 354 S.E.2d 475 (1987).

Prior Conviction And Prior Pending Impaired Driving Charge. — The trial court did not err in admitting evidence of the two prior incidents of impaired driving where the 1991 conviction was identical with the one at bar and the 1997 incident was indicative of the defendant's state of mind although the defendant was appealing that decision and awaited a trial de novo, especially where the court's instruction clearly communicated that the defendant had not been convicted and that the evidence was admitted for the limited purpose of showing state of mind or intent. State v. McAllister, 530 S.E.2d 859, 2000 N.C. App. LEXIS 600 (2000).

The doctrine of collateral estoppel, as encompassed by the U.S. Const., Amend. V guarantee against double jeopardy, does not prohibit the introduction of evidence, in a subsequent trial for a different crime, of a crime of which a defendant has previously been acquitted. State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990).

Prior Acts Must Be Sufficiently Similar and Not So Remote in Time as to Be Prejudicial. — To be admissible, evidence of prior sexual abuse must relate to incidents sufficiently similar and not so remote in time that they are more probative than prejudicial under balancing test of G.S. 8C-1, Rule 403. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

Because there were factual dissimilarities between two robberies which occurred one month before a third robbery which defendant was charged with committing, trial court should not have allowed the victim of the first two robberies to testify about them, and the state supreme court ordered a new trial after defendant was convicted of first-degree murder and sentenced to death. State v. Al-Bayyinah, 356 N.C. 150, 567 S.E.2d 120, 2002 N.C. LEXIS 678 (2002).

Trial court, in a suit between a sublessee and the landlords, did not abuse its discretion in excluding evidence of the revocation of the real estate license of one of the landlords for acts similar to those alleged by the sublessee as the license was revoked 21 years earlier. Di Frega v. Pugliese, 164 N.C. App. 499, 596 S.E.2d 456, 2004 N.C. App. LEXIS 981 (2004).

Remoteness of Other Offense. — While the remoteness of another offense is relevant to its admissibility to show modus operandi or a common scheme or plan, remoteness usually goes to the weight of the evidence, not its admissibility. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Generally, remoteness in time goes to the weight of the evidence and not to its admissibility. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

Remoteness in time is most important where evidence of another crime is used to show that both crimes arose out of a common scheme or plan; remoteness in time is less important when the other crime is admitted because its modus operandi is so strikingly similar to the modus operandi of the crime being tried as to permit a reasonable inference that the same person committed both crimes. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd,

322 N.C. 467, 368 S.E.2d 386 (1988).

A process that allows for the passage of time to be weighed in a court's initial decision to admit evidence of other crimes is the better reasoned approach and one that ensures that an accused is tried only for the acts for which he has been indicted. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Attenuated by time, the pertinence of evidence of prior offenses attaches to the defendant's character rather than to the offense for which he is on trial; in other words, remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Remoteness in time between evidence of other crimes, wrongs or acts and the charged crime is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident, since remoteness in time generally affects only the weight to be given such evidence, not its admissibility. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Temporal remoteness of defendant's prior sexual acts in the presence of children, properly admitted under G.S. 8C-1, Rule 404(b), went to their weight, rather than admissibility. State v. Beckham, 145 N.C. App. 119, 550 S.E.2d 231, 2001 N.C. App. LEXIS 559 (2001).

Testimony Not Too Remote to Be Admissible. — Where defendant was found guilty of taking indecent liberties with a minor, defendant assigned error to the admission of testimony of two witnesses that they were touched by defendant in ways similar to victim in case, and defendant contended evidence of prior acts was inadmissible under G.S. 8C-1, Rule 404(b), because prior acts were both remote in time and dissimilar to the act charged in the indictment, testimony of witnesses was admissible under G.S. 8C-1, Rule 404(b) since lapse of nearly five years between events involving witnesses and those involving victims did not diminish similarities between acts. State v. Roberson, 93 N.C. App. 83, 376 S.E.2d 486, cert. denied, 324 N.C. 435, 379 S.E.2d 247 (1989).

Three instances of similar sexual conduct against same victim within a 28-month span did not make evidence impermissibly remote. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

Evidence that a murder defendant gave the victim defaced photographs of the victim's wife more than four months before the shooting was not too remote to be relevant. The passage of four months did not render this evidence irrelevant. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

Remoteness did not bar admission of the defendant's conviction of second-degree murder that occurred 17 years earlier, where the evidence showed that the prior murder was committed in the same manner as the present murder, because the lapse of time went to the evidence's weight rather than its admissibility. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

Defendant's prior sexual assaults were not too remote in time to prevent their admission to show a similar modus operandi to a new sexual offense, where there was a six-year period between the former offense and present offense, excluding time spent in prison. State v. Blackwell, 133 N.C. App. 31, 514 S.E.2d 116, 1999 N.C. App. LEXIS 341 (1999), cert. denied, 350 N.C. 595, 537 S.E.2d 483 (1999).

Evidence of defendant's prior alleged sexual acts committed on victim when she was five years old, some seven years before the first charged offense, and of sexual acts committed on victim when she was ten years old, some two years before the first charged offense, was admissible pursuant to this rule to show a common plan or ongoing scheme by defendant of sexually abusing her. State v. Thompson, 139 N.C. App. 299, 533 S.E.2d 834, 2000 N.C. App. LEXIS 895 (2000).

Seventeen Year Prior Assault on First Wife, Not Too Remote. — The time between defendant's assault of his first wife and of his second wife was not so remote as to make his first wife's testimony inadmissible where the defendant spent at least half of the seventeen years in prison serving time for the assault; where the defendant attacked both women during a period of marital discord; and where the defendant never denied stabbing his first wife or shooting his second wife to prevent either from leaving him. State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000).

Admission of 27-Year-Old Alleged Sexual Offense Was Error. — Twenty-seven year lapse between an earlier alleged instance of sexual abuse and the current alleged instance merited against finding that defendant was engaged in an ongoing plan or scheme of sexual abuse, and thus, admission of evidence of the 27-year-old alleged incident was error; since the State presented no evidence that defendant's possession of pornographic magazines and women's underwear played any part in the alleged offenses, the evidence was not relevant to prove the charges against him, was merely impermissible character evidence, and admission of the evidence was error but not plain error. State v. Delsanto, 172 N.C. App. 42, 615 S.E.2d 870, 2005 N.C. App. LEXIS 1587 (2005).

Prior Bad Acts Showing Intent, Plan or Design. — Evidence that an arson defendant had previously solicited or attempted to solicit youths to commit other crimes was admissible under G.S. 8C-1, Rule 404(b) for purpose of showing defendant's intent, plan, design, or mode of operation and that its probative value outweighed its prejudicial effect. State v. Richardson, 100 N.C. App. 240, 395 S.E.2d 143 (1990).

Testimony by witnesses that they had contracted with defendant to move their houses, which defendant never did yet retained their money, was admissible to show the intent or plan of defendant. State v. Barfield, 127 N.C. App. 399, 489 S.E.2d 905 (1997).

The trial court properly allowed the plaintiff in a sexual harassment case to present evidence concerning alleged prior misconduct, where the plaintiff alleged that the defendant cut her wages and forced her to resign when she refused his sexual advances, and she was allowed to testify as to a statement allegedly made by defendant concerning a previous sexual relationship he had with a prior employee, in that this statement could suggest an intent to prey on female subordinates. Russell v. Buchanan, 129 N.C. App. 519, 500 S.E.2d 728 (1998), cert. denied, 348 N.C. 501, 510 S.E.2d 655 (1998).

Testimony of prior crimes or wrongs was properly admitted under this rule in a prosecution for conspiracy to traffic in cocaine, where testimony by a witness who had been a minor at the time in question that he had sold cocaine for the defendant and had been paid by the defendant in drugs and currency was relevant to show the defendant's intent to plan and commit a conspiracy. State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998), aff'd, 350 N.C. 586, 516 S.E.2d 382 (1999).

Past incidents of defendant's failure to provide proper care for the victim, her daughter who had cerebral palsy and died from malnutrition, were relevant and admissible to show intent because the trial court properly balanced its probative value against any unduly prejudicial effect by giving a limiting instruction and granted defendant's other motions in limine to suppress evidence of the pathologist's conclusion that the victim died from the withholding of food, of defendant's lifestyle, of the injury to the victim's brother's eye, and of two investigations by the DSS into unsubstantiated allegations of neglect of other children. State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451, 2000 N.C. LEXIS 241 (2000), cert. denied, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000).

In defendant's trial in state court for offenses committed during a two-week crime spree, the trial court did not err in permitting testimony of a bank clerk who witnessed defendant's robbery of a bank during the crime spree, even though defendant was charged for this robbery in federal court; the evidence of the bank robbery was not introduced to show defendant's propensity to commit the state court offenses, but to show that his actions were part of a scheme or plan to commit such offenses during the two-week period. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

In defendant's trial on charges of maintaining a vehicle to keep and sell a controlled substance, trafficking by possession of oxycodone, trafficking by sale of oxycodone, and trafficking by transportation of oxycodone, the trial court did not abuse its discretion by allowing an informant and other witnesses to testify that they met with defendant at various locations over a five-week period to buy oxycodone because, although the evidence described drug transactions that were not charged, it showed knowledge, plan, scheme, design, opportunity, and absence of mistake or entrapment, and was not so remote that its prejudicial impact outweighed its probative value. State v. McCracken, 157 N.C. App. 524, 579 S.E.2d 492 (2003).

Evidence of prior robberies was admissible to show a common scheme or purpose because each of the prior robberies was sufficiently similar to the subject robbery and occurred within weeks of the subject robbery, and the State proffered testimony that the robberies were all part of a common scheme or plan towards a drug transaction with a Connecticut gang. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

Other crimes evidence was properly admitted under G.S. 8C-1-404(b), as defendant's statement that if someone did not call him back he was going to "burn you all up," was admissible to prove a number of the listed purposes, namely defendant's motive, intent, plan, common scheme, as well as defendant's identity as the arsonist; the trial court guarded against the possibility of prejudice under G.S. 8C-1-403 by instructing the jury to consider the evidence only for the limited purposes of establishing identity, intent, motive, absence of mistake, and common plan. State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Confidential police informant's testimony as to prior, uncharged drug transactions with defendant was admitted for a proper purpose under G.S. 8C-1, N.C. R. Evid. 404(b), and the trial court did not act arbitrarily in allowing the testimony under G.S. 8C-1, N.C. R. Evid. 403 because the testimony was offered to show intent, knowledge, and common plan or scheme as well as to explain the relationship between the informant and defendant; additionally, an appropriate limiting instruction to that effect was given to the jury both at the time the informant testified and in the jury instructions. State v. Houston, 169 N.C. App. 367, 610 S.E.2d 777, 2005 N.C. App. LEXIS 606 (2005).

Evidence of defendant's prior sexual relations with his older half-daughter from about nine years before he began to have sexual relations with the victim, his younger daughter, was properly admitted under G.S. 8C-1-404(b) to show a common scheme or plan. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

DNA evidence showing that defendant was the father of the victim's child, and thus must have had sexual intercourse with her, was admissible to show a common scheme or plan under G.S. 8C-1-404(b). State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Prior Convictions Showing Intent or Knowledge. — Trial court did not abuse its discretion in admitting evidence of previously dismissed heroin charges against defendant for purpose of showing guilty knowledge where the trial court gave a limiting instruction to the jury on consideration of the evidence. State v. Woolridge, 147 N.C. App. 685, 557 S.E.2d 158, 2001 N.C. App. LEXIS 1249 (2001), cert. granted, — N.C. —, 575 S.E.2d 761 (2002).

In prosecution for possession of cocaine, possession of cocaine with intent to sell and deliver, and sale and delivery of cocaine, evidence of defendant's prior convictions were properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, because (1) all occurred at the same address, (2) defendant was present at all offenses, (3) all involved cocaine, and (4) the prior convictions occurred within a year of the current charge. State v. Wilkerson, 148 N.C. App. 310, 559 S.E.2d 5, 2002 N.C. App. LEXIS 24 (2002).

Evidence pertaining to defendant's prior convictions for possession with intent to manufacture, sell, and deliver cocaine was properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, and the trial court properly gave a limiting instruction to the jury; furthermore, while testimony from the deputy clerk was inadmissible under G.S. 8C-1, Rule 404(b), the error was harmless when defendant testified and was properly cross-examined about the convictions. State v. Renfro, 174 N.C. App. 402, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005), aff'd, — N.C. —, 627 S.E.2d 463 (2006).

Prior Bad Act Showing Intent, Malice, Premeditation, and Deliberation. — Where defendant was convicted of murdering his wife, testimony regarding defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to his wife were admissible to prove the issues in dispute, lack of intent, malice, premeditation, and deliberation. State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996).

The defendant's prior alcohol-related conviction pursuant to N.C. Gen. Stat. G.S. 20-138.3 was relevant, where the impaired defendant caused a death and was charged with second-degree murder, and admissible for the purpose of establishing malice even though the prior offense imposed strict liability based upon defendant's age without regard to the quantity consumed. State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Evidence of defendant's prior assault on the victim tended to establish not only malice, intent, premeditation and deliberation, all elements of first-degree murder, but more importantly, it tended to establish ill-will against the victim and lack of accident; where defendant contended that he shot her by mistake, this evidence was relevant to an issue other than defendant's character. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Evidence of felonious impaired driving could be used to demonstrate defendant had the requisite state of malice required for second-degree murder. State v. Blackwell, 142 N.C. App. 388, 542 S.E.2d 675, 2001 N.C. App. LEXIS 93 (2001).

Defendant's prior convictions for driving while impaired were admissible into evidence as the State offered the convictions into evidence to establish the malice element in defendant's trial for second-degree murder. State v. Smith, 157 N.C. App. 493, 581 S.E.2d 448, 2003 N.C. App. LEXIS 748 (2003).

Evidence that first-degree murder defendant had robbed drug dealers and hit a drug dealer during a robbery was relevant to refute his contention that he shot a police officer without premeditation and deliberation, while evidence about his illegal acquisition of weapons and his curfew violation was relevant as part of the chain of circumstances leading up to the shooting. State v. Grant, 178 N.C. App. 565, 632 S.E.2d 258, 2006 N.C. App. LEXIS 1637 (2006), cert. denied, appeal dismissed, 361 N.C. 223, 642 S.E.2d 712 (2007).

Trial court did not abuse its discretion by permitting testimony of evidence of defendant's financial dealings with other people, depletion of the victim's bank accounts, violent acts toward the victim, and his adulterous relationships because the evidence tended to show defendant's motive, intent, preparation, plan, absence of mistake, and knowledge under N.C. R. Evid. 404(b). Moreover, the relevancy of the evidence outweighed its danger of unfair prejudice under N.C. R. Evid. 403. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

Evidence of Pending DWI Admissible to Show Malice. — The circumstances attendant to the pending DWI charge—defendant was speeding on the wrong side of the road and ran another motorist off the road while impaired—demonstrated that defendant was aware that his conduct leading up to the collision at issue was reckless and inherently dangerous to human life; thus, such evidence tended to show malice on the part of defendant and was properly admitted under this rule. State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000).

Evidence of Prior DWI Admissible to Show Malice. — Evidence as to defendant's prior convictions for driving while impaired and driving while license revoked was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), as the evidence was relevant to show malice to support defendant's charge for second degree murder following an auto accident in which defendant was driving while impaired. State v. Edwards, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

Intent is a mental attitude seldom provable by direct evidence. Past incidents of mistreatment are admissible to show intent in a child abuse case. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

Passage of Time May Prove Existence of Plan. — Where defendant was convicted of first-degree rape of his daughter, prior acts were not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually; when similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan. State v. Shamsid-Deen, 324 N.C. 437, 379 S.E.2d 842 (1989).

Prior Acts Showing Motive or Conduct. — Evidence that a murder defendant had engaged in homosexual activities with a witness and with two murder victims was relevant to show motive and pattern of conduct. State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990), aff'd, 329 N.C. 108, 405 S.E.2d 158 (1991).

Trial court's admission of the testimony of kidnapping victim regarding a prior incident during which defendant struck the murder victim in the back of the head with a pole and threatened to cut her throat with a butcher knife was upheld under section (b) of this Rule and under G.S. 8C-1, Rule 403. State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993).

Evidence about drug sales by defendant and his friends on the night of the murder was relevant to show the motive for the shooting and to put the crime in context. Thus, the testimony was admissible under section (b) and the trial court did not err in admitting it. State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993).

Testimony of defendant's grandfather concerning defendant's loss of luggage, offered by his brother co-defendant, was relevant as well as admissible, pursuant to this section, to prove his motive for not wanting to return to Richmond by bus (he would ostensibly have to stop over in the town where the police seized his luggage for containing marijuana) and, consequently, his ultimate motive for robbery and car theft. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Admission of evidence of defendant's prior arrest on the evening before the alleged murder, where defendant was found with drugs and cash, was not erroneous because the evidence was admissible under the theory that it went to the motive for the later drug-related murder. State v. Davis, 168 N.C. App. 321, 608 S.E.2d 74, 2005 N.C. App. LEXIS 256 (2005), cert. denied, 359 N.C. 412, 612 S.E.2d 324 (2005).

Evidence that defendant had an outstanding warrant was admissible under G.S. 8C-1, N.C. R. Evid. 404(b), as a possible motive for his decision to flee from officers after drugs were discovered in a car where he was riding as a passenger; also, evidence of the circumstances surrounding defendant's arrest in another state, where defendant was passenger in a car and attempted to flee in that car after drugs were discovered, was properly admitted under that same rule as the circumstances were sufficiently similar to show defendant's propensity or modus operandi to flee after being caught with drugs. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Testimony that the victim of an arson refused to agree to allow defendant to store stolen goods in her home was relevant under G.S. 8C-1, N.C. R. Evid. 401 to show defendant's motive to burn the premises. G.S. 8C-1, N.C. R. Evid. 404(b) did not require exclusion of the victim's testimony as evidence that was probative only of defendant's propensity to commit crimes. State v. Chappelle, — N.C. App. —, 667 S.E.2d 327, 2008 N.C. App. LEXIS 1809 (2008), appeal dismissed, review denied, 362 N.C. 684, 670 S.E.2d 568 (2008).

Evidence of defendant's offenses subsequent to burglary, namely, shoplifting, breaking, entering and larceny, and car theft, were admissible to show intent and motive (defendant wanted money for drugs) and was not unfairly prejudicial where the judge gave a limiting instruction. State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000).

Identity Must Be at Issue. — Before identity evidence is admissible under Rule 404(b), there must be a determination of whether the identity of the perpetrator is at issue. State v. White, 101 N.C. App. 593, 401 S.E.2d 106, cert. denied and appeal dismissed, 329 N.C. 275, 407 S.E.2d 852 (1991).

Where the prior crime was not being offered to show common plan or scheme, but to show identity, the passage of time affected the weight of the evidence rather than its admissibility. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Application of the identity exception of subsection (b) of this rule requires that some unusual facts or particularly similar acts be present in both crimes indicating that the same person committed both crimes. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

Evidence of Other Murder — Showing Opportunity and Identity. — Trial court correctly allowed evidence of one murder to show opportunity and identity in support of another murder. State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999), cert. denied, 528 U.S. 1124, 120 S. Ct. 951, 145 L. Ed. 2d 826 (2000).

Same — Showing Common Scheme. — Where State used evidence of another victim's death to show that defendant had a common scheme to hurt his former girlfriend for refusing to continue their relationship, and the two killings shared significant similarities, and the court conducted a lengthy pretrial hearing which supported its decision to admit the evidence, appellate court found no abuse of discretion under this rule. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999), cert. dismissed, 352 N.C. 669, 535 S.E.2d 33 (2000).

Other acts evidence was admissible as the testimony by defendant's natural daughter of his sexual assaults against her showed a "common plan or scheme" by defendant of abusing young female family members. State v. Starner, 152 N.C. App. 150, 566 S.E.2d 814, 2002 N.C. App. LEXIS 899 (2002), cert. denied, 356 N.C. 311, 571 S.E.2d 209 (2002).

Where evidence regarding a prior murder had been admitted in petitioner's murder trial to show the existence of a similar modus operandi, intent, and design, there was no reasonable probability that if documents generated in the early phases of the prior murder investigation (which led to the initial identification of other potential suspects) had been produced, there would have been a different G.S. 8C-1, N.C. R. Evid. 404 ruling; given the similarities in the murders, the evidence that the same person murdered both victims, and that petitioner was the murderer, was overwhelming. Moseley v. Branker, 545 F.3d 265, 2008 U.S. App. LEXIS 22689 (4th Cir. 2008).

Modus Operandi Need Not Be Unique or Bizarre. — Under subsection (b) of this rule, for similar crimes to be admitted as evidence of identity it is not necessary that the modus operandi of the crime which the state seeks to have admitted rise to the level of the unique or bizarre. Rather, the similarities must support the reasonable inference that the same person committed both the earlier and the later crimes. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Prior Assault. — The evidence of the defendant's prior assault on murder victim tended to establish malice, intent, premeditation and deliberation and the defendant's ill will toward the victim; thus, the evidence was relevant to an issue other than defendant's character. State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996).

The State was allowed to ask the defendant questions about the names of other women he had been convicted of shooting, his relationship with those other women, and type of weapons he had used, to show that he had a history of shooting women with whom he had previously had relationships. State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (1997).

In defendant's conviction for rape and breaking and entering, the trial court properly admitted evidence of past crimes under G.S. 8C-1, N.C. R. Evid. 404(b), as the evidence of defendant's physical abuse towards the victim was not too remote in time to be relevant, and the evidence of defendant's prior abuse of the victim was relevant to prove defendant's pattern of physical intimidation of the victim. State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898, 2002 N.C. App. LEXIS 1266 (2002), cert. denied, 357 N.C. 65, — S.E.2d — (2003), cert. dismissed, — N.C. —, 602 S.E.2d 679 (2004).

In defendant's trial on a charge of murder in the first degree, the trial court properly admitted testimony which showed that defendant assaulted the victim, his girlfriend, on prior occasions and that defendant's girlfriend had asked defendant to leave her residence on the day he shot her, because the testimony was relevant to defendant's claim that he discharged his gun accidentally and the prejudicial effect of the evidence did not outweigh its probative value. State v. Latham, 157 N.C. App. 480, 579 S.E.2d 443, 2003 N.C. App. LEXIS 743 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Although the trial court properly admitted a police officer's testimony about the underlying facts of defendant's prior 1995 conviction for assault inflicting serious injury, the trial court committed reversible error by admitting the state's exhibit of a copy of defendant's criminal conviction for that assault because admitting the bare fact of a non-testifying defendant's prior conviction after testimony had been elicited to establish the factual basis underlying that conviction violated G.S. 8C-1, N.C. R. Evid. 404(b), and 403; the bare fact of the prior conviction was inherently prejudicial. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Testimony concerning the defendant's discipline of the victim, the manner in which she spoke to him, along with testimony describing her as a "pushy person," was properly admitted where the defendant was charged with felony child abuse and her treatment of the victim was at issue and, thus, relevant. State v. Clark, 138 N.C. App. 392, 531 S.E.2d 482, 2000 N.C. App. LEXIS 635 (2000).

Absence of Mistake. — Where defendant was on trial for murdering his 2 1/2 year old niece, evidence that 6 months prior defendant became angry with girlfriend's 4 year old son and shook him and threw him into a chair which then slid and hit the wall was relevant to establish defendant's motive and intent in shaking niece and to show absence of mistake on defendant's part. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Identity. — Evidence showing that defendant beat his girlfriend in the head with the same pistol used to murder the victim was admissible under subsection (b) for the purpose of identity. State v. Robinson, 346 N.C. 586, 488 S.E.2d 174, 1997 N.C. LEXIS 478 (1997), cert. denied, — N.C. —, 502 S.E.2d 611 (1998).

The testimony of a narcotics officer connecting the defendant to an address where clothing worn by the alleged murderer was found did not impermissibly introduce evidence of "crimes, wrongs, or acts" in violation of this section nor was the possibility of the jury's drawing a conclusion from the occupation of the witness as to the defendant's activities prejudicial. State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376, 2000 N.C. App. LEXIS 1278 (2000).

In a first-degree murder, attempted robbery with a dangerous weapon (a knife), and assault with a deadly weapon with intent to kill inflicting serious injury case, the evidence of defendant's prior arrest for carrying a knife was properly admitted at trial pursuant to N.C. R. Evid. 404(b) for the purpose of identifying defendant as the perpetrator, as it showed that defendant was in the habit of carrying a knife, while the other evidence tended to show that his accomplice was not. State v. Sutton, 169 N.C. App. 90, 609 S.E.2d 270, 2005 N.C. App. LEXIS 534 (2005).

Prior Sex Acts by Defendant Showing Intent, Motive or Plan. — Evidence of prior sex acts may have some relevance to the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. Such evidence is deemed admissible and not violative of the general rule prohibiting character evidence. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied, 329 N.C. 273, 407 S.E.2d 846 (1991).

Trial court did not err in permitting child sex offender's prior child victims to testify to show that defendant had a motive for the commission of the crime charged, that defendant had the necessary intent, and there existed in the mind of defendant a plan, scheme, system or design involved in the crime charged in the case. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002).

Where defendant was accused of meeting teenage girls in a skating rink, inviting them to his home for parties, providing drugs and alcohol to these girls, and photographing them in various stages of undress, evidence that defendant had been convicted in another state of similar crimes 10 to 15 years earlier was admissible as evidence of defendant's motive and intent, and of a common scheme or plan. State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321, 2002 N.C. App. LEXIS 215 (2002).

At defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child, trial court properly allowed victim's sister to testify that the defendant had touched her vagina and breasts and had masturbated in front of her; this testimony showed a pattern of opportunity as well as a common plan or scheme. State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Where defendant had sexually explicit conversations with a 15-year-old former karate student in violation of G.S. 14-202.1, the trial court's admission of evidence of defendant's subsequent conduct with another student where there were certain similarities was not prejudicial under the circumstances. State v. Every, 157 N.C. App. 200, 578 S.E.2d 642, 2003 N.C. App. LEXIS 538 (2003).

Evidence of prior sex acts may have some relevance on the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988).

Evidence that perpetrators of sexual offenses have committed other sexual acts with their victims may be relevant and admissible. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

North Carolina is quite liberal in admitting evidence of other sex offenses when those offenses involve the same victim as the victim in the crime for which the defendant is on trial.

State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

When the State seeks to introduce evidence of prior, similar sex offenses by a defendant, the Supreme Court of North Carolina has been markedly liberal in admitting such evidence for the purposes cited in subsection (b) of this rule. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

North Carolina liberally admits evidence of prior similar sex offenses; this is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged. State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

The trial court did not err in admitting evidence that defendant had previously sexually assaulted another daughter pursuant to Rule 403 and subsection (b) of this rule. State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (1994).

Where five females testified that defendant looked after them when they were young and began his misconduct by touching them and fondling them, began to touch them more invasively as they grew older, had sexual intercourse with all but one of them and convinced each of them to remain quiet about the abuse by threatening to send them away or by threatening to stop taking care of their financial needs, all of the witnesses testified to similar forms of abuse which demonstrated a distinct pattern over a protracted period. State v. Frazier, 121 N.C. App. 1, 464 S.E.2d 490 (1995), aff'd, 344 N.C. 611, 476 S.E.2d 297 (1996).

While testimony regarding previous rape may have been irrelevant, its admission was not prejudicial where defendant's admission of intercourse on the grounds of consent was effectively a confession. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Where testimony of defendant's two daughters gave ample evidence of the types of sexual abuse they suffered to conclude that the same person committed the offenses, admission of prior bad acts acts evidence was held appropriate under G.S. 8C-1, Rule 404(b). State v. Patterson, 150 N.C. App. 383, 563 S.E.2d 88, 2002 N.C. App. LEXIS 491 (2002).

Rule allows admission of conduct evidence so long as it is offered for a purpose other than to show that defendant had the propensity to engage in the charged conduct; in a case involving a charge that defendant performed a sex act on a minor girl, the trial court did not err in allowing the girl's mother to testify that defendant had performed a sex act on the mother nearly 20 years before. State v. Love, 152 N.C. App. 608, 568 S.E.2d 320, 2002 N.C. App. LEXIS 971 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 66 (2003).

Admission of victims' prior consistent statements was permitted at defendant's trial for statutory rape, because the testimony was admitted for proper purposes, namely to show opportunity, a common scheme, and the assailant's identity; the victims' testimony shared similarities and temporal proximity. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Trial court properly admitted testimony of defendant's prior sexual assaults where (1) the prior assaults were admitted for purposes other than to show defendant had a propensity to commit the crimes charged; (2) the trial court instructed the jury to limit its consideration of the prior assaults to those proper purposes; (3) the trial court found that the assaults bore several similarities; (4) there were sufficient similarities to support a reasonable inference that the defendant committed all three assaults; and (5) the prior assaults were not so temporally remote as to diminish their probative value. State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001), review denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

Joinder of four sex offense charges against defendant was error, but not prejudicial error, where the record revealed that the crimes charged against defendant occurred over a period of 12 years, from 1984 to 1996, and involved three different victims (one being defendant's daughter, one his niece and the third unrelated), but, although all of the charges alleged sexual crimes against children, the evidence did not show that defendant went about committing them in any special way, or place, and where he neither offered an argument to support his objection to the joinder nor suggested to the court that it would prejudice him, and the evidence of the other crimes would have been admissible under section (b) of this rule. State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

By attacking the victim's character for marital fidelity, defendant went beyond what was necessary for his defense and opened the door to the rebuttal evidence. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

In a prosecution for first-degree murder, first-degree rape, and first-degree sexual assault, evidence of defendant's sexual relations with his ex-wife were probative of defendant's state of mind at the time the victim was sexually assaulted and murdered, and was properly admitted. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

The similarity between two crimes, closely connected temporally, clearly supported the admission of a previous rape to prove identity and intent in the attempted rape for which defendant was being tried. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Evidence of a party's prior driving record is inadmissible in automobile cases. However, where the jury found defendant negligent, admission of defendant's good driving record could not have influenced the jury's verdict to plaintiff's detriment. Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198, cert. denied, 322 N.C. 610, 370 S.E.2d 257 (1988).

The court did not commit plain error in admitting defendant's driving offenses where defendant's driving offenses from eight to two years past were sufficiently proximate in time to the offenses charged, including murder in the second degree for causing a fatal automobile accident as a result of fleeing a police officer. State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861, 2000 N.C. App. LEXIS 632 (2000).

The trial court's instructions properly limited the use of evidence of defendant's prior traffic violations under this rule. State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861, 2000 N.C. App. LEXIS 632 (2000).

While the trial court erred in admitting defendant's entire driving record because of the remoteness in time of some of the convictions, admission of the entire record did not prejudice defendant to the extent required under a plain error analysis, and defendant's driving convictions were admissible to prove defendant's malice in his trial for second degree murder following an auto accident. State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196, 2002 N.C. App. LEXIS 132 (2002), cert. granted, 356 N.C. 170, 568 S.E.2d 852 (2002).

Trial court violated G.S. 8C-1, N.C. R. Evid. 404(b) by admitting multiple letters of suspension, with no redaction of the specific offenses for which the driver's license was revoked, including multiple counts of driving while impaired. State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005).

Evidence of Prior Robberies. — Admission of evidence of defendant's participation in several robberies, to corroborate the accounts of other witnesses or for the purpose of showing defendant's motive, intent or plan to commit the instant crime, presented with limiting jury instructions, could not fairly be characterized as arbitrary and unreasonable and in violation of the principles of G.S. 8C-1, Rule 403. State v. Hall, 134 N.C. App. 417, 517 S.E.2d 907 (1999).

Evidence of a prior robbery and a prior attempted robbery was correctly admitted after the court determined that the evidence was relevant for some purpose other than to show defendant's propensity to commit this type of crime, as required by this rule, and that it was more probative than prejudicial, as required by G.S. 8C-1, Rule 403. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Conversation Regarding Advantages of Committing Armed Robbery. — Evidence of defendant's alleged conversation with witness in which defendant, among other things, discussed the advantages of committing armed robbery over stealing and selling property as well as the manner in which it could be done, constituted Rule 404(b) evidence of another "crime, wrong, or act" on the part of defendant, but was admissible, inter alia, to show defendant had a plan, scheme, system, or design involving the commission of robberies. State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992).

Questions About Collateral Misdeeds Must Have Good Faith Basis. — A defendant who takes the stand may be asked about collateral misdeeds that tend to show his criminal conduct, intent or motive in the case being tried. But such questions must have a good faith basis. State v. Flannigan, 78 N.C. App. 629, 338 S.E.2d 109 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 572 (1986).

And Must Be Supported by Evidence. — The State, by questions put to a defendant during cross-examination, may not inform the jury of purported misdeeds by the defendant that firsthand knowledge of source does not support. State v. Flannigan, 78 N.C. App. 629, 338 S.E.2d 109 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 572 (1986).

Evidence Inadmissible If Its Only Value Is to Show Defendant's Propensity to Commit an Offense. — Subsection (b) of this rule is one of inclusion of relevant evidence of other crimes subject to but one exception requiring its exclusion if its only probative value is to show that defendant has propensity or disposition to commit an offense of nature of crime charged. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

The trial court's error in allowing evidence of a prior assault by defendant on the victim entitled him to a new trial; evidence of the 1994 assault did not tend to prove a material fact in issue in the crimes charged and demonstrated no connection between the 1994 assault and the 1997 assaults, other than the defendant's propensity for violence, making it inadmissible under this section. State v. Elliott, 137 N.C. App. 282, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000).

Evidence of Other Crimes, etc., Is Not

Admissible to Prove Character. — All that subsection (b) of this rule forbids is receiving evidence of other crimes, wrongs or acts to prove the character of a person in order to show that he acted in conformity therewith. State v. Elledge, 80 N.C. App. 714, 343 S.E.2d 549 (1986).

Defendant was prejudiced pursuant to G.S. 15A-1443(a) by the trial court's decision to allow the State to cross-examine defendant regarding two prior criminal charges that had been voluntarily dismissed against him, as the State sought to show that defendant had engaged in violent conduct previously with only slight provocation and that he then claimed self-defense against those charges; however, such evidence of an alleged violent propensity was specifically not allowed under N.C. R. Evid. 404(b), and there was insufficient evidence regarding the factual circumstances of the other incidents to determine whether defendant acted similarly in the charge that defendant was on trial for. State v. Goodwin, 186 N.C. App. 638, 652 S.E.2d 36, 2007 N.C. App. LEXIS 2266 (2007).

Evidence of prior wrongs cannot come into show the character of a person and that he acted in conformity with that character; thus, evidence of 14 separate incidents, which was clearly relevant to no other issue than to show that the defendant was a violent man and therefore must have been the aggressor when he shot and killed victim, was indirect contravention of subsection (b) of this rule, and the trial court erred in allowing it. State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986).

Evidence of a violent disposition to prove that a person was the aggressor in an affray is an impermissible use of evidence of other crimes and not admissible under subsection (b), but even assuming that these acts were relevant and admissible, the probative value is far outweighed by the prejudicial effect of their admissibility and their admission and that they would only serve to show to the jury that the deceased was somewhat less worthy of living than someone who hadn't performed these relevant acts. State v. Smith, 337 N.C. 658, 447 S.E.2d 376 (1994).

And Prosecutor May Not Argue Defendant's Bad Character Therefrom. — Where evidence of defendant's past convictions was offered and admitted solely to impeach defendant's credibility, and this was the only legitimate purpose for which the evidence was admissible, it was error for the prosecutor in his argument to use defendant's prior convictions primarily to characterize him as a bad man of a violent, criminal nature and more likely to be guilty of the crime charged. State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Prosecutor's Questions About Prior Crime Exceeded Permissible Purpose. — While, in murder prosecution, evidence that defendant was familiar with the gun and had used it previously might rebut defendant's claim of accident, the State greatly exceeded this purpose and questioned the witness at length about the details of the breaking and entering, details which had no connection with the crime for which defendant was being prosecuted. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Improper Impeachment of Witness's Statement by Extrinsic Evidence. — Defendant was granted a new trial on his convictions involving the sexual abuse of his grandchildren; the trial court committed prejudicial error under G.S. 15A-1443(a) by allowing the State to impeach by extrinsic evidence testimony by defendant's son and two daughters that defendant had never sexually abused them, and the error was so highly prejudicial that it likely affected the verdict, and because the evidence of prior sexual misconduct was not admissible under a hearsay exception, G.S. 8C-1, N.C. R. Crim. P. 404(b). State v. Mitchell, 169 N.C. App. 417, 610 S.E.2d 260, 2005 N.C. App. LEXIS 682 (2005).

Scope of Inquiry on Cross-Examination of Defendant. — By choosing to testify, a defendant is subject to cross-examination as other witnesses; defendant waived his privilege against self-incrimination regarding bad acts when he elected to testify. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Where defendant testified on direct examination that he had no intent of selling cocaine until he was approached by the informant, he raised the issue of entrapment, and G.S. 8C-1, Rule 404(b) allowed the State on cross-examination to question defendant concerning the prior sale to undercover police to prove absence of entrapment; defendant's privilege against self-incrimination was not violated by the questions. State v. Artis, 91 N.C. App. 604, 372 S.E.2d 905 (1988).

Evidence of a victim's awareness of prior crimes allegedly committed by the defendant may be admitted to show that the victim's will had been overcome by her fears for her safety, where the offense in question requires proof of lack of consent or that the offense was committed against the will of the victim. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Evidence of physical abuse and animal abuse done in victim's presence was admissible pursuant to this rule where it tended to explain victim's fear of defendant and why she never reported all the incidents of sexual abuse, and where defendant specifically made her state of mind relevant; to the extent that evidence of physical and/or animal abuse not done in her presence was admitted, such admission was error, but would not have changed the outcome so as to require a new trial. State v. Thompson, 139 N.C. App. 299, 533 S.E.2d 834, 2000 N.C. App. LEXIS 895 (2000).

Trial court's admission of the victim's testimony from a domestic violence protective order hearing did not violate his right to confront the witness against him, nor did it violate G.S. 8C-1, Rules 403, 404(b), or 803(3) of the North Carolina Rules of Evidence, where the hearsay statements constituted, and were admissible as, statements of declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Witness' Statement to Officer. — Officer's testimony that a witness said she was afraid to talk to the police did not violate the rule against evidence of "other crimes," as the testimony did not relate to "other crimes" of defendant; it did, however, violate the hearsay rule. State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002).

Evidence Properly Admitted. — In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court (1) properly admitted the videotaped statement that defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial, (2) properly admitted letters one of defendant's co-conspirators wrote to a girlfriend urging her to lie about her involvement in the co-conspirator's attempt to conceal evidence of the crime, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(3), (b)(5), and (3) properly admitted evidence of similar crimes that defendant committed shortly after the murder, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b). State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

Evidence of two prior assaults defendant committed against an unrelated party was admissible under G.S. 8C-1, N.C. R. Evid. 404(b), because such evidence demonstrated that defendant was aware that striking a person with a beer bottle was a reckless and dangerous act that could cause serious injury. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

In a robbery and murder prosecution, testimony about defendant's past robberies and prior drug dealing provided evidence of his motive, his intent to commit the crimes, and his modus operandi and was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b). State v. Hightower, 168 N.C. App. 661, 609 S.E.2d 235, 2005 N.C. App. LEXIS 454 (2005).

Trial court properly admitted various evidence in defendant's trial pursuant to G.S. 8C-1, Rule 404(b), because the various evidence was not admitted to prove the character of defendant in order to show that he acted in conformity therewith and was not overly prejudicial. State v. Matthews, 175 N.C. App. 550, 623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).

In defendant's murder trial, the trial court did not err in admitting evidence pursuant to G.S. 8C-1-404(b) regarding an individual close to defendant who 17 years prior to the victim's death was found dead at the bottom of a set of stairs; the trial court found that evidence of the individual's death was probative of defendant's intent, knowledge, and the absence of accident in the victim's death, and the trial court found the evidence to be relevant, finding 17 similarities between the circumstances of the individual's death and that of the victim's. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

Trial court did not err in admitting evidence of drug transactions subsequent to the drug transaction for which defendant was charged. The subsequent transaction evidence was not admitted to show defendant's propensity to commit such an offense, but represented a substantial basis upon which a jury could find that defendant had committed a similar act. State v. Mack, 188 N.C. App. 365, 656 S.E.2d 1, 2008 N.C. App. LEXIS 232 (2008).

On appeal from convictions including rape and kidnapping, the trial court did not err or abuse its discretion in admitting into evidence a receipt for pornographic movies that listed the movie titles, and for admitting evidence of defendant's alleged prior acts of domestic violence against the victim, as: (1) defendant failed to state his grounds for objection to the admission of physical evidence; (2) the evidence was relevant; (3) the prior acts evidence was properly admitted to show defendant's motive, intent or purpose, opportunity, and plan; (4) defendant failed to request a limiting instruction at the time of the admission of the receipt, and failed to request that the trial court redact the movie titles from the receipt; and (5) even assuming that defendant's general objection preserved the matter for appellate review, the record revealed that the admission of the receipt into evidence did not prejudice defendant. State v. Daniels, 189 N.C. App. 705, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Admission of evidence under G.S. 8C-1, N.C. R. Evid. of his prior arrest for the same drug possession offense was not plain error because, inter alia, when the first judge declared a mistrial, his rulings barring this evidence no longer had legal effect, and, thus, neither collateral estoppel nor the one judge overruling another rule applied at the second trial. State v. Harris, — N.C. App. —, 679 S.E.2d 464, 2009 N.C. App. LEXIS 1163 (July 21, 2009).

Evidence of Prior Convictions Held Inadmissible and Prejudicial. — In defendant's trial on a charge of felony possession of cocaine, the trial court erred by allowing a deputy clerk to testify regarding defendant's prior convictions for possession with intent to sell and deliver cocaine and sale of cocaine, G.S. 8C-1, N.C. R. Evid. 404(b), without requiring evidence of the underlying facts of the prior convictions to show similarities between the prior convictions and the offense charged; given the conflicting evidence in defendant's case, the error was prejudicial. State v. Hairston, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

Evidence Held Improper But Not Prejudicial. — In light of uncontradicted evidence recorded against defendant, the State's line of questioning in connection with defendant's previous criminal record, while improper under subsection (b) of this rule, was not prejudicial. State v. Butler, 90 N.C. App. 463, 368 S.E.2d 887, cert. denied, 323 N.C. 176, 373 S.E.2d 116 (1988).

Testimony regarding defendant's failure to spend time with his sons did not tend to show that the victim was afraid of defendant or that she had no intention of reconciling with him. Rather, the evidence tended to show defendant's bad character and, as such, should not have been admitted. In light of all the evidence that was properly introduced, however, this tangential bit of evidence could not have affected the outcome of the trial; therefore, it was not prejudicial error. State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992).

Videotaping of Family Bathroom Not Relevant to Sex Offense Charge. — The admission of evidence indicating that the defendant, who was charged with two counts of first degree statutory sex offense against the twelve-year-old daughter of his girlfriend, installed a camcorder in his girlfriend's bathroom was error, pursuant to this section, since it did not tend to demonstrate a plan or scheme to sexually assault the child; however, its admission was not reversible error since the defendant failed to show it had "a probable impact on the jury's finding of guilt." State v. Doisey, 138 N.C. App. 620, 532 S.E.2d 240, 2000 N.C. App. LEXIS 779 (2000), cert. denied, 352 N.C. 678, 545 S.E.2d 434 (2000), cert. denied, 531 U.S. 1177, 121 S. Ct. 1153, 148 L. Ed. 2d 1015 (2001).

Inadmissible Evidence Admitted but Held Harmless Error. — Although testimony was not relevant to any issue except the defendant's character to show that he had a propensity for bad acts and acted in conformity therewith in killing victim, it was harmless error to admit this testimony. In light of the strong substantive evidence against the defendant, as well as other evidence of bad acts including the ingestion of illegal drugs, the result would not have been different had this testimony been excluded. State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court's review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State presented strong evidence of defendant's guilt through the testimony of three eye witnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

DNA Databank Evidence Properly Admitted. — The admission of testimony regarding the source of the DNA in the DNA data bank which led to the conviction of the defendant for a murder committed 4 years earlier was not plain error under this section. State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001), review denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

Evidence of Prior DWI Admissible to Show Malice. — Evidence that defendant had a breath alcohol concentration of 0.08 and performed poorly on field sobriety tests after he caused an automobile accident that resulted in the death of a child was sufficient to sustain defendant's conviction for second-degree murder, and the trial court did not err by allowing the State to introduce evidence that defendant was convicted of driving while impaired after he was involved in another accident in 1996, to prove malice. State v. Locklear, 159 N.C. App. 588, 583 S.E.2d 726, 2003 N.C. App. LEXIS 1535 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 394 (2004), aff'd, 359 N.C. 63, 602 S.E.2d 359 (2004).

Evidence of Defendant's Gang Membership Properly Admitted. — In a robbery and murder prosecution, testimony that defendant was a gang member was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b) to show his motive for the robbery and the reason for an accomplice's involvement — as gang-initiation rite. State v. Hightower, 168 N.C. App. 661, 609 S.E.2d 235, 2005 N.C. App. LEXIS 454 (2005).

Failure to Show Admissibility. — When a patient in a medical malpractice case argued that statistical reports dealing with infections would be admissible under G.S. 8C-1, N.C. R. Evid. 404(b), but did not explain to what issue in the case a pattern, practice, plan, or modus operandi would be relevant, the appellate court could not conclude that the trial court's ruling denying her request for the reports was manifestly unreasonable. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

IV. ILLUSTRATIVE CASES.

Evidence Held Admissible. — Evidence that on the day prior to robbery the defendant had pleaded guilty to a crime in federal court and that he had been ordered to pay a fine of $2,500 was admissible for the limited purpose of showing that the defendant needed money, and thus had a motive to commit the robbery. State v. Spinks, 77 N.C. App. 657, 335 S.E.2d 786 (1985), aff'd, 316 N.C. 547, 342 S.E.2d 522 (1986).

Photographs depicting defendant in close proximity to marijuana plants or holding or smoking marijuana, which were found in defendant's kitchen, were admissible as evidence that defendant was living at house at which marijuana was found, and to show defendant's knowledge of the marijuana. Photographs of defendant's girlfriend, partially nude, found in an envelope in his bedroom, were also relevant, as evidence that defendant lived in the house. State v. Johnson, 78 N.C. App. 68, 337 S.E.2d 81 (1985).

In a prosecution for false pretenses involving a check cashing scheme, the testimony of certain witnesses, to the effect that defendant had been involved with passing bad checks in the past, was admissible where defendant had maintained in his own defense at trial that he was mistaken about the legitimacy of the checks and had no knowledge that the fake janitorial service in whose name the checks were written was a sham. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

In trial charging defendant with first-degree sexual offense involving his two sons, evidence relating to sexual activity involving defendant's three-year-old daughter was properly admitted under this rule. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

In light of the unusual modus operandi involved in the offense at issue, as well as prior sexual assault, the court did not abuse its discretion in admitting evidence of the earlier incident, the "signature" value of which was high. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part, 318 N.C. 669, 351 S.E.2d 294 (1987).

Testimony that murder and assault victims had a bad reputation as violent people who were prone to fight, especially when drunk, was permissible under subdivision (a)(2) of this rule and G.S. 8C-1, Rule 405(a). State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

In prosecution for obtaining property by false pretense, involving false representations to homeowners of termite infestation, evidence with respect to other similar transactions in which defendant had engaged was relevent to show motive, intent, plan and knowledge and was a generally permissible inquiry pursuant to subsection (b) of this rule. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Where defendant was being tried for the rape of his five-year-old stepdaughter, testimony of a prison inmate that the defendant had admitted engaging in sexual intercourse with his three-year-old daughter tended to show a common scheme or plan by the defendant to take sexual advantage of the availability and susceptibility of his young daughters. The testimony was therefore admissible under subsection (b) of this rule. State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986).

In a prosecution for robbery of a New Bern bank, the court did not err in permitting a teller at another New Bern bank to testify that one of the defendants came into that bank on the day of the robbery and got change for a one hundred dollar bill, where this testimony was offered and received for the limited but proper purpose of showing that the defendants were in New Bern on the day of the robbery and to corroborate the testimony of a confessed participant in the robbery. State v. Alston, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

In prosecution for rape and other offenses where the State produced evidence that one of the defendants had threatened victim with a knife when they abducted her and that one of the three assailants had told her that he would be back for her and that she would be shot if she reported the crimes, trial court did not err in admitting knives and razor found in defendants' car five nights later when defendants came to victim's apartment around 1:00 a.m., beat on the door and attempted to open it, before leaving when a neighbor stepped outside his apartment, as by entering pleas of not guilty and denying that they were the assailants, defendants made identity an issue in the case, and this evidence clearly bore on the issue of identity. State v. Gilliam, 317 N.C. 293, 344 S.E.2d 783 (1986).

Evidence that on earlier occasions defendant had broken into his wife's house and assaulted her tended to prove these two elements of the offense under G.S. 14-277.1 and its receipt did not violate subsection (b) of this rule. State v.

Elledge, 80 N.C. App. 714, 343 S.E.2d 549 (1986).

In a prosecution for felonious larceny of certain tools, evidence of previous dealings between defendant and State's witness involving the sale of tools was admissible as tending to show a plan or scheme to steal tools and sell them to the witness. State v. Weaver, 318 N.C. 400, 348 S.E.2d 791 (1986).

In prosecution for incest, evidence tending to show that defendant had had prior sexual contact with the prosecuting witness was reasonably probative of defendant's knowledge, opportunity, intent, and plan, and was not so prejudicial as to outweigh its probative value and render it inadmissible; moreover, even if there was error in the admission of such evidence, absent a showing of a reasonable possibility that a different result would have been reached had the evidence been excluded, any possible error would be considered harmless. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In trial for rape and incest involving defendant's minor daughter, evidence that defendant had taken his daughter to an X-Rated movie and told her to look at graphic sexual scenes was admissible to show defendant's preparation and plan to engage in sexual intercourse with his daughter and to assist in that preparation and plan by making her aware of such sexual conduct and arousing her. State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

In a proceeding before the trial court in which the respondent attorney was found guilty of criminal contempt upon the court's finding that he "did solicit, encourage and cause" a certain individual to disrupt court, the trial court did not err in admitting into evidence testimony that the respondent violated a court order by making certain public statements. In re Paul, 84 N.C. App. 491, 353 S.E.2d 254, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), 484 U.S. 1004, 108 S. Ct. 694, 98 L. Ed. 2d 646 (1988).

Where defendant's identity as the gunman was the key issue in case involving kidnapping, attempted armed robbery, and unauthorized use of a motor vehicle, the fact that witness had received a telephone call from the defendant a month before the attempted robbery tended to support the witness's claim that he recognized defendant's voice and thus was admissible, even though the call also concerned a stolen TV set not involved in the charges he was being tried for. State v. Harlee, 85 N.C. App. 159, 354 S.E.2d 348, cert. denied, 320 N.C. 173, 358 S.E.2d 60 (1987).

Where defendant, on cross-examination of a State's witness, injected the theory that visitor from Florida, rather than defendant, was the perpetrator of the sexual offenses described by the victim, evidence of a continuing scheme to commit sexual acts against the victim was relevant to show that defendant was the perpetrator of the offense allegedly committed. State v. Frazier, 319 N.C. 388, 354 S.E.2d 475 (1987).

Where the testimony of the prosecuting witness tended to establish a common plan or scheme on the part of defendant to sexually abuse her child, the testimony of the prosecuting witness regarding other acts of sexual abuse was properly admitted. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

In a rape trial, the trial court did not err in allowing a witness to testify that defendant had also attempted to rape her, where in both cases defendant lured the women into his apartment on the pretext that he needed to change clothes before their dates, and once inside, defendant's pattern of behavior was nearly identical. State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182, cert. denied, 320 N.C. 796, 361 S.E.2d 84 (1987).

Evidence of defendant's prior conviction in 1977 for assault with intent to rape, as well as his recent release from prison, which was offered to prove that his intent in assaulting and kidnapping his victim was to rape her, was properly admitted for that purpose in trial for kidnapping and attempted rape. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

In prosecution in which defendant was convicted of second degree rape of mentally retarded adult, testimony of five other mentally retarded females which tended to prove a continuing and ongoing course of sexual molestation by defendant of mentally retarded young women employed under his supervision, and a common plan or scheme to take sexual advantage of his relationship of authority over these women, was relevant and admissible under subsection (b) of this rule. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ dismissed, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

In action against car dealership, alleging breach of contract, malicious prosecution, and unfair and deceptive trade practices, similar occurrence evidence was probative of defendant's motive, intent, absence of mistake and possible bad faith in its dealings with plaintiff, and thus was properly admitted under subsection (b) of this rule. Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 320 N.C. 513, 358 S.E.2d 521 (1987), aff'd, State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

In murder trial, evidence that defendant came into possession of a large quantity of dynamite the day before the shooting was admissible under this rule to show "preparation" and "plan." However, the criminal manner by which defendant came to possess the dynamite was not. State v. Sullivan, 86 N.C. App. 316, 357 S.E.2d 414, cert. denied, 321 N.C. 123, 361 S.E.2d 602 (1987), holding, however, that the error was harmless.

Prosecutor's comment in murder trial on defendant's failure to present evidence of the victim's character which might have shown that the victim was the aggressor was permissible. State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987).

Where defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness, and only then did the prosecutor cross-examine the witnesses about specific instances of conduct by defendant in an effort to rebut their prior testimony as to defendant's character for peacefulness, the answers to the prosecutor's questions were properly admitted. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Where the testimony of the three State's witnesses showed only that each of them had seen defendant in possession of a firearm on some unspecified occasions over a period of years prior to the events giving rise to the present murder charge, and the evidence did not suggest that defendant's possession of a firearm at any previous time was unlawful, nor did it attribute to him a criminal disposition or a character prone to violence, the admission of such testimony did not violate this rule. State v. Knight, 87 N.C. App. 125, 360 S.E.2d 125 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 662 (1988).

In murder trial, evidence that defendant on previous occasions had assaulted victim was competent to prove his malice toward her and was admissible. State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988).

In a civil action for malicious prosecution and intentional infliction of emotional distress, evidence of plaintiff's attempt in earlier action to bribe witness and subordinate perjury could not accurately be classified as character evidence at all. This testimony on the alleged offense arose out of the particular facts of the case. Lay v. Mangum, 87 N.C. App. 251, 360 S.E.2d 481 (1987).

Admission of defendant's 1982 fingerprint identification card and testimony regarding same, for the sole purpose of identifying latent fingerprints taken from credit application completed by individual suspected of larceny, did not violate the longstanding general rule of practice in this State, now codified in subsection (b) of this rule and thus did not unduly influence the jury or prejudice defendant. State v. McKnight, 87 N.C. App. 458, 361 S.E.2d 429 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 663 (1988).

In a first degree sexual offense case, evidence that defendant attempted a remarkable, odd and strikingly similar modus operandi some ten weeks after his attack on victim was relevant and admissible as tending to prove defendant's modus operandi, motive, intent, preparation and plan. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

In trial for possession with intent to sell and deliver cocaine and marijuana, and the sale and delivery thereof, admission of evidence that on a previous occasion, when officers went to defendant's admitted residence to purchase controlled substances from another person, an officer saw defendant inside the apartment did not constitute prejudicial error. State v. Fielder, 88 N.C. App. 463, 363 S.E.2d 662 (1988).

Where defendant was charged with raping his stepdaughter in her bunk-bed while her mother was working late at night, mother's testimony tending to show that defendant similarly took advantage of her cousin when the child was left in his custody, while in his stepdaughter's bunk-bed, while she was working late at night was admissible under the exception of subsection (b) of this rule, and there was no abuse of discretion by the trial court in failing to exclude this testimony under the balancing test of G.S. 8C-1, Rule 403, since the alleged incident was sufficiently similar to the act charged and not too remote in time. State v. Boyd, 321 N.C. 574, 364 S.E.2d 118 (1988).

Videotape and magazines and detective's testimony concerning them were relevant to corroborate child victim's testimony that defendant had shown him such materials at the time he committed the crimes for which he was on trial, and since the exhibits and testimony were relevant to a fact or issue other than the character of the accused, subsection (b) of this rule did not require that they be excluded from the evidence at trial. State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988).

Where victim's testimony clearly tended to establish the relevant fact that defendant took sexual advantage of the availability and susceptibility of his young victim at times when she was left in his care, victim's testimony concerning her father's other acts of sexual intercourse with her was admissible under this rule, and moreover, the trial court did not abuse its discretion in failing to exclude this testimony under G.S. 8C-1, Rule 403. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Evidence that defendant committed another sex offense against the same child, his young son, on the day after the offense for which he was being tried was admissible under subsection (b) of this rule. State v. Miller, 321 N.C. 445, 364 S.E.2d 387 (1988).

In trial for murder and other crimes, testimony of jailer who was assaulted during defendant's escape and of individual from whom defendant and his confederate stole a truck and rifle was admissible to show intent and motive, in that it tended to show that defendant and his confederate intended to escape from jail, and then do whatever was necessary to avoid capture, and therefore that they had a motive for killing state trooper. State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

Shooting incident in tavern some two weeks prior to three barroom shootings for which defendant was on trial was sufficiently similar to subsequent killings to be probative of defendant's guilt, not because of the bizarre or unique nature of the elements, but because of the repetition or reenactment in the barroom of so many of the elements played out in the tavern. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Where evidence of a different sex offense tended to establish a common plan or scheme on the part of defendant to sexually abuse the victim, his stepgranddaughter, such evidence, relating to defendant's other sexual activity with the victim was properly admitted under this rule. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

In a prosecution for second-degree murder, evidence concerning defendant's sale of marijuana to the victim was relevant in showing the relationship between the victim and defendant, and given the evidence defendant once questioned the witness about whether the victim was a "nark," the evidence that defendant sold marijuana was admissible since it had some probative value concerning defendant's possible motive in the shooting. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Where, in a prosecution for first degree sexual offense, the other incidents for which evidence was admitted occurred within three months of the incident for which the defendant was tried, and they were similar to the incident for which the defendant was tried, they were properly admitted to show a common scheme or plan out of which the crime for which the defendant was tried arose. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Where the challenged testimony of the victim, her attending physician, and the investigating police officer tended to establish a plan or scheme by defendant to sexually abuse the victim when the victim's mother went to work, and where the alleged prior incidents occurred within twelve months prior to the incident for which defendant was charged, proof of the incidents was not so remote in time as to outweigh its probative force; therefore, the trial court did not err in allowing evidence of these prior incidents. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

Trial judge did not abuse his discretion by allowing evidence of prior sexual crimes allegedly committed by defendant upon his children; children's testimony concerning prior episodes of abuse would show that defendant engaged in scheme whereby he took sexual advantage of the availability and susceptibility of his young daughters at times they were left in his custody, and the probative value of evidence of other sexual acts outweighed any unfair prejudice to defendant. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Judge correctly permitted the State to introduce evidence of second robbery; defendant's defense of alibi put in issue whether he participated in the crimes at victim's house, and the evidence of the second robbery, when coupled with the evidence of the victims, tended to show that both burglaries were committed by the same people, and that defendant was one of the people involved. State v. McDowell, 93 N.C. 289, 378 S.E.2d 48 (1989).

Where evidence consisted of first witness's testimony concerning defendant's selling and using cocaine in the house and second witness's testimony that he had previously sold cocaine for defendant, the evidence was not inadmissible character evidence under subsection (b) of this rule; first witness's testimony was clearly relevant to the charge of maintaining a dwelling for the purpose of keeping and selling a controlled substance and, therefore, its admissibility was not governed by subsection (b); the admissibility of second witness's testimony was governed by this rule and the testimony was properly admitted to show a defendant's intent and plan to commit a conspiracy. State v. Rosario, 93 N.C. App. 627, 379 S.E.2d 434, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

In a case where defendant was convicted of raping his daughter, sexual misconduct by defendant toward Sister A or Sister B was not too remote in time from the rape in question to be admitted properly for the purpose of showing a systematic plan; the facts demonstrated sufficient similarity between the prior acts and the crime specified in the indictment to justify the trial court's admission of evidence of defendant's prior sexual misconduct; the evidence revealed defendant's pattern of forcing his daughters to submit to intercourse as they reached puberty and continuing to assault them, using whatever force necessary, into their adulthood and after they had left home. State v. Shamsid-Deen, 324 N.C. 437, 379 S.E.2d 842 (1989).

Where defendant was convicted of first-degree rape, the circumstances of the other crime were sufficiently similar to the crimes charged to be admissible under subsection (b) of this rule; although there were no strikingly peculiar similarities in the manner of their commission, nevertheless, in both crimes the perpetrator forcibly entered motel rooms at night occupied by women who were alone, raped the women with accompanying threats of physical harm and the crimes occurred only two weeks apart at the same motel. State v. Moore, 94 N.C. App. 55, 379 S.E.2d 858, cert. denied, 325 N.C. 435, 384 S.E.2d 544 (1989).

The strikingly similar behavior attributed to defendant by all three women — befriending the women; luring them into a dating relationship; and then, after gaining their trust, using physical violence and/or the threat of a deadly weapon to force each woman to engage in vaginal intercourse, anal intercourse, cunnilingus, and fellatio — rendered the testimony of defendant's former lovers admissible to prove defendant's modus operandi, plan, motive and intent. State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383, cert. denied, 325 N.C. 435, 384 S.E.2d 545 (1989).

Where defendant was convicted of second degree rape of the 13-year-old daughter of his girlfriend, trial court did not err by allowing the victim to testify concerning prior acts of sexual conduct between the victim and defendant; the testimony tended to illustrate defendant's opportunity to commit these acts, and a plan to molest the girl in her mother's absence. State v. Morrison, 94 N.C. App. 517, 380 S.E.2d 608, cert. denied, 325 N.C. 549, 385 S.E.2d 507 (1989).

Evidence of separate offense was admissible both to show identity and under the common plan exception; even though defendant presented no evidence, the identity exception applied since defendant's plea of not guilty put into issue every material element of the State's charges against him, including defendant's identity. State v. Bullock, 95 N.C. App. 524, 383 S.E.2d 431 (1989).

Trial court's allowance of testimony by the eight-year-old victim regarding prior acts of sexual misconduct was not error; testimony was admissible to establish a common plan or scheme on the part of defendant to sexually molest his niece. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Evidence of prior assaults by a husband upon his wife was admissible to explain the wife's failure to move out and to prove that because of her fear arising from earlier abuse, her failure to leave her husband's home should not be construed as consent to his abuse. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989).

In a prosecution for felonious possession of stolen property, testimony of son of property owner, who allegedly furnished defendant with the property, that he was indebted to defendant (for purchase of cocaine) was properly admitted to illustrate a possible motive, and its probative value substantially out-weighed the danger of unfair prejudice against defendant. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

In capital murder trial for the murder of a 10-year-old girl, G.S. 8C-1, Rule 403 and subsection (b) of this rule did not require the exclusion of evidence concerning an earlier incident when defendant had masturbated in the presence of a three-year-old girl. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Despite severance of defendant's trials for murder of two sisters two years apart, under subsection (b) of this rule, trial court properly allowed evidence of defendant's attitude towards first victim prior to her disappearance, the facts of her disappearance, the discovery of her remains near the site where her sister, the second victim's, body was discovered, and a description of her remains in trial for the second murder. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

In a prosecution for sale of LSD and cocaine under G.S. 90-95, the State's introduction of evidence of defendant's marijuana use and possession was properly introduced in an attempt to show that defendant had a predisposition to commit these crimes and was, therefore, not entrapped. State v. Goldman, 97 N.C. App. 589, 389 S.E.2d 281, cert. denied, 327 N.C. 434, 395 S.E.2d 691 (1990).

In trial for first degree burglary and first degree rape, circumstantial evidence that defendant was the perpetrator of a rape committed five months earlier, which included both fingerprint evidence and pattern of perpetration similar to those of the crime charged demonstrated a potent, logical pertinence to the question of the assailant's identity in the offense on trial; thus, under the circumstances of the crime charged and those of the offense admitted, for the purpose of proving identity under subsection (b) of this rule, the trial court did not err in admitting evidence of the other, similar offense, which shared strong circumstantial indicia that defendant had been the perpetrator. State v. Jeter, 326 N.C. 457, 389 S.E.2d 805 (1990).

Evidence of prior sex offenses held admissible in trial for second-degree rape and sexual activity by a substitute parent, see State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169, rev'd on other grounds, 330 N.C. 808, 412 S.E.2d 883 (1990).

Where police found defendant in possession of both marijuana and LSD at the time of arrest, but defendant was acquitted on charges of misdemeanor possession of marijuana, evidence introduced at trial for possession of LSD of defendant's marijuana possession served the purpose of establishing the chain of circumstances leading up to his arrest for possession of LSD, and section (b) of this rule did not require its exclusion as evidence probative only of defendant's propensity to possess illegal drugs. State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990).

The court did not err in allowing testimony that a murder defendant had given drugs to a third person who suffered an overdose from those drugs, even though the testimony presented evidence of other crimes; the testimony showed that defendant knew that the drugs he gave to the victim were extremely dangerous. State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820 (1990).

The court properly admitted evidence that a defendant accused of soliciting the murder of his wife had solicited an undercover agent to murder his wife 11 months after the solicitation for which he was on trial; the evidence of the subsequent solicitation showed knowledge, modus operandi or common scheme or plan, and continuing offense. State v. Strickland, 98 N.C. App. 693, 391 S.E.2d 829 (1990).

In trial for obtaining money by false pretenses in which insurance agent was charged with turning in fictitious applications to receive commissions, admission into evidence of information contained in defendant's confession concerning other allegedly false applications submitted by defendant and trial court's instruction to jury on these prior bad acts did not constitute error. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

Defendant's prior sex offenses were sufficiently similar to the crimes charged to be admitted for the purpose of showing defendant's plan, scheme, system, or design of forcing unconsenting female acquaintances into his basement for the purpose of gratifying his sexual desires. State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

During murder prosecution, where victim was a young woman, rebuttal testimony by a woman previously assaulted by defendant, concerning the prior assault, was admissible to clarify defendant's admission that he "beat this girl," as the jury reasonably could infer in light of the witness' testimony, that defendant, in a "hysterical state" shortly after an aggressive sexual encounter with the victim, was referring to the victim rather than the witness when he made his admission. State v. McKinnon, 328 N.C. 668, 403 S.E.2d 474 (1991).

Evidence concerning two previous insurance claims made by defendant on other stores owned by her after purchasing theft policies are relevant insofar as they tend to show intent, absence of mistake and a pattern by which defendant made and then exaggerated claims resulting from commercial burglary under former G.S. 14-214 (repealed). These prior instances are within five years of the present claim, exhibit a distinctive modus operandi, and are relevant under Rule 404(b). State v. Carroll, 101 N.C. App. 691, 401 S.E.2d 114, cert. denied, 329 N.C. 501, 407 S.E.2d 543 (1991).

In case in which defendant was convicted of second degree sexual offense and first degree burglary, evidence that defendant committed a similar break-in and sexual offense approximately one month earlier, about two blocks from victim's house was admissible under subsection (b) of this rule, to show intent, identity, common scheme, plan or design, and under G.S. 8C-1, Rule 403 in that the probative value of the evidence substantially outweighed the danger of unfair prejudice to defendant's case and the court's charge to the jury correctly stated the limited purpose of the evidence. State v. Whitaker, 103 N.C. App. 386, 405 S.E.2d 911 (1991).

In a trial for assault with a deadly weapon in which defendant claimed self-defense, the trial court did not err in admitting evidence that prior to wounding the victim, defendant placed a gun to the head of a fourteen year old boy and questioned him regarding stolen cocaine. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Where evidence of defendant's pending driving while impaired charge was evidence of malice to support a second degree murder charge, the trial court properly admitted such evidence pursuant to subsection (b) of this rule, since the evidence was not submitted to show defendant's propensity to commit the crime, but to show the requisite mental state for a conviction of second degree murder. State v. Byers, 105 N.C. App. 377, 413 S.E.2d 586 (1992).

In a trial for sexual abuse of a child, the trial court did not abuse its discretion by allowing the state to introduce the defendant's statements to the Department of Social Services (DSS) about his prior acts of sexual abuse of a different child in an unrelated case where the defendant "opened the door" to the matter by cross-examining the DSS witness about DSS files containing the statement. Although the state did not reveal the statement in response to the defendant's motion under G.S. 15A-903, neither did the state attempt to use the statement prior to defendant's questions of the DSS witness. State v. Moore, 103 N.C. App. 87, 404 S.E.2d 695 (1991).

Evidence of the circumstances surrounding the death of defendant's first husband 10 years previously was admissible under this rule as evidence of intent, plan, preparation, or absence of accident in capital murder trial for the death of her second husband. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

In malpractice action brought against therapist who had sexual relationship with plaintiff client, testimony of three prior relationships between defendant and his patients was admissible under subsection (b) of this rule. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

Testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to, his wife were admissible under subsection (b) of this rule to prove issues defendant disputed in a trial for her murder, namely, lack of accident, intent, malice, premeditation and deliberation—notwithstanding that some of the incidents dated back to the beginning of the marriage. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Where defendant was tried for the first-degree murder of her husband, evidence of her affair with a co-conspirator was highly probative of her motive for wanting her husband murdered, and evidence of the defendant's theft of money and credit cards, coupled with evidence of her drug problems, tended to show that the defendant needed money which she stood to gain from the insurance proceeds due upon her husband's death; therefore, the trial court did not err in admitting the evidence. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Where a statement regarding a prior sex act, rather than pertaining exclusively to defendant's character, was relevant to lend credibility to the State's confession, the evidence was admissible under section (b) of this rule. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992).

Where the State's evidence showed that in both 1967 and in 1990 defendant gained the trust of his victims, lured them into an automobile and then took them to a different location where they were sexually assaulted, the similarities justified admitting the evidence of prior crimes to prove modus operandi and intent; furthermore, since the 1967 rape was also admissible on the question of consent, it was not so remote as to have lost its probative value. State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993), aff'd, 336 N.C. 482, 444 S.E.2d 218 (1994).

Where defendant had poisoned two other men with arsenic, given the similarities between the crime charged and the other crimes presented by the State, the evidence of the other offenses was relevant as evidence tending to prove modus operandi, motive, opportunity, intent and identity of defendant as the perpetrator. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

Evidence that one month prior to the alleged rape, defendant failed to return the victim's car, stole some money, broke into her home, and was arrested was admissible as a part of the history of the event which served to enhance the natural development of the facts. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Testimony regarding prior conviction was admissible under subsection (b) and was not precluded under Rule 609; therefore, the trial court did not err in admitting it and there was no plain error. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

Where evidence of defendant's prior assault on the victim tended to show malice, the evidence was thus relevant to an issue other than defendant's character and was properly admitted. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

In a prosecution for first-degree murder, first-degree rape, and first-degree sexual assault, evidence of an attack on a prior victim was properly admitted. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Testimony was allowed to show that defendant had a metal pipe in his bedroom approximately one month prior to the death of the victim since the evidence tended to show that the victim was killed by the use of a blunt object, such as a pipe, and since defendant's confession indicated that he had thrown a pipe away prior to the victim's death. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

In a prosecution for murder, testimony that a witness saw defendant dancing with the victim and that the witness called the police was relevant and properly admitted as evidence of defendant's character. Also, evidence that witness called the police because he recognized defendant as being with the victim only after seeing on television that defendant had been charged with another murder was not irrelevant, inflammatory, and improperly prejudicial. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

In a murder prosecution, evidence of a prior murder was properly admitted by the trial court to show identity, plan, and the existence of a common modus operandi between the two murders. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Where in both robbery and the crime committed against the victims, there were at least two individuals involved who incapacitated the victims by pulling their clothing down around their elbows and hands, and at least one person was robbed during both events and the evidence tended to show that defendant punched robbery victim in the eye during the robbery and that victim's body was found to have areas of abrasion and bruising on his face, that the similar acts and the close proximity of time in both the robbery and the murders tend to indicate that the same person was involved in both crimes. State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

Proffered testimony of defense witness that would have taken the form of an opinion, because it illuminated a pertinent trait of defendant's character, should have been admitted; the testimony did not constitute hearsay and would have revealed a character trait of defendant that was relevant to rebut the State's evidence which raised the implication that defendant declined to swear to his innocence because he knew he was guilty. State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995).

Evidence that defendant was arrested for carrying a concealed weapon in connection with the seizure of handgun was relevant to show defendant's possession of the murder weapon and the circumstances under which the police obtained this weapon, and the trial court did not err in overruling defendant's objection to the admission of evidence that defendant was arrested for carrying a concealed weapon at trial of defendant for murder. State v. Williams, 341 N.C. 1, 459 S.E.2d 208 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996).

Evidence that defendant was firing the gun in question shortly before events at mobile home park where four-year-old girl was killed was admissible to prove defendant's identity as the person who fired the stray 9mm bullet that killed her. State v. Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995).

Evidence that four-year-old victim, who died from strangulation on a plastic bag, suffered from a severe skull fracture and serious burns shortly before his death was relevant to the jury's determination of whether defendant was criminally negligent; evidence that during the time victim was home under defendant's sole supervision, he obtained matches and ignited a can of gasoline, resulting in severe burns on his leg and ankle, was relevant to the determination of whether defendant had a pattern of reckless or careless supervision of the child. The fact that the child suffered a severe skull fracture during the same time period and the fact that defendant wrapped the child's burns in plastic wrap, in spite of his alleged habit of putting the plastic in his mouth and her knowledge that the plastic could hurt him, were likewise relevant to the issue of defendant's criminal negligence. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

From evidence that defendant continued to cover four-year-old victim's burns with plastic wrap even though she told a neighbor she knew he liked to chew on it and it could hurt him, the jury could reasonably infer that defendant was setting the stage for the victim to strangle to death on a piece of plastic, either by accident or with her assistance; this evidence was relevant and admissible as proof of defendant's preparation and planning for the commission of this crime and that the victim's death was not accidental. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Evidence that property owners made renovations in bad faith and for the purpose of enhancing their damages was relevant and competent evidence for a jury to consider in the determination of the value of the property at the time of the taking. DOT v. Coleman, 127 N.C. App. 342, 489 S.E.2d 187 (1997).

Where defendant and his stepson kidnapped two boys and put them in the trunk of a car while they murdered the boys father and then murdered the two boys, evidence regarding the murder of the father was so intertwined with evidence of the murder of the boys that it was admissible and was not an abuse of discretion. State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997), cert. denied, 523 U.S. 1097, 118 S. Ct. 1583, 140 L. Ed. 2d 797 (1998).

Convictions for driving under the influence that were more than 10 years old were admissible in a second degree murder prosecution, where the evidence was relevant to show malice in that the defendant was driving under the influence, was without a license, and was speeding when he struck another car, killing the driver and injuring her daughters, and the court gave the jury a limiting instruction concerning the purpose for which contested evidence could be considered. State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998).

Evidence of the defendant's acts of violence toward his former girlfriend were admissible in his prosecution for the murder of the girlfriend's grandmother and the grandmother's friend, where evidence showing that the defendant tried to control the girlfriend to the point of assaulting her, kidnapping her, tying her to the bed, and threatening to kill her family members pertained to the chain of events explaining the context, motive, and set-up of the crime. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Other crimes evidence was admissible on the issue of identity in a capital murder trial, where a witness testified that the defendant had participated in two bank robberies with the witness during the two months before the robbery urder for which the defendant was being tried, and the testimony established that the defendant drove his white car in bank robberies and a white car was seen outside the jewelry store on the day of the murder, the defendant's sawed-off shotgun and ski mask were used in the prior bank robberies and the murderer wore a ski mask and carried a sawed off shotgun, and all the robberies were during business hours in small towns surrounding a larger city. State v. Hoffman, 349 N.C. 167, 505 S.E.2d 80 (1998), cert. denied, 526 U.S. 1053, 119 S. Ct. 1362, 143 L. Ed. 2d 522 (1999).

In a prosecution for murder, the trial court did not err when it allowed the admission of evidence relating to the defendant's prejudice against Jewish people and homosexuals since such evidence showed the defendant's skinhead beliefs and was relevant to show the defendant's motive and intent when he killed two black people. State v. Burmeister, 131 N.C. App. 190, 506 S.E.2d 278 (1998).

Photographs were admissible in a capital murder case over an irrelevancy objection, where the photographs showing empty beer cans and cigarette butts in a corn field supported the testimony of a companion of the murder victim that the defendant lured him to the cornfield and tried to kill him after they drank beer and smoked cigarettes, as the photographs supported the inference that this also happened to the murder victim. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Evidence that the capital murder defendant took his former girlfriend away from a cookout and fired a shotgun when members of her family came to check on her safety was admissible to show identity and the motive of retaliation for the girlfriend's resistance to his forceful control in the defendant's prosecution for the murder of the girlfriend's grandmother and the grandmother's companion. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Evidence of similar circumstances surrounding the death of the defendant's second wife were admissible in his prosecution for the murder of his first wife to show that the death was a homicide and not an accident, where the evidence was that both alleged victims were married to the defendant, that both died in the home they shared with the defendant and he was home at the time, that the defendant was the last person to see the victims alive and was performing CPR on the victim when emergency personnel arrived, that one victim died in or around a bathtub and the other in a hot tub, that the defendant stated in both cases that the dead women had drinking problems and had been drinking, that both had similar marks and injuries, and that insurance money was involved in both incidents. State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (1998).

Evidence that defendant had been convicted in the shooting death of his first wife was properly argued to the jury as making more incredulous his claim of accident in the shooting death of his second wife, particularly as defendant had made incriminating remarks regarding his role in the death of his first wife to threaten his second one. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

The defendant's previous traffic violations were relevant and admissible in his second-degree murder prosecution arising from a traffic accident to show malice based on defendant's "depraved heart" on the night that he struck the two victims' vehicle while intoxicated and while rounding a sharp curve at a speed at least 40 mph over the speed limit. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

The murder defendant's statement that he was going to have to "cap someone" if his employer did not stop garnishing his wages was not excludable as evidence of a prior bad act. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

Evidence of a prior crime was similar to the charged crime so as to be admissible to prove identity, where both crimes involved cutting a hole in the roof of a department store and removing large amounts of jewelry from display counters, and the previous crime had occurred fewer than three years earlier. State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

Evidence that the defendant previously had punished her children by beating them with a belt and/or biting them was admissible in her prosecution for the murder of a two-year old child and felonious child abuse to establish the identity of the person who committed the crime, a plan, and the absence of accident. State v. Anderson, 350 N.C. 152, 513 S.E.2d 296, 1999 N.C. App. LEXIS 239 (1999), cert. denied, 528 U.S. 973, 120 S. Ct. 417, 145 L. Ed. 2d 326 (1999).

The defendant's comment to witness about having gotten in trouble was admissible where it was not presented in a vacuum, but was part of a narrative that justified a police officer's initial contact with defendant, clarified the witness' identification of defendant after the shooting, and explained why an incorrect name was placed on certain documentation in the case. State v. Riley, 137 N.C. App. 403, 528 S.E.2d 590, 2000 N.C. App. LEXIS 411 (2000), cert. denied, 352 N.C. 596, 545 S.E.2d 218 (2000).

Exception under subsection (b) of this rule applied to witnesses' repetition of defendant's statements relating to recent burglaries at home in question, showing proof of opportunity, preparation, knowledge, identity, and absence of mistake, entrapment, or accident, proximate time, as well as statements regarding victim's demeanor after rape. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732, 1999 N.C. App.

LEXIS 619 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 370 (1999).

Where evidence surrounding two robberies, as well as the circumstances immediately preceding and following those robberies, was relevant to facts other than the defendant's propensity to commit the robbery and murder at issue, the trial court correctly allowed its inclusion. State v. Cheek, 351 N.C. 48, 520 S.E.2d 545, 1999 N.C. App. LEXIS 1158 (1999), cert. denied, 530 U.S. 1245, 120 S. Ct. 2694, 147 L. Ed. 2d 965 (2000).

Testimony of fourth sister regarding sexual molestation by defendant was admissible in case involving sexual molestation of three other sisters to show a common plan or scheme. State v. Owens, 135 N.C. App. 456, 520 S.E.2d 590, 1999 N.C. App. LEXIS 1145 (1999).

The admission of statements in a letter in which defendant urged his girlfriend to divorce her estranged husband and made threatening statements towards him were clearly relevant as an admission with respect to victim's death and also to show defendant's deliberate intent to kill. State v. Perez, 135 N.C. App. 543, 522 S.E.2d 102, 1999 N.C. App. LEXIS 1181 (1999).

Evidence that defendant lied in order to have child support for his three children terminated and that the Department of Social Services planned to have said support reinstated was not admitted to show bad character but was relevant to show motive for murder and attempted murders, and to show the particular circumstances leading up to them. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Evidence that defendant complained to a co-worker about having the Department of Social Services take over half his paycheck for child support was admissible to show motive and plan for first-degree murder of defendant's daughter and attempted murder of defendant's two children and their mother. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

Admission of testimony revealing that police informant became informant as a result of being arrested for buying cocaine from defendant and promising to help catch the seller, i.e. the defendant, was proper to prove intent, a common plan or scheme, and to identify defendant. State v. Montford, 137 N.C. App. 495, 529 S.E.2d 247 (2000).

Witness testimony that defendant fled when approached by law enforcement officers, including the details of the flight such as the fact that the defendant fired a weapon at the officers and was then hit with a bullet fired by one of them, was admissible to show his consciousness of guilt. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Evidence that approximately one week before the victim's death, defendant (1) pointed and shot a gun over his mother's head and (2) pointed a gun at his brother and threatened to kill him was admissible to establish the "chain of circumstances" of the crime charged; these prior acts revealed not only defendant's intensifying display of violent behavior toward his family, but also tended to show the possibility that defendant was angry with the victim for confronting him about the treatment of his family. State v. Allen, 141 N.C. App. 610, 541 S.E.2d 490, 2000 N.C. App. LEXIS 1436 (2000), cert. denied, 353 N.C. 382, 547 S.E.2d 816 (2001).

Testimony of defendant's two former wives concerning his behavior towards them during their marriages, which tended to show that as the marriages deteriorated, defendant responded violently, was admissible at his trial for the murder of his wife. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000), cert. denied, 353 N.C. 269, 546 S.E.2d 114 (2000).

Court rejected defendant state trooper's argument that evidence of his alleged crimes, wrongs, and acts was admitted in violation of the Rules of Evidence and his due process rights; testimony that defendant asked one witness to ride in the floor of his patrol car before the shooting, that another witness and defendant had violated or circumvented numerous automobile title transfer procedures, and that, upon searching the defendant's patrol car, a third witness had found licenses and registrations that should have been turned over to a magistrate under highway patrol policy, was admissible to chronicle the murder and its probative value was not outweighed by the danger of prejudice. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Where two defendants were convicted of armed robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury, the trial court did not commit error in admitting testimony about the first defendant's drug transaction, which had occurred four years before the instant crimes. State v. Holadia, 149 N.C. App. 248, 561 S.E.2d 514, 2002 N.C. App. LEXIS 221 (2002), cert. denied, 355 N.C. 497, 562 S.E.2d 432 (2002).

Evidence of violence against child's mother was admissible to show why the mother did not take any action against defendant when he first began assaulting her son, to identify defendant, rather than the mother, as the perpetrator, and to dispel defendant's contention that the child's injuries were accidentally inflicted; because the evidence of prior acts of domestic violence toward the mother was offered for a purpose other than to show the propensity of defendant to commit the crime for which he was being tried, the trial court did not abuse its discretion in admitting the evidence. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

Evidence of defendant's conviction for second-degree murder 27 years earlier was properly admitted in defendant's murder trial where the trial court found similarities between the two murders, and the 18 years defendant spent in prison were excluded when the trial court ruled on whether the previous crime was too remote; the probative value of the previous conviction upon the issues for which it was offered, defendant's intent to kill and his identity as the perpetrator, far outweighed the possibility of unfair prejudice. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon was granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

When defense counsel revealed that a police detective falsely told defendant he had been caught on videotape committing two robberies, the prosecutor's question of the detective as to whether defendant had been caught on videotape committing other robberies was not inadmissible under G.S. 8C-1, Rule 404(b). State v. Fleming, 148 N.C. App. 16, 557 S.E.2d 560, 2001 N.C. App. LEXIS 1276 (2001).

Where defendant was tried for multiple sexual assaults and two murders by strangulation, the trial court did not err in permitting defendant's former girlfriend to testify concerning choking incidents between herself and defendant in order to show motive, plan, common scheme, and intent. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Defendant's conduct with two women was sufficiently similar and proximate in time to support its admission under G.S. 8C-1, N.C. R. Evid. 404(b) where defendant was charged with sexual misconduct with a 12-year-old which consisted of rubbing her breast and digitally penetrating her vagina, and a witness testified that, when she was 15 years old, defendant had sexual intercourse and performed oral sex on her without her consent. State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Evidence that defendant assaulted a jail officer while incarcerated pending trial was properly admitted in defendant's trial for first degree murder of a police officer to rebut defendant's assertion that defendant was not aware of the police officer's identity and would not knowingly harm a police officer. State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360, 2003 N.C. App. LEXIS 1254 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003), cert. denied, 358 N.C. 547, 599 S.E.2d 913 (2004).

Evidence of events occurring after defendant left a patrol car was not inadmissible under G.S. 8C-1, N.C. R. Evid. 403 and 404(b) as the evidence was part of a single, continuing transaction beginning with defendant's insertion of herself into the events at a school and continuing through her arrest; evidence of what occurred after she left the patrol car was part of the chain of events leading to defendant's arrest and, therefore, was admissible, and the evidence of events occurring after defendant left the patrol car provided added evidentiary support for the charge of obstructing and delaying an officer. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Admission of testimony that defendant viewed sexually explicit photos on his home computer was relevant, and any prejudice that might have been caused by allowing the jury to see the photos was addressed by the trial court's decision not to show the photos to the jury. State v. Quinn, 166 N.C. App. 733, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004).

When defendant was charged with second-degree murder for causing another's death by his drunk driving, his nine-year-old conviction for driving while impaired was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), because it showed malice, which was a proper purpose for admitting it, and the fact that it was nine years old did not render it too remote to be relevant. State v. Westbrook, 175 N.C. App. 128, 623 S.E.2d 73, 2005 N.C. App. LEXIS 2704 (2005).

Trial court did not abuse its discretion when it admitted evidence consisting of defendant's post-Miranda statements to an officer that, inter alia, the defendant gave persons meth in exchange for work. A similar transaction with the victim was a sale under G.S. 90-95. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

In a drug case, the testimony of a probation officer regarding defendant's residence was admissible under G.S. 8C-1, Rule 404(b) because they evidence was only used to establish that defendant occupied a dwelling where drugs were located; moreover, the danger of unfair prejudice was outweighed by the probative value of the evidence. State v. Shine, 173 N.C. App. 699, 619 S.E.2d 895, 2005 N.C. App. LEXIS 2306 (2005).

Trial court did not abuse its discretion in admitting evidence of a prior robbery under G.S. 8C-1-404(b) because the similarities between the prior robbery and the current offense, which occurred within one week of each other, were sufficient to support a finding that the probative value of the evidence of the prior robbery was not substantially outweighed by the danger of unfair prejudice. State v. Hagans, 177 N.C. App. 17, 628 S.E.2d 776, 2006 N.C. App. LEXIS 719 (2006).

Testimony of a detective regarding defendant's involvement in a second robbery was admissible under G.S. 8C-1-404(b), because the second robbery was sufficiently similar. State v. Jones, 176 N.C. App. 678, 627 S.E.2d 265, 2006 N.C. App. LEXIS 589 (2006).

Testimony of a state witness, made after the trial judge conducted voir dire of the witness, was properly admitted as it was relevant to show plan, modus operandi, and identity. Among other things, the testimony of the witness included a positive identification of defendant as the perpetrator of the crime against her, that the offense against her occurred within three miles of the offense against the victim, that both attacks occurred in the evening and during the hours of darkness, that the attacker was armed on each occurrence, and that the victims were similar in age and were both white females. State v. Summers, 177 N.C. App. 691, 629 S.E.2d 902, 2006 N.C. App. LEXIS 1188, appeal dismissed, cert. denied, 637 S.3.2d 192 (N.C. 2006).

Admission of evidence of other crimes was not prejudicial where the trial court instructed the jury that the evidence was being received for limited purpose of showing defendant's motive, opportunity, intent, and knowledge. State v. Calvino, 179 N.C. App. 219, 632 S.E.2d 839, 2006 N.C. App. LEXIS 1834 (2006).

Admission of photographs of nude women was not erroneous because they were admitted for a permissible purpose other than to show defendant's character in conformity therewith; the photographs served to corroborate the victim's testimony and provided evidence of a plan and preparation to engage in sexual activities with the victim. State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

In light of uncontested evidence of defendant's prior convictions, defendant failed to show that the state's cross-examination of defendant regarding the prior convictions as improper under G.S. 8C-1-404. State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411, appeal dismissed, cert. denied, 637 S.E.2d 187 (N.C. 2006).

Admission of evidence of a power of attorney defendant obtained naming her as attorney in fact, personal papers and identification belonging to the victims, and the purchase of a vehicle with the power of attorney, did not violate G.S. 8C-1-404(b), as it was relevant and offered to show a common plan or scheme and the absence of mistake, and defendant failed to show that the admission of the evidence was manifestly unsupported by reason and was so arbitrary that it could not have been the result of a reasoned decision. State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

Contrary to defendant's contention, testimony by the victim's grandmother concerning the relationship between defendant and the victim's mother was not impermissible character evidence but was relevant, factual information dealing with the dynamics of the two personalities involved; given the defense's attempts to suggest that the mother might have been the perpetrator or that the child died from an accidental fall, the evidence was probative for a purpose other than defendant's character. State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18, 2006 N.C. App. LEXIS 2504 (2006).

Prior bad act evidence was properly admitted where it was relevant to show defendant's intent because the state contended defendant shot at the car either intending to shoot the victim's friend of believing the victim to be the passenger. State v. Christian, 180 N.C. App. 621, 638 S.E.2d 470, 2006 N.C. App. LEXIS 2518 (2006).

Defendant's desire to avoid returning to prison constituted evidence of defendant's motive for the traffic violations committed while fleeing the police, and thus was relevant and admissible. State v. Locklear, 180 N.C. App. 115, 636 S.E.2d 284, 2006 N.C. App. LEXIS 2248 (2006).

Testimony of the second of the victim's daughters that defendant had thrown a record player at the victim during an argument that occurred 14 years prior to the murder was admissible because defendant opened the door to the testimony; any remoteness in time went to weight not admissibility. State v. Parmaei, 180 N.C. App. 179, 636 S.E.2d 322, 2006 N.C. App. LEXIS 2234 (2006).

Testimony of one of the victim's daughters regarding two prior acts of violence of defendant toward the victim, one involving defendant allegedly pushing the victim in front of a moving vehicle and the other involved an attempt to strike the victim with a piece of firewood, was admissible to prove either intent to harm or an absence of mistake. State v. Parmaei, 180 N.C. App. 179, 636 S.E.2d 322, 2006 N.C. App. LEXIS 2234 (2006).

In defendant's murder trial, the trial court did not err in admitting evidence of defendant's bisexuality pursuant to G.S. 8C-1-404(b), as defense counsel, in the opening statement, extensively discussed defendant and the victim's relationship and portrayed their marriage as a happy and loving one; the trial court properly found that evidence of defendant's attempts to have sexual relations with a male escort and interest in homosexual pornography were relevant to rebut defense counsel's opening statement. State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

Where a victim testified in defendant's kidnapping and assault trial only after being arrested and jailed as a material witness and he stated that defendant did not threaten him personally even though others had shot up his "momma's house" after he testified in a co-defendant's trial, the court failed to see how such testimony constituted evidence of a prior bad act by defendant under G.S. 8C-1-404(b) and was not persuaded that even presuming error, such error would have prejudiced defendant, given other evidence presented in the case. State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78, 2007 N.C. App. LEXIS 17 (2007), cert. denied, appeal dismissed, 361 N.C. 364, 644 S.E.2d 555 (2007).

Admission of evidence that defendant hid from police under a pile of clothing was not an abuse of discretion because it showed defendant's guilty conscience. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Evidence related to a prior killing was admissible because it satisfied both the similarity and temporal requirements of G.S. 8C-1-404(b); both crimes involved fatal stab wound to unarmed victim's neck with a folding pocketknife, which occurred during an argument in the victim's home and the relevant time between the two crimes, which actually occurred 10 years apart, was only five years because defendant was incarcerated for five of the ten years. State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007).

Admission into evidence of a receipt for an attempted credit card transaction and a statement made by defendant and written by a detective was proper where a limiting instruction was given to the jury to consider the evidence as tending to show a common scheme or plan. State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007).

In a trial in which the state sought to show that defendant pressured her daughter to shoot defendant's husband so that defendant could be with a boyfriend she met at a swingers party, the admission of sexually suggestive photographs of defendant and the boyfriend was proper under G.S. 8C-1-401, G.S. 8C-1-403, and G.S. 8C-1-404(b) because the photographs corroborated the existence of a sexual relationship between defendant and the boyfriend, the photographs illustrated the chain of events leading up to the murder, and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Police officer's testimony that defendant provided fake names and possessed a fictitious identification card was admissible under G.S. 8C-1-404(b) because it was probative of defendant's guilty knowledge and established the chain of circumstances culminating in defendant's arrest. State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876, 2007 N.C. App. LEXIS 1805 (2007), appeal dismissed, 362 N.C. 178, 657 S.E.2d 663 (2008).

Trial court did not abuse its discretion in admitting defendant's prior conviction into evidence as under the North Carolina Felony Firearms Act, specifically G.S. 14-415.1(b), records of prior convictions of any offense were admissible in evidence for the purpose of proving a violation of G.S. 14-415.1; as there was no indication that defendant agreed to stipulate to defendant's prior felony conviction, the state had no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a felon. State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007).

Evidence of defendant's participation in three armed robberies two months before the subject event was admissible under G.S. 8C-1-404(b) because the fact that the firearm used by defendant in the subject offense was the same as that used during the three robberies was relevant to prove identity and supported an inference that the same person committed the earlier and the later acts. State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007).

Even assuming that the prosecutor's closing argument, which contained statements that defendant alleged were made to prove defendant's bad character, was grossly improper, any prejudice to defendant was cured by the trial court's instructions to the jury stating, inter alia, that the testimony of defendant's cell mate could only be considered for the limited purpose of showing defendant's consciousness of guilt. State v. Goss, 361 N.C. 610, 651 S.E.2d 867, 2007 N.C. LEXIS 1106 (2007).

Admission of evidence concerning the death of an old neighbor of defendant was proper because there were significant similarities between the death of the old neighbor and defendant's wife, the victim in the instant action, and there was sufficient circumstantial evidence that defendant was involved in the prior death; the prosecution was not required to present direct evidence of defendant's involvement in the prior death, but could present circumstantial evidence tending to support a reasonable inference that the same person committed both the earlier and later acts. State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007).

Evidence of a later incident between defendant and a witness was properly admitted under G.S. 8C-1, N.C. R. Evid. 404(b) and 403 as: (1) the later incident occurred 20 days after the incident with a victim, (2) the two incidents occurred in the early morning hours, (3) defendant told both victims that defendant's vehicle would not start, (4) defendant told the victim defendant would let the victim live if the victim stopped struggling, and told the witness that the defendant would kill the witness if the witness made any noise, and (5) defendant tried to restrain and silence the victim and the witness, and defendant ceased defendant's efforts when the victim and the witness forcefully resisted defendant's advances; the prejudicial effect of the witness's testimony did not substantially outweigh its probative value. State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Admission of the testimony of three witnesses that the alleged assault against each witness took place within one year of the attack on a victim, and that defendant used substantially the same method of restraining each witness during the attack, employing defendant's greater size and strength, limiting the witness's breathing, and making dire threats against the witness, and called each witness after the attack was not plain error under N.C. R. App. P. 10(c)(4), and was proper under G.S. 8C-1, N.C. R. Evid. 403 and 404(b). State v. Simmons, 191 N.C. App. 224, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (2008).

Testimony about prior acts against defendant committed against the victim was admissible, where the testimony was relevant because it made it more probable than not that defendant committed the charged crimes against the victim given defendant's belief that the victim was cheating on defendant again, and the prior action, which also involved incidents where defendant believed the victim was cheating on defendant and which occurred less than a year earlier, were also sufficiently similar and close in time to be admitted. State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

Evidence of prior drug sales was admissible under G.S. 8C-1, N.C. R. Evid. 403 and 404(b), as the drive-by, street-level drug sale that occurred between defendant and an undercover female officer was not a general substantive crime in and of itself, but was a modus operandi by which defendant carried out the sale or distribution of drugs. State v. Welch, — N.C. App. —, 666 S.E.2d 826, 2008 N.C. App. LEXIS 1741 (2008).

Denial of defendant's motion in limine was not plain error as there was no G.S. 8C-1, N.C. R. Evid. 404(b) violation in a witness's testimony that a digital camera was stolen during a breaking and entering from the witness's employer, and that the digital camera found in defendant's camper was that camera as the testimony only tended to show that defendant possessed stolen items, not that defendant was acting in conformity with a propensity to steal, and the fact that defendant had multiple stolen items in the camper was relevant to the felonious possession of stolen goods charge under G.S. 14-72(c). State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

Testimony by defendant's sister and the sister's boyfriend that they were feared defendant was admissible because it was not offered as mere character evidence, but was relevant in that the fear was a product of their belief in defendant's guilt and explained by the sister did not contact law enforcement directly or more immediately after a codefendant confessed; as such, the testimony had some tendency as circumstantial evidence to make the existence of defendant's guilt more probable. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Evidence of defendant's prior driving while intoxicated (DWI) convictions was admissible where defendant had been convicted of DWI four times in the 16 years leading up to the subject incident, defendant had been convicted of DWI six months earlier, and thus, defendant's driving record demonstrated a consistent and probative pattern of criminal behavior. State v. Maready, 362 N.C. 614, 669 S.E.2d 564, 2008 N.C. LEXIS 985 (2008).

Testimony concerning a prior assault on another victim was a major identity piece of evidence, relevant to showing that defendant was in possession of and fired a gun that was used in the subject murder less than 48 hours before the murder. State v. Dean, — N.C. App. —, 674 S.E.2d 453, 2009 N.C. App. LEXIS 456 (2009).

Admission of evidence that a deputy had responded to a prior domestic disturbance at defendant's residence and went their after defendant's mother called the deputy but was unable to be reached to return the call did not violate G.S. 8C-1, N.C. R. Evid. 404(b), because the evidence completed the picture for the jury. State v. Madures, — N.C. App. —, 678 S.E.2d 361, 2009 N.C. App. LEXIS 1077 (July 7, 2009).

Drugs Found at Defendant's Home Inadmissible. — Evidence of substantial amounts of drugs belonging to others and seized at the trailer where the defendant lived was irrelevant, prejudicial and inadmissible to show his knowledge that the substance in a van he was driving was cocaine; the defendant was not charged with any offense in connection with the drugs seized at the trailer and the circumstantial evidence presented at trial—the fact that drugs belonging to other people were discovered at the trailer defendant shared with others—was too weak to support an inference of knowledge on his part. State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52, 2000 N.C. App. LEXIS 1287 (2000).

Evidence that a defendant used drugs shortly before a fire he was accused of starting was not excluded under G.S. 8C-1, Rule 404(b) because it served the purpose of establishing the chain of events and circumstances leading to the fire. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

Evidence Held Inadmissible. — Where five year old child, whom the court ruled was incompetent to testify, herself was incapable of informing the jury firsthand of the events that the State claimed she had participated in, it was not proper for the prosecutor to advise the jury of these purported events based on his secondhand understanding of what the child knew and had said. State v. Flannigan, 78 N.C. App. 629, 338 S.E.2d 109 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 572 (1986).

In a prosecution for armed robbery, evidence elicited from defendant's girlfriend regarding another crime, namely, the shooting of her former boyfriend, constituted prejudicial error. State v. Monroe, 78 N.C. App. 661, 338 S.E.2d 137 (1986).

It was error for the trial court to allow, over defendant's objection, the prosecutor's cross-examination of defendant regarding alleged extrinsic acts of misconduct in order to circumstantially prove defendant's character for violence as the basis for an inference that defendant was the aggressor in the affray at issue and could not have acted in self-defense. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986), holding, however, that the error was harmless in light of other evidence properly admitted at trial.

In a prosecution for first degree sexual offense involving three and four year old victims, defendant's alleged sexual contacts with his sister nine years before trial, when defendant was thirteen years old, were too remote in time to be probative or relevant. State v. Scott, 317 N.C. 689, 347 S.E.2d 414 (1986).

Evidence of defendant's involvement in other crimes, offered by the State to prove the crime for which defendant was being tried, was not admissible where the only relation between the other crimes and the crime charged was that they were similar and were committed within a time not too far removed from the crime charged. State v. Hamrick, 81 N.C. App. 508, 344 S.E.2d 316 (1986).

In prosecution for rape, sexual offense and crime against nature, cross-examination of defendant with regard to other nonconsensual sexual activity with another woman was not relevant on the question of the victim's consent, and where defendant's only defense was consent, this cross-examination inquiry was clearly prejudicial and required a new trial. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434, petition for cert. improvidently allowed, 318 N.C. 652, 350 S.E.2d 94 (1986).

The fact that the defendant pointed his gun at victim three years previously and that both men laughed afterward did not indicate that three years later defendant did not fear victim or make the apparent necessity to defend himself more or less probable than it would be without the evidence; thus, it was error to allow testimony of this extrinsic act of misconduct in order to show defendant's character for violence and that therefore he must have acted in conformity with that character, and not in self defense, when he fatally shot the victim. State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986).

In trial for murder of defendant's husband, specific instances of conduct regarding defendant's alleged participation in three previous unrelated murders were not probative of defendant's character for truthfulness under G.S. 8C-1, Rule 608(b), and were not admissible to prove motive under subsection (b) of this rule. Thus the trial court committed prejudicial error in denying defendant's motion in limine to prevent the district attorney from using the inadmissible evidence to impeach defendant. State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857 (1987), aff'd, 321 N.C. 633, 365 S.E.2d 600 (1988).

The trial court erred by admitting testimony elicited by the prosecutor from witness that she was "still afraid" of defendant on the day she testified, as this was inadmissible character evidence. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

Where it was clear at trial who was being tried and witnesses specifically identified defendant, and there was no evidence that defendant ever gave anyone a different name, testimony by police officer that he knew defendant by an alias inferred that defendant had been involved in some other crime or had used other names for some illegal purpose, and such testimony was, therefore, not admissible as an identity exception under subsection (b) of this section. State v. General, 91 N.C. App. 375, 371 S.E.2d 784 (1988).

In a prosecution for second-degree murder, testimony that the defendant was in the business of selling marijuana to high school age persons had no tendency to make any fact of consequence more or less probable, nor was the evidence about how defendant procured his automobile and the evidence concerning the details of how the marijuana was packaged and sold relevant to any material fact in issue. Equally irrelevant was evidence concerning the victim's citation for possession of marijuana. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456,

cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Evidence of prior, noncriminal unrelated fire was held inadmissible because of its prejudicial character since such evidence was irrelevant in that it neither confirmed nor suggested a relationship between two defendants charged with burning down a food market. Moreover, the State failed to show defendants had had any connection with the previous fire, the exception for the admission of prior bail acts set out by this rule. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

Testimony of cellmate and detective that defendant was in jail on a charge of attempted murder of his girlfriend was not relevant where defendant was on trial for an unrelated crime of murder, since the court determined that this testimony was not relevant to any fact or issue other than the character of the accused. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Where, in an attempt to undercut defendant's testimony about her abuse by her first husband, who was a drug addict, and by her second, who was an alcoholic, district attorney asked, "Well, you sort of enjoyed smoking marijuana, didn't you?" and defendant responded, "I did on occasion sir," the question was error; defendant's admission to having smoked marijuana had no conceivable tendency to prove or disprove her truthfulness and subsection (b) of this rule prohibits evidence of other crimes, wrongs, or acts to prove the defendant acted in conformity with a character trait those acts exhibit. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

In trial for first degree arson, court erred in admitting evidence of an earlier fire in another house where there was no evidence that defendant had performed any act with respect to the 1982 fire, and no evidence placing defendant at the scene or in its vicinity at the time of that fire; there was no nexus between the defendant and the act sought against him; therefore, the evidence did not support the inference that defendant committed both the earlier and the later acts. State v. English, 95 N.C. App. 611, 383 S.E.2d 436 (1989).

Where defendant was charged with two counts of burglary, two counts of rape and two counts of sex offense, his employment record had no relevance to any of those offenses; thus, neither defendant's evidence that he was a good employee nor State's rebuttal evidence of his bad conduct toward fellow employees was admissible under subdivision (a)(1) of this rule. State v. Cotton, 99 N.C. App. 615, 394 S.E.2d 456 (1990), aff'd, 329 N.C. 764, 407 S.E.2d 514 (1991).

Court's refusal to permit defendant to cross-examine detective about police department's having used defendant as an informant was proper. Defendant's purpose was to show that he had credibility with the police department, but at that time only the State had presented evidence, defendant's credibility had not been attacked, and he was not entitled to bolster it in advance. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Proffered testimony as to the victim's alcohol consumption with other people in party settings had no tendency to prove that the victim consented to sexual activity with the defendant on the day in question. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Where defendant was arrested after a bag of cocaine was found under the seat of the truck he was operating, and at trial he offered the criminal record of the owner of the truck to show that the owner acted in conformity with a prior conviction by placing cocaine under the seat, the court properly excluded the criminal record under section (b) of this rule. Such evidence created only an inference or conjecture. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Where defendant sought unsuccessfully to introduce evidence that another victim was attacked in the hospital basement by a black male attired similarly to the suspect the hospital employee described and where defendant contended that the evidence should have been admitted to show that someone else committed the crime, trial court did not err in excluding this evidence. The crimes were not similar; other victim was not raped and there was no indication that her attacker attempted to rape her; the attacker's identity was not known; and there was no evidence to indicate that the man who grabbed other victim also committed the offense against the victim two months later. State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991).

Prosecutor's questioning of capital murder defendant's mother about locks placed on the outside of defendant's bedroom door was highly prejudicial and of no probative value; however, such error was harmless where the question of defendant's guilt was strong, the trial court properly sustained defendant's objections to the questions and the mother testified she was not afraid of her son. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

It was proper for the prosecution to refer to the defendant's illegal adulterous affair only in order to rebut the defendant's contention that he was a law-abiding citizen. Therefore, the trial court erred in allowing the prosecution to cross-examine the defendant concerning the adulterous affair and to require the defendant to read the love letters concerning the affair on cross-examination. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

Where the prosecution cross-examined the defendant concerning his affair before the defendant put character witnesses on the stand to testify as to his law-abidingness, the trial court erred in allowing the prosecution to ask the defendant about his adultery before the defendant put his witness on the stand. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

In trial for sexual offenses against 3 minor teenage boys, testimony of a 24 year old man that he had been sexually assaulted by the defendant approximately seven years before was error, but the error was not prejudicial in light of the other evidence. State v. Gross, 104 N.C. App. 97, 408 S.E.2d 531, cert. denied, 330 N.C. 444, 412 S.E.2d 78 (1991).

Evidence that thirteen and one-half years prior to trial defendant had been convicted of armed robbery was admissible where the evidence presented by the State of the earlier armed robbery was sufficiently similar to the crimes charged to be admitted for the purpose of showing a modus operandi, motive and even identity, and where the evidence was not too remote in time to be probative of any fact at issue. State v. Wilson, 106 N.C. App. 342, 416 S.E.2d 603 (1992).

Trial judge did not err by allowing testimony about defendant's drug dealings; the disputed evidence was relevant to show defendant's motive for murder. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

The trial court erred in allowing cross-examination of defendant about details of his prior convictions in that it bore no logical relevance to the crimes charged that would render it admissible under section (b), and it was not admissible to refute any inaccurate or misleading testimony or inferences raised by defendant. State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

Where defendant was convicted of second degree murder, evidence that defendant had previously shot over a truck was irrelevant and inadmissible and could not be deemed harmless error so that defendant was entitled to a new trial. State v. Irby, 113 N.C. App. 427, 439 S.E.2d 226 (1994).

Court properly excluded from evidence the fact that the victim had twice been convicted of murder. State v. Leazer, 337 N.C. 454, 446 S.E.2d 54 (1994).

The trial court erred in allowing the introduction of evidence of plaintiff's prior use of illegal drugs in sexual molestation case, such information was highly prejudicial and defendants proffered no permissible use of such information. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, 467 S.E.2d 713 (1996).

Evidence of witness's juvenile adjudication of guilt of involuntary manslaughter was not relevant; admission of the evidence was not necessary to a fair determination of defendant's guilt or innocence. State v. Deese, 136 N.C. App. 413, 524 S.E.2d 381, 2000 N.C. App. LEXIS 8 (2000), cert. denied, 351 N.C. 476, 543 S.E.2d 499 (2000).

Evidence of a prior detainment incident at another department store was inadmissible in defendant's shoplifting case where she did not claim to have made a mistake in either incident and where defendant was judicially acquitted of the crime for which she was charged in the prior incident. State v. Fluker, 139 N.C. App. 768, 535 S.E.2d 68, 2000 N.C. App. LEXIS 1026 (2000).

Testimony by a witness as to defendant's having lied to the witness about an unrelated matter was not admissible under G.S. 8C-1, N.C. R. Evid. 404 because the testimony was not to establish defendant's intent or motive, but was to attack defendant's credibility. State v. Lee, 189 N.C. App. 474, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (2008).

State should not have been allowed to introduce evidence in its case-in-chief about the victim's good character merely because defense counsel forecasted during opening statements the introduction of evidence of the victim's bad character. Since defendant offered no evidence in his case-in-chief of the victim's bad character, the admission of character evidence as to the victim was in error; however, the error was harmless under G.S. 15A-1443(a) because there was sufficient evidence to refute defendant's claim that, but for the admission of the character evidence, the jury would have reached a different verdict. State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009).

Trial court erred in allowing the State to cross-examine defendant about instances of domestic violence that occurred between defendant and a former girlfriend more than 10 years earlier, because the two incidents did not contain similarities supporting an inference that the same person committed both acts; the prior event involved defendant's former adult girlfriend, while the event that was the subject of the trial, involved a child who defendant barely knew. State v. Ray, — N.C. App. —, 678 S.E.2d 378, 2009 N.C. App. LEXIS 1069 (July 7, 2009).

Possession of Pornographic Videos and Magazines. — As a general rule, evidence of a defendant's prior conduct, such as the possession of pornographic videos and magazines, is not admissible to prove the character of the defendant in order to show that the defendant acted in conformity therewith on a particular occasion. State v. Smith, 152 N.C. App. 514, 568

S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002), cert. denied, 356 N.C. 623, 575 S.E.2d 757 (2002).

Evidence That Defendant Enjoyed Consensual Anal Sex With His Wife Improperly Admitted. — Defendant was granted a new trial on his convictions of first degree sex offense with a child, G.S. 14-27.4, and taking indecent liberties with a child, G.S. 14-202.1, because the trial court erred, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), in admitting testimony by defendant's wife that defendant enjoyed anal sex; the fact that defendant engaged in and liked consensual anal sex with his wife was not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both to be admissible under rule 404(b). State v. Dunston, 161 N.C. App. 468, 588 S.E.2d 540, 2003 N.C. App. LEXIS 2186 (2003).

Evidence of Prior Abuse Toward Other Child. — Admission of testimony by the victim's sister regarding defendant's prior abuse toward her was not erroneous because the testimony concerned defendant's actions towards the sister when she was approximately the same age, illustrating a continuing pattern of sexual abuse and an intent to commit incest. State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

Where defendant was charged with indecent liberties with a child and with statutory sex offense, it was proper to admit testimony by three witnesses about other acts allegedly committed by defendant, in light of the similarity between the ages of the girls at the time of the acts, their placement with defendant because of familial or quasi-familial relationships, defendant's purported modus operandi in each instance, and the warning he allegedly gave each girl. State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

Evidence Held Prejudicial. — Where the challenged evidence that defendant was in custody for assault with a deadly weapon with intent to kill his girlfriend was especially prejudicial because of its similarity to the charge at issue, which was murder and assault with a deadly weapon with intent to kill, and the similarity of the charges was compounded by the additional "verification" evidence of a detective, such admissions constituted prejudicial error and defendant was entitled to a new trial. State v. Cashwell, 322 N.C. 574, 369 S.E.2d 566 (1988).

Evidence of prior sexual assaults against a witness, which happened seven years before a similar sexual assault for which defendant was charged was prejudicial to defendant's fundamental right to a fair trial because the prior acts were too remote in time. State v. Jones, 322 N.C. 585, 369 S.E.2d 822 (1988).

Where defendant was accused of sexually abusing his 14-year-old adopted daughter, the trial court erred in admitting testimony of alleged prior bad acts committed by defendant; namely, defendant's alleged frequent nudity, his alleged frequent fondling of himself, and an adulterous affair in which he was allegedly involved, as under the circumstances of this case, the admission of such evidence was highly prejudicial and of questionable relevance. State v. Maxwell, 96 N.C. App. 19, 384 S.E.2d 553 (1989), cert. denied, 326 N.C. 53, 389 S.E.2d 83 (1990).

The appellate court agreed with 14-year-old defendant that allegations of a subsequent sexual assault on a four-year-old were not admissible since the incident was not sufficiently similar to the one at issue involving a nine-year-old; the admission of such evidence tended only to show the propensity of the defendant to commit sexual acts against young female children, an improper purpose, and therefore entitled defendant to a new trial. State v. White, 135 N.C. App. 349, 520 S.E.2d 70 (1999).

Refusal to Exclude Evidence of Other Killings Held Prejudicial. — In trial for murder of defendant's husband, rulings of the trial judge denying defendant's motion in limine to exclude evidence implicating her in other killings held to have impermissibly chilled her right to testify in her own defense. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Cumulative Effect of Admitted Evidence Held Prejudicial. — Where, in a murder prosecution, the State spent a great deal of time focusing on the details of defendant's alleged prior offenses of selling marijuana to high school students, citation for possession of marijuana, and breaking and entering, the cumulative effect of the admission of the evidence was prejudicial error entitling the defendant to a new trial. State v. Emery, 91 N.C. App. 24, 370 S.E.2d 456, cert. denied, 323 N.C. 627, 374 S.E.2d 594 (1988).

Admission of Irrelevant Evidence Not Prejudicial. — In the light of the direct evidence against defendant and the utter irrelevance of marijuana possession to the charges on which defendant was ultimately convicted, no prejudicial error occurred by virtue of admission of evidence that marijuana was found in defendant's basement. State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986), rev'd on other grounds, 320 N.C. 626, 359 S.E.2d 774 (1987).

Although a detective's testimony concerning defendant's statement concerning an unrelated robbery was inadmissible under G.S. 8C-1, N.C. R. Evid. 404, defendant was not entitled to a mistrial because the curative instruction given was sufficient to cure the error, and there was no evidence that the statement had any impact on the trial, particularly in light of the fact that defendant admitted participating in the charged robberies. State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

Erroneous Admission of Testimony Held Harmless Error. — Admission of testimony as to the victim's character was erroneous; however, the error was harmless given the overwhelming evidence of defendant's guilt presented by the State and defendant's failure to show that the exclusion of the character testimony would have impacted the jury. State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Admission of Evidence Not Plain Error. — Admission of evidence as to defendant's pornography business and a confidential informant's testimony that defendant handed him pornographic tapes was not impermissible evidence of defendant's character under a plain error analysis as its admission was not an error that was so fundamental as to result in a miscarriage of justice or that had a likely impact on the outcome of the trial as there was substantial evidence establishing defendant's commission of trafficking in cocaine by possession. State v. Williams, 177 N.C. App. 725, 630 S.E.2d 216, 2006 N.C. App. LEXIS 1219 (2006).

Failure to Preserve Challenge for Appellate Review. — Defendant failed to preserve a challenge to the admission of evidence under G.S. 8C-1, N.C. R. Evid. 404, because defendant failed to object when the evidence was offered at trial and made no attempt to introduce evidence that the charges relating to the Rule 404(b) evidence were dismissed. State v. Reaves, — N.C. App. —, 676 S.E.2d 74, 2009 N.C. App. LEXIS 523 (2009).

Rule 405. Methods of proving character.

(a) *Reputation or opinion.* — In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) *Specific instances of conduct.* — In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 405 except for the addition of the last sentence to subdivision (a).

The Advisory Committee's Note states:

"The rule deals only with allowable methods of proving character, not with admissibility of character evidence, which is covered by Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue."

With respect to specific instances of conduct and reputation, this treatment is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 110 (1982).

With respect to opinion evidence, the Advisory Committee's Note states:

"In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with 'the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation".' It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. *** No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In permitting opinion evidence as a means of proving character, the rule departs from current North Carolina practice. The general practice in this state is to frame questions in terms of reputation. However, if the witness is questioned concerning the "general character" or the "reputation and character" of another person, it is understood that the real subject of inquiry is reputation. *State v. King,* 224 N.C. 329 (1944); *State v. Hicks,* 200 N.C. 539 (1933); *State v. Cathey,* 170 N.C. 794 (1916). Professor Brandis points out that:

"If as *e.g.,* in the initial question in *State v. Cathey* ... 'reputation' is entirely omitted from the question, or if the question refers, as in *State v. Hicks* ... to 'reputation and character,' the judge and counsel may know that the witness should confine himself to reputation, but, in the absence of further enlightenment, it seems most doubtful that the witness is so legally learned. Therefore, the practical result may well be to admit opinion evidence while giving lip service to the prohibition against it. Since, additionally, as a practical matter, many witnesses will in fact give opinion in answering a question ostensibly calling only for reputation, it seems to the author of this edition that it would be much more realistic for the Court to scrap the present stated rule and frankly admit either opinion or reputation testimony." *Stansbury's North Carolina Evidence* (Brandis ed.) § 110, at 338, n. 99.

Since Fed. R. Evid. 405 opens up the possibility of proving character by means of expert witnesses, the last sentence was added to subdivision (a) to prohibit expert testimony on character as it relates to the likelihood of whether or not the defendant committed the act he is accused of. This sentence is not intended to exclude expert testimony of a personality or character change as it relates to the issue of damages.

The second sentence of subdivision (a) permits inquiry on cross-examination into relevant specific instances of conduct. The Advisory Committee's Note states:

"According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *** The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony."

Under current North Carolina practice, inquiry into specific instances of conduct on cross-examination is available only on the cross-examination of the person whose character is in question. *Brandis on North Carolina Evidence* §§ 111, 115 (1982). It is not permissible in North Carolina to ask a character witness whether he has heard of the person in question having committed a particular act. *Id.* § 115. However, to some extent the North Carolina rule may be circumvented by cross-examination as to specific traits. *Id.*

Also, the Advisory Committee's Note states:

"The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.,* be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701."

Legal Periodicals. — For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

CASE NOTES

This rule effects a change in the permissible methods of proving character. Subsection (a) of this rule provides that proof of character may be made by testimony as to reputation or by testimony in the form of an opinion. State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986).

Rule 404 Compared. — A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue, and the State in rebuttal can then introduce evidence of defendant's bad character; unlike evidence of prior bad acts being offered under G.S. 8C-1, Rule 404(b), G.S. 8C-1, Rule 405(a) does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one. State v. Rhue, 150 N.C. App. 280, 563

S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Unlike evidence of prior bad acts being offered under G.S. 8C-1, Rule 404(b), subsection (a) of this rule does not contain any time limit or rule regarding remoteness, and the North Carolina Supreme Court has explicitly refused to impose one; rather, a "relevant" specific instance of conduct under subsection (a) of this rule would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Violent Reputation of Victims. — Testimony that murder and assault victims had a bad reputation as violent people who were prone to fight, especially when drunk, was permissible under subsection (a) of this rule and G.S. 8C-1, Rule 404 (a)(2). State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

Same — Not Relevant Where Victim Unknown. — Defendant did not know victim nor did he know anything about his reputation prior to altercation; thus, evidence of specific instances of victim's violent character was irrelevant in regards to the reasonableness of defendant's apprehension and need to use force, and the trial court properly denied its admission on this basis. State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

In self-defense cases, the victim's character for violence is relevant only as it bears upon the reasonableness of defendant's apprehension and use of force, which are essential elements of the defense of self-defense. Thus, the conduct becomes relevant only if defendant knew about it at the time of the shooting. State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

In self-defense cases, the victim's violent character is relevant only as it relates to the reasonableness of defendant's apprehension and use of force, which are essential elements of self-defense. Thus, the victim's conduct in his relationship with ex-girlfriend became relevant only if defendant knew about it at the time of the shooting. State v. Brown, 120 N.C. App. 276, 462 S.E.2d 655 (1995).

Where defendant argues he acted in self-defense, evidence of the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor. State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997).

Cross-Examination as to Specific Instances of Defendant's Conduct. — The second sentence of subsection (a) of this rule represents a departure from prior case law, in that it allows a witness who has given character evidence for the defendant to be cross-examined by the State about relevant specific instances of the defendant's conduct. By enacting this sentence, the legislature adopted the practice applied in most jurisdictions. Prior case law applying the former rule that prohibited the use of specific instances of misconduct to test a character witness' knowledge of the character and reputation of the person about whom he was testifying is no longer authoritative or binding in this regard. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Subsection (a) of this rule allows questions of a character witness on cross-examination concerning specific instances of conduct of the person whose character is in issue. This changes the rule in this state as it existed before the adoption of the Evidence Code. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

Although evidence of other acts is not permissible under G.S. 8C-1, N.C. R. Evid. 404(b) to show a propensity for violence solely because a defendant raised the claim of self-defense, such evidence may be used to refute specific evidence of a defendant's credibility under G.S. 8C-1, N.C. R. Evid. 608, when such credibility is at issue (such as when a criminal defendant introduces evidence of his good character, thereby placing his character at issue); when the criminal defendant introduces such evidence, the State in rebuttal can then introduce evidence of defendant's bad character, and under G.S. 8C-1, N.C. R. Evid. 405(a), and the State may do so by cross-examining a defendant's character witnesses as to relevant specific instances of conduct. State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005).

Since the defendant's sister gave her opinion as to the character of the defendant, under G.S. 8C-1, N.C. R. Evid. 405(a), the cross-examiner could test that opinion with questioning on specific acts of conduct, such as his threats against the life of the sister, a person with whom he alleged a deep emotional bond; also, since the examination was in the death penalty phase, the State was allowed to present, by competent relevant evidence, any aspect of the defendant's character or record and any of the circumstances of the offense that could substantially support the imposition of the death penalty or that was contrary to the assertion of one of the defendant's proposed mitigating circumstances. State v. Duke, 360 N.C. 110, 623 S.E.2d 11, 2005 N.C. LEXIS 1314 (2005).

It was not error for witnesses to be cross-examined about whether they knew that defendant had hit or been violent toward his wife where defendant placed his character at issue by having members of his family testify about his reputation for nonviolence or peacefulness. State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1, 2000 N.C. LEXIS 352 (2000), cert. denied, 531 U.S. 1019, 121 S. Ct. 582, 148 L. Ed. 2d 498 (2000).

When Character Evidence May Be Admitted. — A criminal defendant will be entitled to an instruction on a good character trait as substantive evidence of his innocence when he satisfies the following four-part test: First, the evidence must be of a "trait of character" and not merely evidence of a fact (e.g., "being 'law-abiding' addresses one's character of abiding by all laws, a lack of convictions addresses only the fact that one has not been convicted of a crime"); second, the evidence of the trait must be competent (i.e., in addition to satisfying all other applicable standards, the evidence must be in the proper form as required by this rule); third, the trait must be pertinent (i.e., relevant in the context of the crime charged in that it bears a special relationship to or is involved in such crime); and fourth, the instruction must be requested by the defendant. State v. Moreno, 98 N.C. App. 642, 391 S.E.2d 860 (1990).

Consideration of Defendant's Character Evidence. — When a defendant testifies and also offers evidence of his good character, he is entitled to have the jury consider his character evidence both as bearing upon his credibility as a witness and as substantive evidence bearing directly upon the issue of his guilt or innocence. A court is not required to charge on this feature of the case, however, unless the defendant requests it. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

Proffered testimony of defense witness that would have taken the form of an opinion, because it illuminated a pertinent trait of defendant's character, should have been admitted; the testimony did not constitute hearsay and would have revealed a character trait of defendant that was relevant to rebut the State's evidence which raised the implication that defendant declined to swear to his innocence because he knew he was guilty. State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995).

In a prosecution for the murder of a child, in which defendant offered evidence of his appropriate behavior around children, while defendant's allegedly peaceable character was pertinent to the charge of first-degree murder, neither his character nor a trait of his character were essential elements of the charge or his defense, so elicitation of evidence about his character during direct testimony had to be accomplished by opinion or reputation testimony rather than specific opinion testimony, pursuant to G.S. 8C-1-404(a)(1) and G.S. 8C-1-405(a). State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Indictment May Not Be Used to Impeach. — An indictment's function is not to determine whether a person is guilty of a crime, but rather, to show only that the state's evidence is sufficient to try the defendant. For this reason, it may not be used to impeach a witness. The same considerations apply during the cross-examination of a character witness. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

It was error for character witness to be cross-examined about whether he knew that defendant had been charged with selling marijuana in jail. However, the error was not prejudicial where defendant had previously testified that he had grown marijuana. State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988).

Rebuttal of Evidence as to Defendant's Character. — Where defendant put his character in issue by having witnesses testify concerning his reputation for peacefulness, and only then did the prosecutor cross-examine the witnesses about specific instances of conduct by defendant in an effort to rebut their prior testimony as to defendant's character for peacefulness, the answers to the prosecutor's questions were properly admitted. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Evidence of a prior alleged rape was offered for impeachment purposes and was admissible to show character witnesses' knowledge of specific instances of defendant's conduct to rebut the witnesses' prior testimony as to defendant's good character. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Although defendant's motion to suppress evidence of his prior conviction for assault with a deadly weapon had been granted, the trial court did not abuse its discretion by permitting the evidence to be admitted where defendant put his character at issue by offering the testimony of two witnesses as to his peaceful nature during the time frame of the conviction. State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72, 2002 N.C. App. LEXIS 498 (2002).

Cross-examination, which revealed defendant's prior similar crime, was proper under where defendant placed his character at issue; the possibility of prejudice did not substantially outweigh the probative value of the evidence. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue, and the State in rebuttal can then introduce evidence of defendant's bad character; under subsection (a) of this rule, the State may do so by cross-examining a defendant's character witnesses as to "relevant specific instances of conduct." State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Evidence of Plaintiff's Character in Civil Suit. — In a civil suit for assault and battery, where in addition to pleading self defense and alleging that plaintiff assaulted defendant, defendant sought to cast doubt on plaintiff's truthfulness by rigorously cross-examining him about his version of the incident as well as about specific misdeeds that tended to sully plaintiff's character, plaintiff had a right to attempt to counteract these reflections upon his veracity and character with evidence as to his reputation for truthfulness, and as to his general character. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), modified on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Character Evidence in Defamation Action. — Because evidence of the "character" of a plaintiff in a defamation action is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. Raymond U v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, cert. denied, 323 N.C. 629, 374 S.E.2d 590 (1988).

Expert Opinion on Credibility. — Subsection (a) of this rule and G.S. 8C-1, Rule 608, read together, forbid an expert's opinion as to the credibility of a witness. State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

In a prosecution for taking indecent liberties with a child, testimony of two witnesses for the State, a pediatrician and a child psychologist, that in their opinion the child had testified truthfully, did not meet the requirements for expert testimony, as it concerned the credibility of a witness, a field in which jurors are supreme and require no assistance, rather than some fact involving scientific, technical or other specialized knowledge, and as character evidence the testimony violated the provisions of subsection (a) of this rule and G.S. 8C-1, Rule 608. State v. Holloway, 82 N.C. App. 586, 347 S.E.2d 72 (1986).

Testimony of pediatrician that in her opinion the victim of alleged sexual abuse was "believable" was inadmissible under this rule and G.S. 8C-1, Rule 608. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986).

Subsection (a) of this rule and G.S. 8C-1, Rule 608, read together, forbid an expert's opinion testimony as to the credibility of a witness. State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986); State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

Testimony of child psychologist as to child rape victim's truthfulness during her evaluation and treatment was not admissible, where her sessions with the child began as a result of the acts which resulted in charges against the defendant and involved psychotherapy to assist the victim in overcoming her negative responses to the incidents, as the question posed by the prosecutor to which this testimony was responsive clearly invoked the psychologist's status as an expert and sought to establish the credibility of the victim as a witness. State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986).

In prosecution for taking indecent liberties with children, the trial court committed prejudicial error in allowing a child psychologist to give his expert opinion as to whether children lie about sexual abuse, where his testimony referred in part to the individual witnesses and not just to children in general. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

Subsection (a) of this rule and G.S. 8C-1, Rule 608 prohibit the admission of expert testimony on the issue of credibility of a witness. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987), holding, however, that erroneous admission of testimony did not entitle defendant to a new trial absent prejudice.

Expert witness' answer on cross examination that his opinion about "improbability" of hair originating from a source other than defendant was based on nonscientific considerations, addressed credibility of other witnesses and was an expression of opinion as to defendant's guilt and thus violated the Rules of Evidence. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

Expert testimony of credibility of a witness is not admissible. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

While it is true that in North Carolina expert testimony on the credibility of a witness is inadmissible, the defendant must show prejudicial error. State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, Rule 702 allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Trial court committed plain error in distributing to the jury an expert witness' report prepared following an evaluation of an alleged sexual assault victim, wherein the expert gave the opinion that the victim's disclosure of the alleged sexual assault was credible; the admission of that portion of the report constituted impermissible expert testimony on the credibility of the alleged sexual assault victim's testimony; moreover, because there was no physical evidence of abuse and the State's case was almost entirely dependent on the alleged victim's credibility with the jury, the admission of the statement was plain error. State v. O'Connor, 150 N.C. App. 710, 564 S.E.2d 296, 2002 N.C. App. LEXIS 639 (2002).

Trial court did not err under G.S. 8C-1, N.C. R. Evid. 405 and G.S. 8C-1, N.C. R. Evid. 608 in allowing an expert witness to testify as to the credibility of a minor victim because defendant's cross-examination was designed to elicit the type of response which the expert provided. Therefore, defendant could not contend that the expert's response, which might have rightfully been excluded had it been offered by the State of North Carolina, unfairly prejudiced defendant and warranted a new trial. State v. Crocker, — N.C. App. —, 676 S.E.2d 658, 2009 N.C. App. LEXIS 712 (2009).

Expert Opinion on Witness's Procedures. — The court rightfully refused the testimony of defendant's expert, a private detective and retired police officer of 30 years, where the jury was perfectly capable of judging the improper methods and procedures used by the undercover narcotics officer without the assistance of the expert; the testimony was irrelevant, had insufficient probative value on the facts to be proved, and violated the rule prohibiting expert testimony as to witness credibility, G.S. 8C-1, Rules 405(a) and 608, as read together. State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000).

Expert Testimony Held Not Expression of Opinion. — In trial on first-degree rape charges where, when asked to "describe the victim emotionally" during counseling sessions, the victim's counselor, who was qualified as an expert, responded, "Genuine," the witness was testifying that the emotions of the victim during the counseling session were genuine emotions, and was not testifying that she believed what the victim told her was true, nor was she giving her opinion as to the victim's character for truthfulness in general; therefore, such a response was proper. State v. Wise, 326 N.C. 421, 390 S.E.2d 142, cert. denied, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990).

Expert's Opinion Held Not Character Evidence. — Expert's opinions related to the state of defendant's marriage, and defendant's attitude toward her husband and marriage did not meet the definition of character evidence. State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007).

Opinion and Reputation Evidence on Credibility. — Both opinion and reputation evidence are admissible as evidence pertaining to a witness's credibility under this rule and G.S. 8C-1, Rule 608. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

It was error to exclude opinion testimony of three defense witnesses as to a victim's character for untruthfulness under G.S. 8C-1-405(a) and G.S.8C-1-608(a) as: (1) a foundation was not required for opinion testimony as to a witness's character for truthfulness or untruthfulness, nor did the victim have to have been shown to have been untruthful on a particular occasion; (2) defendant established that each of the three defense witnesses had personal knowledge of the victim and that each of the them had formed an opinion as to her character for truthfulness or untruthfulness; and (3) the defense witnesses testified to having personal knowledge of the victim and to having formed an opinion as to the victim's character for untruthfulness. State v. Valdez-Hernendez, 184 N.C. App. 344, 646 S.E.2d 579, 2007 N.C. App. LEXIS 1449 (2007).

Defendant was entitled to a new trial due to the improper exclusion of opinion testimony as to the truthfulness or untruthfulness of a victim under G.S. 8C-1-405(a) and G.S. 8C-1-608(a) as defendant was prejudiced under G.S. 15A-1443(a) since: (1) the state's case rested almost exclusively on the victim's testimony; (2) because the victim did not report the alleged rape until over two weeks after the night of the incident, and defendant admitted to having consensual sexual intercourse with the victim; and (3) the credibility of the victim was of significant probative value. State v. Valdez-Hernendez, 184 N.C. App. 344, 646 S.E.2d 579, 2007 N.C. App. LEXIS 1449 (2007).

Admission of Expert Opinion, Although Error, Not Prejudicial. — In trial of defendant accused of his wife's murder, trial court erred, under section (a) of this rule, in admitting expert psychiatrist's opinion that victim was not homicidal; however, defendant did not show that this amounted to prejudicial error under G.S. 15A-1443(a). State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363, cert. denied, 334 N.C. 437, 433 S.E.2d 183 (1993).

Testimony Relating to Defendant's Mental Condition Not Character Evidence. — Court erred in excluding doctor's testimony that related to psychological factors affecting the defendant's mental condition on the basis that it was testimony on character. State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (1997), cert. granted, 345 N.C. 756, 485 S.E.2d 299 (1997), discretionary review improvidently allowed, 347 N.C. 348, 492 S.E.2d 354 (1997).

Credibility of Children Who Report Abuse. — In trial for sexual offenses committed against mentally retarded victim who functioned at an eight to ten year old level, expert testimony as to the general credibility of children who report sexual abuse was not excluded by this rule. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Psychologist's testimony that child victim responded to test questions in an "honest fashion ... admitting that she was in a fair amount of emotional distress" did not constitute an expert opinion as to her character or credibility, but was merely a statement of opinion by a trained professional, based upon personal knowledge and professional expertise, that the test results were reliable because the victim seemed to respond to the questions in an honest fashion. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Continued Cooperation of Child with Abuser. — In a prosecution in which defendant was convicted of taking indecent liberties with a minor, testimony of social worker and pediatrician as to a child's continued cooperation with a person whom the child has accused of sexual abuse was specialized knowledge, helpful to the jury and well within the fields of expertise of the two witnesses, and as defendant had "opened the door" for this evidence by cross-examining child victim about going to barn alone with defendant after she admitted she was afraid of defendant and did not like to be alone with him, it was also admissible expert testimony that corroborated the testimony of the state's prosecuting witness. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

History of Fantasizing or Fabricating. — In prosecution for second-degree rape and sexual offense, the trial court erred in permitting the prosecutor to pose a question to an expert in clinical psychology regarding whether the 13-year-old victim had a mental condition which would cause her to fabricate a story about the sexual assault. State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

Question asked of expert as to whether or not mentally retarded adult who had been sexually assaulted had any mental condition which would generally affect her ability to distinguish reality from fantasy was within the scope of the expert witness' expertise and did not amount to an impermissible opinion with respect to defendant's guilt or innocence. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Failure to Object to Expert Opinion on Credibility. — Defense counsel's failure to object to a social worker's testimony that child/victim's statements were believable did not constitute ineffective assistance of counsel, where testimony was elicited by defense counsel in an effort to show that child's sexual knowledge resulted from a prior incident of sexual abuse. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677, 1999 N.C. App. LEXIS 803 (1999), cert. denied, appeal dismissed, 351 N.C. 117, 540 S.E.2d 745 (1999).

Prostitution Cases. — Under North Carolina common law, evidence of other crimes is generally inadmissible, subject to certain well-defined exceptions. Section 14-206, pertaining to reputation and prior convictions in prosecutions for prostitution, represents a legitimate legislative decision to broaden such rules. The statute does not, of course, relieve the State of its burden of coming forward and proving its case beyond a reasonable doubt. Nor does the statute provide an "open door" for any evidence of other crimes or reputation. The legislature did not intend thereby to remove entirely the trial judge's discretion to exclude irrelevant evidence. Evidence proffered on the State's case in chief under G.S. 14-206 must remain relevant to the issues at hand. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Statement Not Admissible. — Witness's statement that defendant had been in trouble with the law from the time that he was twelve years old was not admissible under either subsection (a) of this rule or Rule 608(a). State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Certified Copies of Prior Convictions Inadmissible. — In a murder action, certified copies of the victim's prior convictions were not admissible under G.S. 8C-1, N.C. R. Evid. 405, because defendant failed to demonstrate that the victim's dangerousness was an essential element of a defense. State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

Applied in State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997); State v. Belfield, 144 N.C. App. 320, 548 S.E.2d 549, 2001 N.C. App. LEXIS 425 (2001); State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Cited in State v. Peek, 313 N.C. 266, 328 S.E.2d 249 (1985); State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986); State v. Bogle, 324 N.C. 190, 376 S.E.2d 745 (1989); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994); State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (1994); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 406.

The Advisory Committee's Note states:

"An oft-quoted paragraph, McCormick § 162, p. 340, describes habit in terms effectively contrasting it with character.

'Character and habit are close akin. "Character" is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'

Equivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

'Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it.'

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to difference of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate 'habits' is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In Levin v. United States, 119 U.S.App. D.C. 156, 338 F.2d 265 (1964), testimony as to the religious 'habits' of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtained money through larceny by trick, was held properly excluded:

'It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." (1 Wigmore 520.) Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.' *Id.* at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38-41 (1957). Nor are they inconsistent with such cases as Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. *** The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases."

Rule 406 is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 95 (1982).

CASE NOTES

Court to Make Inquiries. — This rule permits proof of habit by evidence of specific instances of conduct; before evidence of specific instances of conduct may be admitted to prove habit, however, the trial court must make certain inquiries to determine the reliability and probative value of the proffered evidence. Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993), cert. denied, 335 N.C. 553, 441 S.E.2d 113 (1994).

Witness Held Competent to Testify as to Routine Practice. — Defendant-employer's corporate safety specialist was competent to testify concerning the routine practice of the defendant-employer in removing asbestos pursuant to this rule, even though the witness was not actually present at the jobsite where plaintiff worked. Barber v. Babcock & Wilcox Constr. Co., 98 N.C. App. 203, 390 S.E.2d 341 (1990), rev'd on other grounds on rehearing, 101 N.C. App. 564, 400 S.E.2d 735, cert. granted, 328 N.C. 569, 403 S.E.2d 506 (1991).

Witness testimony as to the customary procedures followed in administering tests using the Breathalyzer model 900 machine was sufficient, and properly admitted under this rule, to prove defendant's test was administered in accordance with "approved methods," required by G.S. 20-139.1, where copies of the actual test and the arresting officer's personal notes concerning the case had been discarded as customary after approximately five years. State v. Tappe, 139 N.C. App. 33, 533 S.E.2d 262, 2000 N.C. App. LEXIS 801 (2000).

Admission of Testimony Properly Denied. — The trial court did not abuse its discretion in refusing to admit habit evidence under this section given the vague and imprecise nature of the witness's testimony regarding defendant's speed (defendant was driving "'wide open as usual") and the witness's potential, albeit understandable, interest in the outcome of the case as the son of plaintiffs. Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000).

The trial court did not abuse its discretion in denying admissibility of evidence of a victim's prior assault which the defendant claimed the victim fabricated so as to obtain a pregnancy test and which he wanted to introduce to demonstrate "habit" where it noted that the "two incidents" occurring "two years apart" were not sufficient to constitute a habit within the meaning of this rule. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Where defendant claimed to have met murder victim in an adult video store the night of the murder, and defendant attempted to introduce evidence that the victim had visited adult-oriented establishments two or three times per month, the trial court properly excluded the evidence; occasional visits did not constitute relevant evidence of habit. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Testimony Held Admissible. — It was not error to allow the decedent's sister to testify that she was familiar with the decedent's habit of keeping money and always having on her person from twenty to forty dollars. State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993).

Trial court did not err in admitting testimony relating to plaintiff's prior course of conduct involving alcohol, marijuana, and automobiles where the habit evidence was not admitted to prove that plaintiff was drinking on the night in question, but that plaintiff had a habit of engaging in the above-described behavior, and that his conduct on the night in question was willful or wanton, in conformity with the habit. Anderson v. Austin, 115 N.C. App. 134, 443 S.E.2d 737, cert. denied, 338 N.C. 514, 452 S.E.2d 806 (1994).

Cited in State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000); Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Perry, 159 N.C. App. 30, 582 S.E.2d 708, 2003 N.C. App. LEXIS 1435 (2003).

Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 407 except that the phrase "those issues are" has been inserted to clarify what must be controverted.

The Advisory Committee's Note states:

"The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before'. *Hart* v. *Lancashire & Yorkshire Ry. Co.,* 21 L.T.R.N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See *Falknor, Extrinsic Policies Affecting Admissibility,* 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co.* v. *Brown,* 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers* v. *J. B. Michael & Co.,* 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403."

The increasing tendency of federal courts is to hold that Rule 407 is not applicable to product liability cases. North Carolina courts have applied the rule excluding evidence of subsequent remedial measures in product liability cases. See *Jenkins* v. *Helgren,* 26 N.C. App. 653 (1975). It is the intent of the Committee that the rule should apply to all types of actions.

Rule 407 is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 180 (1982).

CASE NOTES

Measures Taken to Assess Reasonableness of Conduct. — In a negligence action, trial court did not commit prejudicial error in admitting evidence concerning a subsequent accident in which, on the day after the accident in question, officers and employees of defendant employer, in an attempt to assess the safety and reasonableness of defendant employee's actions, placed another garbage truck of similar size and weight in the same location as the truck driven by defendant employee the day before, at the same time of day and where a car driven in an easterly direction collided with the right front portion of the truck; this rule excludes evidence of measures taken after an event which would have made the event less likely to occur, and there was no evidence that the actions taken by defendant were remedial in nature. Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

Evidence of subsequent remedial measures in the form of written instructions to security guards was properly excluded since it could not be used to impeach testimony that there was no reason to lock the front door of the restaurant and since its probative value tended to be outweighed by the danger of unfair prejudice. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53, 1999 N.C. App. LEXIS 1296 (1999).

Measures Taken by Another. — In action against motel by guest who was criminally assaulted by third parties, admission of the testimony of another motel operator as to security measures that he took after the incident involving plaintiff at defendants' motel did not violate this rule. Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987), rev'd on other grounds, 321 N.C. 494, 364 S.E.2d 392 (1988).

Evidence of Control and Feasibility of Precautionary Measures. — Where general contractor repeatedly argued that it had no control of a construction site on the day of the subject accident, the measures taken by it, immediately following decedent's death, to cover floor openings, were admissible to rebut this contention and to demonstrate the feasibility of taking precautionary measures. Lane v. R.N. Rouse & Co., 135 N.C. App. 494, 521 S.E.2d 137, 1999 N.C. App. LEXIS 1153 (1999).

Applied in McClain v. Otis Elevator Co., 106 N.C. App. 45, 415 S.E.2d 78 (1992); Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993); Monson v. Paramount Homes, Inc., 133 N.C. App. 235, 515 S.E.2d 445 (1999).

Cited in Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth., 88 N.C. App. 495, 364 S.E.2d 179 (1988).

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 408 except that the words "evidence of" were added to the second sentence. The addition is for the purpose of clarification and is not intended as a material change. The Advisory Committee's Note states:

"As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromise when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person."

North Carolina practice is consistent with Rule 408 in that an offer of compromise, as such, is not admissible to prove liability for or invalidity of a claim or its amount. See *Brandis on North Carolina Evidence* § 180 (1982). The same rule applies to an offer to settle, or the actual settlement of, a third person's claim arising out of the transaction in litigation. *Id.* at 56. The words "the claim" in the first sentence should be interpreted to include the claim that is the subject of the lawsuit and any other claim arising out of the same occurrence.

The Advisory Committee's Note states:

"The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount."

The phrase "which was disputed" should be interpreted consistently with North Carolina decisional law concerning what constitutes a dispute. See *Wilson County Board of Education v. Lamm,* 276 N.C. 487 (1970).

With respect to the second sentence of the rule, the Advisory Committee's Note states:

"The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself."

Thus Rule 408 changes the current North Carolina practice that allows a "distinct admission of an independent fact" made during compromise negotiations to be received in evidence. See *Brandis on North Carolina Evidence* § 180, at 56-57 (1982).

Policy reasons for the compromise rule do not apply to evidence discoverable outside of settlement negotiations. Thus the third sentence of Rule 408 states that evidence otherwise discoverable need not be excluded merely because it is presented in compromise discussions. There is not any North Carolina case law on this point.

The Advisory Committee's Note states that:

"The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, *Fenberg* v. *Rosenthal,* 348 Ill.App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to 'buy off' the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick, § 251, p. 542."

The final sentence of the rule is consistent with North Carolina practice in that an offer for a purpose other than to prove the validity or invalidity of the claim or its amount is not within the rule. See *Brandis on North Carolina Evidence* § 180, at 55, 56 (1982).

Legal Periodicals. — For comment, "An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts," see 71 N.C.L. Rev. 1857 (1993).

CASE NOTES

This rule does not apply unless there is an existing dispute when offer to compromise a claim which is disputed is made. Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990).

Evidence of a Contract of Compromise. — While evidence of either an offer or an acceptance of consideration in compromising or attempting to compromise a disputed claim is not admissible to prove liability for or invalidity of the claim, evidence admitted under this rule of a contract of compromise between the parties to a suit, whether or not performed, is admissible. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Failure to Object at Trial. — Even if affidavits of two defendants contained evidence of settlement negotiations made inadmissible by this rule incompetent to support defendants' motions for summary judgment, plaintiff's failure to move to strike the affidavits prohibited plaintiff from asserting their admission as error on appeal. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Exclusion of Evidence Otherwise Discoverable Not Proper. — Although this rule provides that evidence of conduct or statements made in compromise negotiations is inadmissible, this rule does not require the exclusion of evidence that is otherwise discoverable or offered for another purpose, merely because it is presented in the course of compromise negotiations. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 553 (1997).

Evidence Held Admissible. — Admission into evidence of defendants' offer of $150,000 to plaintiff to terminate lease, which was an effort on part of defendant to satisfy a condition of sale of restaurant property, was not violative of G.S. 8C-1, Rule 408, nor was it barred by G.S. 8C-1, Rule 402, as offer was evidence of value of lease and was therefore relevant to issue of damages. Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990).

The trial judge properly determined that admitted portions of an answering machine message and a subsequent conversation between the plaintiff mother of a boy injured on an amusement ride and the deceased defendant ride operator in which defendant admitted the possibility that he had not fastened the boy properly were not part of settlement negotiations; there was no mention of an intent to compromise or negotiate in the admitted portions of the conversation and the testimony was an admission of fact during a telephone conversation initiated by a party to the dispute. Breedlove v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 543 S.E.2d 213, 2001 N.C. App. LEXIS 147 (2001).

Deputy commissioner in workers' compensation proceeding properly allowed evidence of the existence of a claims adjuster's form, which contained an offer to pay compensation, that was sent to the injured worker's counsel to be introduced as rebuttal after the injured worker claimed the insurance company refused to pay according to the treating physician's evaluation. Hawley v. Wayne Dale Constr., 146 N.C. App. 423, 552 S.E.2d 269, 2001 N.C. App. LEXIS 944 (2001).

Harmless Error. — The admission of offers of compromise to boost defendant's argument that decedent intended for home listed in her daughter's name to belong to her constituted harmless error where an abundance of evidence otherwise supported the decedent's intent to treat the property as a gift. Tucker v. Westlake, 136 N.C. App. 162, 523 S.E.2d 139, 1999 N.C. App. LEXIS 1310 (1999).

Evidence Held Inadmissible. — In a medical malpractice case, evidence of the plaintiffs' separate lawsuit against a different defendant, which had been dismissed, was irrelevant under G.S. 8C-1, Rule 402, and its admission contravened the strong public policy favoring settlement of controversies out of court. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

Use of Statements Made During Compromise Negotiations to Support Separate Claim. — While affidavit of plaintiff's attorney containing statements made during negotiations between a member and the board of a voluntary association could not be offered up to prove plaintiff's innocence of the charges against her, they could support a distinct and separate claim for damages on the ground that she was denied a fair hearing by an impartial board. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Applied in State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992).

Cited in Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996).

Rule 409. Payment of medical and other expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 409, except that the phrase "other expenses" has been established for the phrase "similar expenses."

The Advisory Committee's Note states:

"The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:

'[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.'"

Under current North Carolina law, rendering aid to an injured person or promising to render aid is not an admission of fault.

Rule 409 does not cover rendering aid but does not change existing North Carolina law that rendering aid to an injured person or promising to render aid is not an admission of fault. *Brandis on North Carolina Evidence* § 180, at 58 (1982).

Unlike the federal rule, which applies to "medical, hospital, or similar expenses," this rule applies to "medical, hospital, or other expenses." The phrase "other expenses" is intended to include, but is not limited to, lost wages and damage to property. The phrase "occasioned by an injury" is intended to include a property injury as well as a personal injury. The rule's coverage of nonmedical expenses occasioned by either a personal or property injury is an expansion of the current North Carolina rule. See *Id.* However, this rule is intended to apply only to tort claims and not to claims in other actions such as child support.

Rule 409 is consistent with North Carolina practice in that evidence inadmissible under the rule to prove liability may be admissible for another purpose. See *Id.* § 180, at 58-59 (1982). The rule is also consistent with North Carolina practice in that it does not bar evidence of conduct and statements outside of the simple act of furnishing or offering to pay medical expenses. As the Advisory Committee's Note states:

"Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature."

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of no contest;

(3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 410, except as noted below.

The Advisory Committee's Note states:

"Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval* v. *United States,* 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People* v. *Spitaleri,* 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in *Kercheval,* which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326."

Subsection (2), regarding pleas of no contest is the same as the federal rule and is consistent with North Carolina law. *Brandis on North Carolina Evidence* § 177, at 41, 42 (1982).

The third paragraph differs from Fed. R. Evid. 410 by making a reference to Article 58 of General Statutes Chapter 15A, which specifies the procedure relating to guilty pleas in superior court. The third paragraph also refers to comparable procedures in district court, although no statutory scheme regulates plea negotiations in district court. See Official Commentary to Ch. 15A, Art. 58.

Prior to the 1979 amendments to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6), it was questionable whether an otherwise voluntary admission to law enforcement officials was rendered inadmissible merely because it was made in hope of obtaining leniency by a plea. The Notes of the Advisory Committee on the amendment to Fed. R. Crim. P. 11(e)(6) state that the rule:

"makes inadmissible statements made 'in the course of any proceedings under this rule regarding' either a plea of guilty later withdrawn or a plea of no contest later withdrawn and also statements 'made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.' It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process ... without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions .... This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases ... must be resolved by that body of law dealing with police interrogations."

If there has been a plea of guilty later withdrawn or a plea of no contest, the third paragraph of Rule 410 makes inadmissible statements made in the course of any proceedings relating to guilty pleas in the superior or district courts. This includes, for example, admissions by the defendant when he makes his plea in court and also admissions made to provide the factual basis for the plea. However, the rule is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, statements made to the probation officer in connection with the preparation of that report would come within the third paragraph. See Notes of Advisory Committee on the Amendment to Fed. R. Crim. P. 11(e)(6).

The last sentence of Rule 410 provides an exception to the general rule of nonadmissibility of the described statements. Such a statement is admissible "in any proceedings wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it."

"... when evidence of statements made in the course of or as consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not 'against' the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language ... follows closely that in Fed. R. Evid. 106, as the considerations involved are very similar." *Id.*

Unlike the federal rule, Rule 410 does not contain an exception permitting a statement made by the defendant under oath, on the record, and in the presence of counsel to be introduced in a criminal proceeding for perjury or false statement.

Rule 410 differs from the federal rule by making the described evidence inadmissible in favor of the defendant as well as against him. North Carolina practice in this area is governed in part by G.S. 15A-1025 which is consistent with this rule. G.S. 15A-1025 should be amended after Rule 410 is adopted.

CASE NOTES

The defendant waived his right to appellate review of a possible violation of this section by introducing evidence during his own direct examination of plea discussions and subsequently failing to object to the State's eliciting of further evidence during cross-examination. State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160, 2001 N.C. App. LEXIS 20 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001).

Inculpatory Statements Improperly Admitted. — Defendant's letters to the district attorney constituted a "plea discussion" within the intent and meaning of G.S. 15A-1025 and G.S. 8C-1, N.C. R. Evid. 410, so the State could not cross-examine defendant concerning those plea negotiations; the trial court committed reversible error and a new trial was ordered because the State's questioning repeatedly placed before the jury defendant's statements that he made a big mistake and was willing to confess to what he had done and to reveal who planned the robbery, which information was highly prejudical and potentially influenced the jury's decision. State v. Walker, 167 N.C. App. 110, 605 S.E.2d 647, 2004 N.C. App. LEXIS 2172 (2004).

Inculpatory Statements Properly Admitted. — Where defendant was told he would have to be completely cooperative with law enforcement for a plea offer to be considered, but was also told that no formal plea offer was being made, his inculpatory statements to law enforcement were admissible against him, because he had no reasonable, subjective belief that he was negotiating a plea, nor did he state an intention to plead guilty to any offense. State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002).

Cited in State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691, 2002 N.C. App. LEXIS 1131 (2002); State v. Watkins, — N.C. App. —, 672 S.E.2d 43, 2009 N.C. App. LEXIS 122 (2009).

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 411. The Advisory Committee's Note states:

"The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. *Id.*"

Rule 411 is consistent with North Carolina practice in barring evidence of insurance unless offered for a purpose other than to prove negligence. See *Brandis on North Carolina Evidence* § 88 (1982).

CASE NOTES

Generally, Evidence of Insurance is Not Relevant. — Under G.S. 8C-1, N.C. R. Evid. 411, evidence of insurance is generally inadmissible as relevant evidence unless offered for some collateral purpose. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

G.S. 8C-1, N.C. R. Evid. 411 deals with the admissibility of evidence of liability insurance, and the general rule is that the existence of liability insurance is not admissible to show a party acted negligently or wrongfully; however, the rule does not require the exclusion of evidence of insurance for other purposes, such as proof of agency. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Rule Not an Absolute Bar. — This rule does not operate as an absolute bar to the admission of evidence concerning liability insurance when offered for a purpose, such as proof of agency, ownership, or control or bias and prejudice of a witness. Warren v. Jackson, 125 N.C. App. 96, 479 S.E.2d 278 (1997).

Section 8C-1, Rule 411 does not absolutely bar the admission of evidence concerning liability insurance when that evidence is offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. Williams v. McCoy, 145 N.C. App. 111, 550 S.E.2d 796, 2001 N.C. App. LEXIS 568 (2001).

Admission to Explain Answer. — The trial court abused its discretion when it refused, under G.S. 8C-1, Rule 411, to allow the injured party to explain why she consulted an attorney before seeing a doctor, since this was prompted by a negative experience with an insurance adjuster, because this rule did not prohibit such testimony, and the trial court could have given a limiting instruction. Williams v. McCoy, 145 N.C. App. 111, 550 S.E.2d 796, 2001 N.C. App. LEXIS 568 (2001).

Purposes for Which Evidence of Insurance Is Admissible. — This rule enumerates several examples for which evidence of insurance is admissible, but it does not by its terms limit admissibility to those examples alone. Johnson v. Skinner, 99 N.C. App. 1, 392 S.E.2d 634, cert. denied, 327 N.C. 429, 395 S.E.2d 680 (1990).

In deciding whether evidence of insurance should be received under G.S. 8C-1, N.C. R. Evid. 411, a trial court should engage in the following analysis: (1) Is the insurance coverage offered for a purpose other than to show that a person acted negligently or otherwise wrongfully; (2) If so, is the evidence relevant to show that other purpose; and (3) If so, is the probative value of the relevant evidence substantially outweighed by the factors set forth in N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 403. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Introduction of Coverage. — In suit regarding automobile accident, evidence of defendant's liability insurance coverage should not have been introduced just because evidence of plaintiff's recovery in workers' compensation was introduced pursuant to G.S. 97-10.2(e). Anderson v. Hollifield, 123 N.C. App. 426, 473 S.E.2d 399 (1996), rev'd on other grounds, 345 N.C. 480, 480 S.E.2d 661 (1997).

The fact that defendant may have had liability insurance on vehicle some two months before accident in question did not tend to show agency, ownership or control on the later date. As registration certification and financial responsibility certification did not tend to show agency on the date of the accident, this rule had no application. Further, the documents were not relevant and were thus inadmissible. Smith v. Starnes, 88 N.C. App. 609, 364 S.E.2d 442 (1988).

Evidence of Insurance Held Admissible. — Admission was proper where evidence was offered for following purposes: (1) to show defendant's motive for using dealer tags; (2) to show that Toyota had knowledge that defendant wanted to use tags so his Pontiac could be driven on highway by himself and others after defendant's insurance had lapsed; and (3) to allow jury to assess foreseeability of an accident when dealer tags are loaned to a member of class of persons who have not complied with North Carolina's Financial Responsibility Act. Johnson v. Skinner, 99 N.C. App. 1, 392 S.E.2d 634, cert. denied, 327 N.C. 429, 395 S.E.2d 680 (1990).

Evidence of Insurance Held Inadmissible. — Personal representatives for a decedent were properly disallowed from admitting evidence of a fishing club's insurance policy because the policy did not show whether a boat driver, who was a director for the fishing club, was its agent. Williams v. Bell, 167 N.C. App. 674, 606 S.E.2d 436, 2005 N.C. App. LEXIS 18 (2005).

Admission to Show Bias or Prejudice. — The trial court properly allowed plaintiff to cross-examine private investigator about insurance company's hiring him to do videotape; this rule provides for the admission of evidence concerning insurance when offered to show bias or prejudice of a witness. Carrier v. Starnes, 120 N.C. App. 513, 463 S.E.2d 393 (1995).

Claim Estimates Properly Excluded as Evidence. — In personal injury action against plaintiff's UIM insurer, admitting claim estimates prepared by the insurer as admissions of a party opponent would unduly prejudice the defense and circumvent the policy of having the jury focus on the facts and not the existence of liability insurance. Braddy v. Nationwide Mut. Liab. Ins. Co., 122 N.C. App. 402, 470 S.E.2d 820 (1996).

Reference to defendant builder's insurance was not grounds for a mistrial in a liability suit for defects in plaintiffs' house, where the reference was accidental, insignificant and inadvertent, so much so that the judge determined that giving the jury a curative instruction would only serve to highlight the matter and bring it to the jury's attention. Medlin v. FYCO, Inc., 139 N.C. App. 534, 534 S.E.2d 622, 2000 N.C. App. LEXIS 995 (2000).

Evidence of Settlement Offer From Insurance Company Held Inadmissible. — Judgment for a driver in an injured party's personal injury action was affirmed; pursuant to G.S. 8C-1, N.C. R. Evid. 411, and G.S. 1-540.2, a letter from the driver's insurer indicating that the insurer would consider settling claims arising from the accident was inadmissible as proof that the driver was liable for the accident. Garrett v. Smith, 163 N.C. App. 760, 594 S.E.2d 232, 2004 N.C. App. LEXIS 574 (2004).

Right to Appeal Waived. — Injured automobile passenger waived her right to appeal the refusal of the trial court to allow her to rehabilitate her expert witness, a chiropractor; the passenger failed to make an offer of proof under G.S. 1A-1, N.C. R. Civ. P. 43(c), indicating the relevance of the question or that the testimony was sought for purposes allowed under G.S. 8C-1, N.C. R. Evid. 411. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(e) The record of the in camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs substantially from Fed. R. Evid. 412. Except as noted below, the rule is the same as the current shield law, G.S. 8-58.6 [now repealed].

Subdivision (c), which is derived from the federal rule, was added to the current shield law to make it clear that sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

The next to the last sentence of subdivision (d), which is derived from the federal rule, was added to the shield law to address the issue of conditional relevancy. The sentence provides that, notwithstanding Rule 104(b), if the relevancy of the evidence depends upon the fulfillment of a condition of fact, the court will hear evidence in the in camera proceeding and decide whether the condition of fact is fulfilled. The court should decide whether the defendant has presented sufficient evidence for a reasonable jury to find the proposition asserted to be true. If so, the defendant's evidence should be admitted. If not, the evidence should be excluded. See S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual*, at 221 — 27 (3d ed. 1982). Evidence should not be admitted on behalf of the defendant subject to connecting-up. The court should make sure, before any evidence of prior sexual activity is admitted, that the conditional relevance analysis has been satisfied. *Id.* at 90.

Legal Periodicals. — For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?," see 21 Wake Forest L. Rev. 93 (1985).

For note, "State v. Strickland: Evening the Odds in Rape Trials! North Carolina Allows Expert Testimony on Post Traumatic Stress Disorder to Disprove Victim Consent," see 69 N.C.L. Rev. 1624 (1991).

For note entitled, "Michigan v. Lucas: Failure to Define the State Interest in Rape Shield Legislation," see 70 N.C.L. Rev. 1592 (1992).

For note, "Evidence — Rape Shield Statute — Witnesses — State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993)," see 72 N.C.L. Rev. 1777 (1994).

CASE NOTES

I. General Consideration.
II. Decisions under Former § 8-58.6.

I. GENERAL CONSIDERATION.

Qualifications for Relevancy. — Under this rule, the sexual behavior of the prosecuting witness is irrelevant unless the behavior (1) was between the complainant and the defendant; or (2) is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or (3) is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or (4) is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

Prior sexual conduct between the complainant and the defendant on trial was relevant, even though multiple defendants were being tried for rape in separate proceedings. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

By this statute, the legislature intended to exclude from evidence only the actual sexual history of the complainant and not prior false accusations made by the complainant. State v. McCarroll, 109 N.C. App. 574, 428 S.E.2d 229, cert. granted, 333 N.C. 794, 430 S.E.2d 426 (1993), rev'd on other grounds, 336 N.C. 559, 445 S.E.2d 18 (1994).

Exclusion of Public Held Proper. — Court did not err in closing to the public a voir dire hearing conducted to determine the relevance of prosecuting rape victim's past sexual behavior. State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990).

Scope of In Camera Hearing. — At an in camera hearing pursuant to this rule, the trial judge acted well within his authority when he refused to allow defendant to question victim about the manner in which her assailant performed the act of sexual intercourse. Such questions did not present an inquiry into evidence of sexual activity of the victim other than the sexual acts which were at issue, and so were not a proper subject of the in camera examination; further, defendant had already cross-examined victim about the extent of penetration and ejaculation by her assailant during the rape. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986).

Cross-Examination Properly Limited. — Where the defendant attempted to elicit testimony from the victim regarding an incident in which she was allegedly "making out" with defense witness, the trial court properly limited the cross-examination of the victim pursuant to the Rape Shield Statute. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Trial court did not err in denying defendant's request to inquire into the victim's previous sexual activity for the purpose of attacking her credibility as a witness, where defendant was on trial for having committed sexual offenses against the victim, his 16-year-old daughter, as he failed to show that such examination was within any of the four very narrow situations that were excepted from that prohibition under the Rape Shield Statute. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Deceased Rape Victim. — In the limited circumstance where the rape victim is deceased and the defendant's own testimony brings into question the victim's sexual behavior, the prosecution may present rebuttal evidence relating to the victim's prior sexual conduct to challenge the credibility of defendant's testimony. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

The victim's virginity or lack thereof does not fall within any of the four exceptions and is therefore an area prohibited from cross-examination by this rule. State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988).

Although this rule did not operate as a shield to questions regarding medical records relating to victim's gonorrhea where defendant maintained that the sexual acts, if any, committed on the victim (and the resultant gonorrhea) were done by someone else, defendant's questions were properly excluded as irrelevant because the records, referring only to the victim's "partner," did not contradict anything testified to by the victim, nor did it suggest anything else that could be used to impeach her. State v. Thompson, 139 N.C. App. 299, 533 S.E.2d 834, 2000 N.C. App. LEXIS 895 (2000).

Evidence of prostitution does not necessarily counter the allegations of a witness as prostitutes may be victims of sexual offenses. State v. Fletcher, 125 N.C. App. 505, 481 S.E.2d 418 (1997), cert. denied, 346 N.C. 285, 487 S.E.2d 560 (1997), cert. denied, 522 U.S. 957, 118 S. Ct. 383, 139 L. Ed. 2d 299 (1997).

Prior Abuse of Child Not Admissible. — Absent some "opening of the door," evidence of prior abuse sought to be admitted solely to show child had prior knowledge of sexual matters was not admissible under this rule. State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (1996).

Trial court did not abuse its discretion in refusing to permit defendant from introducing evidence that his minor sexual assault victim had been sexually abused by her father years earlier because there was no indication in the record that this evidence was relevant to the victim's credibility. State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

Evidence excluded under G.S. 8C-1, N.C. R. Evid. 412(b)(2) that a victim's grandfather had kissed the victim did not establish an alternative explanation for a healed tear in the victim's vaginal area as evidence of blood on the victim's panties and on the victim's grandfather's underwear did not show vaginal penetration as there was testimony that the blood stain on the victim's panties was from the victim's period and that the stain on the victim's grandfather's underwear was from a boil. State v. Adu, — N.C. App. —, 672 S.E.2d 84, 2009 N.C. App. LEXIS 117 (2009).

Prosecutor Held Allowed to Comment on Purpose of the Rape Shield Statute. — The trial court did not abuse its discretion in overruling the defendant's objection to the prosecutor's comment about the purpose of the Rape Shield Statute where the prosecutor attempted to explain that the statute was intended to insure that victims were not again "victimized" through inquiries about irrelevant sexual behavior, and the trial court immediately cautioned the jury to follow the court's instructions as to the law. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Questions Excluded Where No Request for Hearing. — Trial court did not err by excluding questions defendant sought to ask the prosecutrix regarding her past sexual behavior; once the state opens the door into a victim's sexual activity, the defendant may request an in camera hearing, and in the absence of such a request, a fishing expedition into the victim's past sexual behavior is not permitted. State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, cert. denied, 325 N.C. 548, 385 S.E.2d 504 (1989).

Where a child victim denied on cross examination that she had sexual activity with another person and the other person was not called during an in camera hearing during the State's case or as a witness during the defense case, the trial court properly excluded the other person's testimony pursuant to G.S. 8C-1, N.C. R. Evid. 412(d). Even if defense counsel's representation regarding the proposed testimony was sufficient to comply with Rule 412(d), defendant failed to establish the relevance of the other person's testimony. State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Cross-Examination of Defendant Concerning Defendant's In Camera Statements. — Contrary to defendant's position, this rule could not be utilized as a barrier to prevent cross-examination concerning critical inconsistencies in sworn testimony; therefore, the prosecution was properly permitted to cross-examine defendant concerning his prior inconsistent statements made at an in camera hearing. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

Exclusion of Evidence Upheld. — In prosecution in which defendant was convicted of taking indecent liberties with a minor, the trial court did not err by prohibiting defendant from cross-examining prosecutrix about her previous accusations of sexual misconduct against her father and stepfather. State v. Anthony, 89 N.C. App. 93, 365 S.E.2d 195 (1988).

The trial court did not commit reversible error in denying defendant's request to cross-examine the victim about her testimony that before she was raped she told defendant that she was a virgin, despite defendant's contention that the trial court's ruling prevented the correction of false testimony by the victim and was therefore fundamentally unfair and violative of his constitutional right to confront his accuser. State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988).

Contention that because witness stated at trial that he thought the victim was a "nice person" and detective stated that witness had voiced a similar opinion during a recorded statement given to the police, certain portions of that recorded statement concerning the victim's prior sexual history should have been admitted into evidence was without merit. State v. McCrimmon, 89 N.C. App. 525, 366 S.E.2d 572, appeal dismissed and cert. denied, 322 N.C. 609, 370 S.E.2d 253 (1988).

Trial court properly limited line of questioning whereby defense counsel attempted to question rape victim about an alleged violent incident with her boyfriend, which rape victim testified was unrelated to any sexual activity, as these questions were not relevant or admissible under subsection (b) of this rule. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

Defendant's request to cross-examine the prosecuting witness in rape trial, based upon his speculation that she was motivated to accuse him of rape because she was pregnant by her boyfriend, did not fall under an exception in this rule; therefore, the trial court was correct in denying this line of questioning during cross-examination of the prosecuting witness. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

Evidence that someone other than defendant sexually abused child two and a half years before the incident resulting in a rape charge against defendant was properly excluded as being irrelevant and confusing to the jury. State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415, appeal dismissed, 332 N.C. 669, 424 S.E.2d 413 (1992).

Testimony was properly excluded where there was evidence of only one incident of the complainant exchanging sex for crack cocaine; there was not sufficient evidence that the complainant engaged in a pattern of exchanging sex for crack. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

Evidence of victim's alleged past sexual behavior was not the type of relevant evidence which could be offered, under this rule, for the purpose of showing that the acts charged were not committed by defendant. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64, 1999 N.C. App. LEXIS 917 (1999), cert. denied, 351 N.C. 190, 541 S.E.2d 725 (1999).

Because no evidence proffered at an in camera hearing supported an inference that a victim's prior sexual activity was forced or caused any injuries, evidence of the victim's prior sexual activity was properly excluded under the rape shield statute, G.S. 8C-1, N.C. R. Evid. 412(b)(2); the probative value, if any, to defendant was substantially outweighed by the danger of unfair prejudice to the State and the prosecuting witness under G.S. 8C-1, N.C. R. Evid. 403. State v. Harris, 360 N.C. 145, 622 S.E.2d 615, 2005 N.C. LEXIS 1320 (2005).

Trial court did not err, in a trial of charges of statutory sexual offense and taking indecent liberties with a child, in disallowing defendant from questioning the prosecuting witness regarding her sleeping in the same bed with a boyfriend around the same period of defendant's alleged criminal conduct; since the victim's denial of a sexual relationship was the only evidence on this point, there was no evidence of sexual activity the relevance of which the trial court was obligated to determine. State v. Hammett, 182 N.C. App. 316, 642 S.E.2d 454, 2007 N.C. App. LEXIS 580 (2007), cert. denied, appeal dismissed, 361 N.C. 572, 2007 N.C. LEXIS 884 (2007).

Where defendant had never argued that he had a consensual sexual encounter with his sexual assault victim and repeatedly denied having such an encounter, consensual or otherwise, the exception to the rape shield did not apply, rendering the contested evidence irrelevant under G.S. 8C-1, N.C. R. Evid. 412(b). The trial court therefore did not err in excluding evidence of the victim's prior sexual behavior with persons other than defendant. State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Trial court properly sustained the State's objection under G.S. 8C-1, N.C. R. Evid. 403, on the basis that the prejudicial effect of testimony, that defendant and his sexual assault victim previously had rented motel rooms together, outweighed its probative benefit. The evidence was not relevant and admissible under G.S. 8C-1, N.C. R. Evid. 412(b)(1) because defendant had not raised the victim's consent as a defense. State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Trial court did not err in excluding a police report and a minor child's Myspace website pursuant to G.S. 8C-1, N.C. R. Evid. 412, during an adjudicatory and disposition hearing because although the report was not evidence of prior sexual history, it had no probative value because it was not a false accusation that could be used to impeach; the Myspace page was admissible as impeachment evidence, but the exclusion of the evidence was harmless error because the child's father did not offer a persuasive argument that the outcome of the hearing would have been different if the website had been admitted. In re K.W., — N.C. App. —, 666

S.E.2d 490, 2008 N.C. App. LEXIS 1655 (2008).

Undisputed medical evidence indicated that a child's having sex with another person could not have resulted in the child's vaginal scarring, and therefore the other person's testimony would not have tended to show that defendant did not commit the charged offenses. Therefore, the other person's testimony as to whether he had sex with the child was not relevant and was not admissible under G.S. 8C-1, N.C. R. Evid. 412(d). State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Although a child victim admitted, during an in camera hearing, that her boyfriend had inserted his finger in her vagina while she was partially nude in a closet with him, defendant failed to present evidence during the in camera hearing that the boyfriend's digital penetration could have caused the internal scarring attributed to the charged offenses. That evidence was not admissible under G.S. 8C-1, N.C. R. Evid. 412(d). State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Exclusion of Evidence Held Error. — In a trial for rape and sexual offense against a child victim, where the only physical evidence corroborating the victim's testimony of rape was possibly attributable to the acts of a man other than the defendant, namely, the defendant's adult son, exclusion of evidence about defendant's son's acts was prejudicial to the defendant in presenting his defense to the charge of rape, and necessitated a new trial. State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986).

Excluded testimony of 12-year-old rape complainant's grandmother that she observed complainant masturbate with a washcloth and with her fingers on several occasions provided an alternative explanation for the victim's physical condition, consistent with physician's testimony that repeated acts of intercourse, penetration or masturbation could create the degree of irritation that prosecutrix suffered, and should have been admitted as evidence relating to whether the rape occurred. State v. Wright, 98 N.C. App. 658, 392 S.E.2d 125 (1990).

Defendant's evidence, which consisted of a letter written by victim to her friend asking her to engage in sex, was evidence of conversation, not of a prior sexual act. Therefore, testimony in sexual abuse case concerning the letter was not deemed irrelevant by this rule and was improperly excluded on that basis. State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853, cert. denied, 333 N.C. 793, 431 S.E.2d 28 (1993).

It was error to exclude testimony which would have tended to show that the prosecuting witness was not truthful when she said she had a sexual encounter with someone other than the defendants. State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994).

Where the trial court erred by not allowing the defendant to question the complainant in the presence of the jury regarding the allegation of rape made five months earlier and subsequently withdrawn, defendant was entitled to a new trial because there was a reasonable probability that the outcome of the trial would have been different. State v. Ginyard, 122 N.C. App. 25, 468 S.E.2d 525 (1996).

Sexual behavior of a rape complainant can be relevant if such behavior is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by a defendant; thus, defendant's rape conviction was reversed and a new trial was granted where evidence of a victim's sexual encounter earlier in the day of her alleged rape was improperly excluded despite its relevance to the issue of consent. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

Error in the Face of Overwhelming Evidence to Convict. — Even if evidence of victim's alleged past sexual behavior was improperly excluded, the defendant failed to show, in view of the testimony of seven other juvenile sexual abuse victims, that a different result would have resulted from its inclusion. State v. Trogden, 135 N.C. App. 85, 519 S.E.2d 64, 1999 N.C. App. LEXIS 917 (1999), cert. denied, 351 N.C. 190, 541 S.E.2d 725 (1999).

Failure to Conduct In Camera Hearing Held Harmless. — Where all of the testimony complained of by defendant related to sexual behavior between complainant and defendant, even if it was assumed arguendo that the trial court erred by failing to conduct the required in camera hearing before admitting such testimony, the error was harmless. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Victim Not Prohibited from Willingly Testifying. — Neither this rule nor its predecessor statute, G.S. 8-58.6, prohibited a rape victim from willingly testifying as to her lack of sexual involvement for purposes of corroboration. State v. Stanton, 319 N.C. 180, 353 S.E.2d 385 (1987).

Defendant could present evidence of previous acts of bondage between the complainant and defendant, sexual acts on a leather couch, complainant experiencing pain during previous acts of intercourse, a sexual act on a piano stool, and watching pornographic movies because it was evidence of sexual act pertinent to the defense that the complainant consented to the sexual act that was the basis of the charge. State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622, stay granted pending appeal, 336 N.C. 784, 447 S.E.2d 435, cert. denied, temporary stay dissolved, 337 N.C. 804, 449 S.E.2d 752 (1994).

Applied in State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988); State v. Norris, 101 N.C. App. 144, 398 S.E.2d 652 (1990); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State

v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906; State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

Cited in State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289, 2002 N.C. App. LEXIS 973 (2002); State v. Peterson, 179 N.C. App. 437, 634 S.E.2d 594, 2006 N.C. App. LEXIS 1980 (2006).

II. DECISIONS UNDER FORMER § 8-58.6.

Editor's Note. *— The cases below were decided under former G.S. 8-58.6 and previous statutory provisions.*

Codification of Rule of Relevance. — Former G.S. 8-58.6 was nothing more than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Constitutionality. — Former G.S. 8-58.6, referred to as the rape victim shield statute, did not violate a rape defendant's constitutional right to confront the witnesses against him by preventing him from automatically questioning the victim about her prior sexual experience, since (1) there is no constitutional right to ask a witness questions that are irrelevant, (2) the statute was primarily procedural in its impact and application and does not alter any of the defendant's substantive rights, and (3) there were valid policy reasons, aside from questions of relevance, which support the statute. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Former G.S. 8-58.6 changed the rule of evidence in such a way that matters collateral to the issues on trial could not be introduced into evidence, and this change in the rule of evidence did not violate a defendant's constitutional right to cross-examine witnesses appearing against him. State v. Porter, 48 N.C. App. 565, 269 S.E.2d 266, appeal dismissed and cert. denied, 301 N.C. 529, 273 S.E.2d 459 (1980).

Inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Evidence of Discussion Between Complainant and Defendant Held Inadmissible. — In a prosecution for rape, evidence of a discussion between complainant and defendant concerning complainant's sexual problems was not admissible, since such discussion did not constitute sexual behavior or activity between complainant and defendant. State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980).

Evidence of Different Semen Stains on Victim's Clothing. — Former G.S. 8-58.6 was not unconstitutionally applied to defendant when the trial court excluded evidence that three different semen stains were found on clothing worn by an alleged rape victim, since the inference raised by such evidence, i.e., that the victim had had sex with two persons other than defendant at some time prior to the sexual acts in question, was not probative of the victim's consent to those acts. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Evidence of Prosecutrix' Moral Environment Held Irrelevant Where Defendant Denied Act. — Whether the prosecutrix in a prosecution for second degree rape lived in an environment of sexual immorality or in a cloistered convent had no relevance to the issues in a case where defendant denied that any act of intercourse or other assault took place. State v. McLean, 294 N.C. 623, 242 S.E.2d 814 (1978), decided prior to the effective date of this section.

Decisions of Trial Court at Voir Dire Hearing Held Proper. — In a prosecution for assault with intent to commit rape, the trial court did not err in refusing to permit defendant to testify at a voir dire hearing to determine whether testimony as to prior conduct of the prosecutrix was admissible as evidence of a pattern of sexual behavior closely resembling defendant's version of the alleged encounter, and in postponing its ruling on the admissibility of the testimony of prior conduct until after it had heard defendant's version of the events in question. State v. White, 48 N.C. App. 589, 269 S.E.2d 323 (1980).

Rule 413. Medical actions; statements to ameliorate or mitigate adverse outcome.

Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons shall not be admissible to prove negligence or culpable conduct by the health care provider in an action brought under Article 1B of Chapter 90 of the General Statutes. (2004-149, s. 3.1.)

ARTICLE 5.

Privileges.

Rule 501. General rule.

Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with the law of this State. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 501. After reviewing rules on privilege proposed by the Supreme Court, Congress rejected the proposal and substituted a rule that applies the common law of privileges in federal civil and criminal cases. In civil actions in which state law supplies the rule of decision, the state law on privileges applies.

The Uniform Rules of Evidence (1974) adopted the federal draft and several states have modeled their privilege laws on the federal draft. However, there is not a great deal of uniformity among the federal courts and various states with respect to privileges. Adoption of the federal draft would modify and delete privileges currently recognized in North Carolina and add other privileges currently not recognized in North Carolina.

Because of the extensive effort needed to clarify this confused area, the Committee decided not to draft new rules of privilege at this time but to continue the present statutory and common law system. See generally *Brandis on North Carolina Evidence* § 54 *et seq.* (1982).

Cross References. — As to privileged communications, see G.S. 8-53 through 8-53.5.

Legal Periodicals. — For note, "The Case for a Federal Psychotherapist-Patient Privilege that Protects Patient Identity," see 6 Duke L. Rev. 1217 (1985).

For article, "Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds," see 64 N.C.L. Rev. 443 (1986).

For article, "Recent Developments: Mortal Clients, Immortal Privilege? In re Death of Miller and the Future of the Posthumous Attorney-Client Privilege in North Carolina," 81 N.C.L. Rev. 2095 (2003).

ARTICLE 6.

Witnesses.

Rule 601. General rule of competency; disqualification of witness.

(a) *General rule.* — Every person is competent to be a witness except as otherwise provided in these rules.

(b) *Disqualification of witness in general.* — A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

(c) *Disqualification of interested persons.* — Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic. However, this subdivision shall not apply when:

(1) The executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf regarding the subject matter of the oral communication.

(2) The testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

(3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, committee or person so deriving title or interest.

Nothing in this subdivision shall preclude testimony as to the identity of the operator of a motor vehicle in any case. (1983, c. 701, s. 1.)

COMMENTARY

Subdivision (a) is identical to the first sentence of Fed. R. Evid. 601. The second sentence of Fed. R. Evid. 601 concerns the application of state law in diversity cases and was omitted. Fed. R. Evid. 601 does not contain subdivision (b) on disqualification of a witness.

This rule eliminates all grounds of incompetency not specifically recognized in subdivision (b) or (c) or the succeeding rules of this Article.

At common law husband and wife were incompetent to testify in an action to which either was a party. However, by statute, each spouse has been competent to testify for or against the other in all civil actions and proceedings, with two rigidly defined exceptions. One exception makes one spouse incompetent to testify "for or against the other ... in any action or proceeding for or on account of criminal conversation... ." G.S. 8-56. With respect to this exception Professor Brandis states:

"It is hard to find a purpose except one based on notions of delicacy, and even this is frustrated by permitting the plaintiff husband to testify to his wife's improper relations with the defendant. Danger of collusion would seem to be no greater than in any other case, and the interest of the state in the marriage relation, which only doubtfully justifies extreme measures to prevent collusion in divorce litigation, is no excuse for a rule of incompetency in criminal conversation actions." *Brandis on North Carolina Evidence* § 58, at 232, n. 28 (1982).

The other exception bars a spouse from testifying "for or against the other in any action or proceeding in consequence of adultery." G.S. 8-56. This exception is supplemented by G.S. 50-10 which provides that in divorce actions "neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." With respect to this exception, Professor Brandis notes that if the original purpose was to prevent collusion in divorce actions, "[I]t would seem that the prohibition should have been repealed when a relatively short period of separation was made a ground for divorce." *Brandis on North Carolina Evidence* § 58, at 230, n. 20 (1982).

At common law the spouse of a criminal defendant was incompetent to testify. This incompetence was removed by G.S. 8-57 so far as testifying for the defendant was concerned. With respect to testimony against the other spouse, G.S. 8-57 left in force the common law rule of incompetence. In *State* v. *Freeman,* 302 N.C. 591 (1981), the court removed the incompetence to testify against the other spouse (except to the extent that it preserved the privilege against disclosure of confidential communications). During the 1983 Legislative Session G.S. 8-57 was rewritten and now provides that the spouse of the defendant is competent but not compellable to testify for the State against the defendant except that the spouse is both competent and compellable to testify in the following cases:

(1) In a prosecution for bigamy or criminal cohabitation, to prove the fact of marriage and facts tending to show the absence of divorce or annulment;

(2) In a prosecution for assaulting or communicating a threat to the other spouse;

(3) In a prosecution for trespass in or upon the separate lands or residence of the other spouse when living separate and apart from each other by mutual consent or court order;

(4) In a prosecution for abandonment of or failure to provide support for the other spouse or their child;

(5) In a prosecution of one spouse for any other criminal offense against the minor child of either spouse, including any illegitimate or adopted or foster child of either spouse.

The provisions of the previous G.S. 8-57 which provided that the spouse is a competent witness for the defendant in a criminal action and which also provided that a spouse was not compellable to disclose any confidential communication made by one to the other during their marriage are retained in the rewrite of the statute.

Upon adoption of Rule 601, G.S. 8-56 and 50-10 should be rewritten to make it clear that a husband or wife are competent to testify. The privilege against disclosure of confidential communications should be retained.

Subdivision (b) establishes a minimum standard for competency of a witness and is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 55 (1982).

Subdivision (c) represents a narrowing of the scope of G.S. 8-51 [now repealed], the Dead Man's Statute. The Dead Man's Statute will now be applicable only to oral communications between the party interested in the event and the deceased person or lunatic, rather than to "a personal transaction or communication between the witness and the deceased person or lunatic." Subdivision (c) preserves the exceptions already existing in G.S. 8-51 and adds subsection (3) which is a statement of the North Carolina case law having to do with one way in which "the door can be opened." See *Carswell v. Greene,* 253 N.C. 266, 270 (1960); *Brandis on North Carolina Evidence* § 75, at 282, 283 (1982).

It was not the intent of the drafters of subdivision (c) to change any existing cases where the Dead Man's Statute has been held to be inapplicable, or where, because of the actions of one party or the other the protection of the rule has been held to be waived. For example, subdivision (c) would not change the results in *Smith v. Perdue,* 258 N.C. 686 (1963) or *In re Chisman,* 175 N.C. 420 (1918). The report of the Legislative Research Commission's Study Committee on the Laws of Evidence to the 1983 General Assembly did not contain subdivision (c), nor did the original versions of House Bill 96 and Senate Bill 43. This would have completely eliminated the Dead Man's Statute, which has been much criticized. In Professor Brandis' view, for example:

"[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute." *Brandis on North Carolina Evidence* § 66 at 258, n. 62 (1982).

However, subdivision (c) was added to Rule 601 because of a concern that fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased or lunatic.

G.S. 8-51 should be repealed after this rule is adopted.

Legal Periodicals. — For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

CASE NOTES

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I. GENERAL CONSIDERATION.

Prior to the adoption of the North Carolina Rules of Evidence, the test for whether a witness was competent to testify was whether the witness understood the obligation of an oath or affirmation and had sufficient capacity to understand and relate facts which would assist the jury in reaching its decision. There was no fixed age limit below which a witness was incompetent to testify. The determination of the competency of a witness was entrusted to the discretion of the trial judge, and his determination was conclusive on appeal absent a showing of an abuse of discretion. State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986).

The purpose of this section is to exclude evidence of statements of deceased persons since those persons are not available to respond. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

This rule makes no change in the basic rules of competency as they have been stated by the North Carolina Supreme Court. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

The general rule is that every person is competent to testify unless determined to be disqualified by the Rules of Evidence. State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Lack of understanding of the nature of an oath would have been grounds for disqualification of a person as a witness prior to the adoption of the Rules of Evidence; however, this rule does not mention the ability to understand the nature of an oath, but provides that a person may be disqualified as a witness when he is incapable of expressing himself concerning the matter or when he is incapable of understanding the duty of a witness to tell the truth. State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987).

Subsection (b) establishes a minimum standard for competency of a witness. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Subsection (c) of this rule is a compromise between the traditional "Dead Man's Act" and complete abolition. Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

As to the applicability of subsection (c) of this rule, see Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

Hearsay Defined. — Whenever the assertions of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay. DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 893 (1986).

A witness' testimony is incompetent under the dead man's statute if the witness is a party or is interested in the event, his or her testimony relates to a personal communication with the decedent, the action is against a personal representative of the decedent or a person deriving title or an interest from, through, or under the decedent, or the witness is testifying in his or her own behalf. In re will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

The competency of a witness is determined at the time the witness is called upon to testify. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986), cert. denied, 351 N.C. 186, 541 S.E.2d 709 (1999).

Defendant Who Was Competent to Testify Held Competent to Confess. — Where there was no dispute that the defendant was capable of expressing herself concerning the matter so that she could be understood, and there was no evidence that she was incapable of understanding the duty of a witness to tell the truth, the defendant would have been competent to testify; therefore, she was competent to confess. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Defendant was properly found competent to confess; therefore, even if she was not fully capable of appreciating the seriousness of the confession, this did not make it inadmissible if it otherwise had the indicia of reliability. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

The test of competency is the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986); State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

Competency under both the new rules and the case law prior to their adoption is the capacity of the proposed witness to understand and relate, under the obligation of an oath, facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987).

Subsection (b) of this rule does not ask how bright, how young, or how old a witness is. Instead, the question is: does the witness have the capacity to understand the difference between telling the truth and lying? State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

The trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses because the focus of the voir dire was incorrectly directed to the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and to relate events which they may have seen, heard or experienced; rather than determining whether all or any of them were competent to testify under this section, the trial court disqualified them as being "unavailable," apparently relying upon the definition of "unavailability" contained in G.S. 8C-1, Rule 804(a)(4), but the question of a potential witness' unavailability becomes relevant only with respect to the admissibility of his hearsay declarations. In re Faircloth, 137 N.C. App. 311, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Ambiguity or Vagueness of Witness on Voir Dire. — It matters not that some of a witness' answers during voir dire are ambiguous or vague or that a witness is unable to answer some of the questions which are put to him. Such performance is not unusual when the witness is a young child. The same applies for a mentally retarded individual. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Effect of Drug Use on Competency. — A witness is not incompetent to testify on the basis of drug use alone, but only insofar as such use affects his ability to be understood or to respect the importance of veracity. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Where the effect of drug use is concerned, the question is more properly one of the witness' credibility, not his competence. As such, it is in the jury's province to weigh his evidence, not in the court's to bar it. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Competency of Child to Testify. — The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel absent the trial judge's independent finding pursuant to personally examining or observing the child on voir dire. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

There is no age below which one is incompetent, as a matter of law, to testify. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987); State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988).

In sexual offense case, fact that six-year-old victim testified without objection that she was six years old and had one brother who was eight years old, named the school she attended, gave her teacher's name and where she lived, and said that she was going to tell the truth clearly supported the trial judge's conclusion that the six-year-old was competent to testify; thus, the trial judge's failure to conduct a voir dire examination to establish the child's competency was not prejudicial error. State v. Gilbert, 96 N.C. App. 363, 385 S.E.2d 815 (1989).

Trial court did not abuse its discretion in finding the four year old victim competent to testify and allowing her to testify to sexual offenses allegedly occurring when she was two. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

Although child was two-and-a-half years at the time of her mother's murder she had the capacity to testify at age five. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, 514 U.S. 1114, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995).

It was not error to allow five year old child to testify to the jury while sitting on her stepmother's lap. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, 514 U.S. 1114, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995).

The court did not abuse its discretion in ruling that a mentally retarded rape victim was incapable of effectively communicating at trial and was therefore incompetent to testify. State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998), cert. denied, 352 N.C. 362, 544 S.E.2d 562 (2000).

A six-year old sexual abuse victim was not competent to testify, where the trial court conducted an extensive voir dire of the child to determine his ability to tell the truth, and he consistently exhibited that he did not know the truth from falsehood. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Despite the fact that the three-year-old child testified that telling the truth was bad at one point, he was found competent to testify where he later demonstrated his understanding that telling the truth was what you do and then promised to tell only the truth. State v. Meadows, 158 N.C. App. 390, 581 S.E.2d 472, 2003 N.C. App. LEXIS 1189 (2003), cert. denied, 357 N.C. 467, 586 S.E.2d 774 (2003).

Further findings were required because the juvenile court disqualified the four-year-old victim without making an appropriate inquiry into her competency to testify. A short voir dire based on five questions, only one of which she did not answer, was insufficient to allow the juvenile court to determine whether she was incapable of expressing herself concerning the matter or incapable of understanding the duty to tell the truth. State v. Pugh, 138 N.C. App. 60, 530 S.E.2d 328, 2000 N.C. App. LEXIS 551 (2000).

"Unavailable" Witness. — Where four year old victim's testimony was so limited and she was neither cooperative nor responsive, the victim was in fact "unavailable" for purposes of testifying at trial, and combining her de facto unavailability with the evidentiary importance of her previous statements, the hearsay testimony of the witness to these statements was "necessary" under the two-part hearsay test. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

Failure of Court to Personally Determine Competency of Child. — In a prosecution charging defendant with first-degree rape, incest, and taking indecent liberties with his three-year-old daughter, the trial judge's adoption of counsel's stipulation in concluding that the child victim was incompetent to testify, where he never personally examined or observed the child's demeanor in responding to questions during a voir dire examination, was reversible error, where highly prejudicial testimony was erroneously admitted pursuant to G.S. 8C-1, Rules 803 (24) and 804 (b)(5) on the basis of this improperly based conclusion. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Despite child prosecutrix's lack of understanding of an obligation to tell the truth from a religious point of view, because she stated on direct examination an understanding of the difference between truth and lies and the importance of telling the truth, she exhibited a capacity to understand and relate facts and a comprehension of the difference between the truth and untruth. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

Effect of Mental Illness on Competency. — Even when the trial court finds that a witness is presently suffering from a mental illness, the witness may testify if he has sufficient understanding to apprehend his obligation to tell the truth and is able to give a correct account of the matters he seeks to testify about. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

An interested party may testify to oral communications with a decedent or lunatic where his mental capacity is in issue, the interested party expresses an opinion thereon, and the basis for the opinion includes the communications and personal transactions testified to. Peterson v. Finger, 82 N.C. App. 743, 348 S.E.2d 351 (1986).

Dead Man's Act Protections. — Estate did not waive the protections of the Dead Man's Statute, G.S. 8C-1, N.C. R. Evid. 601(c), when it timely objected at the widow's deposition to oral communications between the decedent and the widow, moved to strike the incompetent parts, and later admitted the deposition into evidence and did not object at a partial summary judgment hearing regarding the deposition. Since the oral communications in the deposition were offered by the widow, and not the estate, the estate's conduct at the deposition of objecting and moving to strike properly preserved those protections. Estate of Redden v. Redden, — N.C. App. —, 670 S.E.2d 586, 2009 N.C. App. LEXIS 33 (2009).

Failure to Make Findings as to Competency. — Trial court did not commit reversible error by failing to make findings of fact and more detailed conclusions concerning competency of child victim to testify. State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988).

When the evidence clearly supports a conclusion that the witness is competent, the trial court's failure to conduct a voir dire inquiry and make specific findings and conclusions concerning the witness' competency is, at worst, harmless error. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Although the trial court did not make a specific finding as to whether a nine-year-old child was capable of expressing herself concerning matters as to which she was to testify, the findings made by the trial court and its conclusion that she was competent clearly establish that the trial court exercised its discretion in declaring her competent as a witness. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Finding of Competency Upheld. — Trial court did not abuse its discretion in finding 12-year-old child with a low IQ competent to testify, where the court considered and determined the overall competency of the witness as to his mental capacity and his age as these factors affected his ability to understand and relate under oath facts concerning the charge of first-degree sexual offense committed upon him. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Refusal of the trial court to disqualify ten-year-old victim and her nine-year-old brother upheld. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

Trial court's exercise of its discretion in ruling that four-year-old child victim was competent to testify would be upheld. State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988).

Testimony of four-year-old victim of rape held to meet the standards of this rule. State v. Everett, 98 N.C. App. 23, 390 S.E.2d 160, cert. denied, 326 N.C. 599, 393 S.E.2d 884 (1990), rev'd on other grounds, 328 N.C. 72, 399 S.E.2d 305 (1991).

Testimony of victim, who was one month short of her 14th birthday, observed by the trial court, fully supported the conclusion that she was not disqualified as a witness for failure to understand her duty to tell the truth as a witness. Assuming arguendo that the trial court erred in failing to conduct a voir dire examination of the witness and in failing to make specific findings and conclusions as to the witness' competency, any such error was harmless. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Finding of Incompetency Upheld. — The trial judge did not abuse her discretion by finding that witness was incapable of remembering, understanding, and relating to the jury matters of detail concerning holographic will in question, where the events and conversations which the witness would have testified about occurred during the period of 1979-1982, and where the witness could not remember having twice been involuntarily committed during that same period of time. In re Will of Leonard, 82 N.C. App. 646, 347 S.E.2d 478 (1986).

Where the trial judge conducted a competency hearing at which he was able to observe for himself a five-year-old's competence to be a witness, and the record showed that the child could not respond to simple questions about basic facts in her life, and was contradictory, uncommunicative, and frightened, there was no error in the court's finding the child incompetent to testify. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

Discretion of Trial Court. — The determination that a witness is competent to testify is within the discretion of the trial court, which has the opportunity itself to observe the comportment of the witness. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

The competency of a witness is a matter which rests in the sound discretion of the trial judge in the light of his or her examination of the observation of the particular witness. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987); State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987); State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Averments in Affidavit Violating This Rule Properly Disregarded. — Decedent's estate's contention that the trial court erred by allegedly considering an affidavit because it contained statements made by a decedent and her deceased sister was without merit since to the extent the challenged affidavit contained averments that would violate N.C. R. Evid. 601(c) if admitted as evidence at a later trial, the appellate court assumed the trial court properly disregarded them. Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382, 2007 N.C. LEXIS 813 (2007).

Appellate Review of Trial Court's Ruling. — Absent a showing that the trial court's ruling as to the competency of a witness could not have been the result of a reasoned decision, the ruling must stand on appeal. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987); State v. Rael, 321 N.C. 528, 364 S.E.2d 125 (1988); State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Applied in Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953); Heiland v. Lee, 207 F.2d 939 (4th Cir. 1953); Fesmire v. First Union Nat'l Bank, 267 N.C. 589, 148 S.E.2d 589 (1966); North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Woodard v. McGee, 21 N.C. App. 487, 204 S.E.2d 871 (1974); Brown v. Moore, 286 N.C. 664, 213 S.E.2d 342 (1975); In re Will of Wadsworth, 30 N.C. App. 593, 227 S.E.2d 632 (1976); Waters v. Humphrey, 33 N.C. App. 185, 234 S.E.2d 462 (1977); Stone v. Paradise Park Homes, 37 N.C. App. 97, 245 S.E.2d 801 (1978); Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979); Hanover Co. v. Twisdale, 42 N.C. App. 472, 256 S.E.2d 840 (1979); Page v. Wilson Mem. Hosp., 49 N.C. App. 533, 272 S.E.2d 8 (1980); Almond v. Rhyne, 108 N.C. App. 605, 424 S.E.2d 231 (1993); State v. Beck, 163 N.C. App. 469, 594 S.E.2d 94, 2004 N.C. App. LEXIS 405 (2004).

Cited in Hinson v. Morgan, 225 N.C. 740, 36 S.E.2d 266 (1945); Bell v. Chatwick, 226 N.C. 598, 39 S.E.2d 743 (1946); State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948); Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949); Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968); Peaseley v. Virginia Iron, Coal & Coke Co., 12 N.C. App. 226, 182 S.E.2d 810 (1971); Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972); Wall v. Sneed, 30 N.C. App. 680, 228 S.E.2d 81 (1976); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985); Smith v. Allison, 83 N.C. App. 232, 349 S.E.2d 623 (1986); Chandler v. U-Line Corp., 91 N.C. App. 315, 371 S.E.2d 717 (1988); State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988); State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820 (1990); State v. Huntley, 104 N.C. App. 732, 411 S.E.2d 155 (1991); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); Caudill v. Smith, 117 N.C. App. 64, 450 S.E.2d 8 (1994); State v. Waddell, 351 N.C. 413, 527 S.E.2d 644, 2000 N.C. LEXIS 235 (2000); State v. Redd, 144 N.C. App. 248, 549 S.E.2d 875, 2001 N.C. App. LEXIS 422 (2001); In re M.G.T.-B., 177 N.C. App. 771, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006).

II. PERSONS INTERESTED IN THE EVENT OF THE ACTION.

Dead Man's Statute. — The North Carolina "Dead Man's Statute", formerly G.S. 8-51, has traditionally prohibited testimony involving both transactions and communications by individuals who would potentially benefit from the alleged statements of a deceased individual. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

The statute, or rule as now codified, is applicable only to oral communications between the party interested in the event and the deceased. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

The Dead Man's Statute was intended as a shield to protect against fraudulent and unfounded claims. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

Affidavit, in which a nephew averred that he never took any action on behalf of his aunts without their knowledge and consent, never converted any assets to his own benefit or engaged in inappropriate conduct as attorney-in-fact for the aunts, and denied fraud, did not violate G.S. 8C-1, Rule 601. Forbis v. Neal, 175

N.C. App. 455, 624 S.E.2d 387, 2006 N.C. App. LEXIS 189 (2006), aff'd in part, rev'd in part, 361 N.C. 519, 649 S.E.2d 382 (2007).

Trial court erred in admitting the testimony of the brother's wife about conversations she had with decedent, and about conversations she overheard between decedent and the brother; since the wife was an interested party because she stood to inherit the property the brother was seeking if his specific performance action to enforce decedent's contract to make a will in the brother's favor was resolved in the brother's favor, she was barred from testifying about what a dead man had said in that regard. Taylor v. Abernethy, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005), appeal dismissed, — N.C. —, 630 S.E.2d 454 (2006).

Exception to the Dead Man's Statute. — With regard to a holographic will, an exception to the Dead Man's Statute has evolved which allows beneficiaries to testify as to the three material elements of a will: the testator's handwriting, the testator's signature, and what the testator considered to be his place for keeping valuable players. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

Legal or Pecuniary Interest in the Outcome. — To be disqualified as a witness interested in the event of the action, the witness must have a direct legal or pecuniary interest in the outcome of the litigation. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

The named executor's membership in a church, which was a beneficiary under the contested will, was too tenuous an interest to come within the meaning of the dead man's statute. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801 (1987).

Propounders and Caveators. — In a proceeding for the probate of a will, both propounders and caveators are parties interested in the event within the meaning and spirit of subsection (c) of this section. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987); In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

A beneficiary under a will may not testify as to communications with the deceased, but he or she may give an opinion, based on his or her own observations, as to the issue of the decedent's mental capacity at the time of the execution of the will and testify to transactions with the deceased as being a part of the basis of the opinion. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Subsection (c) prohibits beneficiaries from testifying as to oral communications they had with the decedent about his intent to make a new will or with regard to specific bequests to be contained in that will. In re Will of Lamparter, 348 N.C. 45, 497 S.E.2d 692 (1998).

III. TESTIMONY NOT DISQUALIFIED.

Child Held Competent. — Where a child testified at the voir dire hearing that she knew what it meant to tell the truth and she knew it was bad to tell a lie, and she promised to tell just what had happened and nothing else, the fact that the child may not have told the truth in the past and was uncertain about some times and dates did not prevent her from being a competent witness. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Where child's competency to testify was not determined until after her direct testimony, this was not prejudicial error; although the better practice would have been to conduct the voir dire examination and determine competency prior to the witness' testimony in order to avoid possible mistrial or prejudice from the admission of testimony by a witness later found incompetent, this witness was correctly determined to be competent during her testimony, and the timing of the competency finding was not prejudicial error. State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989).

A child was competent to testify in a capital murder trial, where she was about five when she testified and she had been four when her mother was murdered, and although she said at the trial's outset that it was not good to tell the truth, she thereafter responded to the prosecutor that it was not true to say that her blue dress was red, and she also stated that she knew she would get a spanking if she did something wrong, that it was wrong to tell a lie, that she knew she was in court to talk about the defendant shooting her mother, and that she wanted to tell the truth. State v. Andrews, 131 N.C. App. 370, 507 S.E.2d 305 (1998).

The child victim-witness was competent to testify where it was demonstrated that she knew the difference between the truth and a lie; she indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her; she displayed a comprehension of the difference between truth and untruth; and she affirmed her intention to tell the truth. State v. Ford, 136 N.C. App. 634, 525 S.E.2d 218, 2000 N.C. App. LEXIS 111 (2000).

Defendant's conviction of first-degree sexual assault on a child under the age of 13 years was affirmed and the trial court did not err when it determined that the children victims were competent to testify. State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007).

Seven-Year-Old Child Competent to Testify. — Where the voir dire record revealed that although the seven-year-old child did not understand her obligation to tell the truth from a religious point of view and had no fear of certain retribution for mendacity, she knew the difference between the truth and a lie, indicated a capacity to understand and relate facts to the jury concerning the defendant's assaults upon her, a comprehension of the difference between truth and untruth, and her obligation to tell the truth, and affirmed her intention to do so, the victim's testimony met the standards of this rule. State v. Hicks, 319 N.C. App. 84, 352 S.E.2d 424 (1987).

Where defendant was charged with first degree rape of his seven-year-old daughter, although child answered she did not know what it meant to break a promise and did not know what an oath was, court did not abuse its discretion in finding child competent to testify, since child testified she knew what it meant to tell the truth and she knew the difference between right and wrong. State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989).

Four-Year-Old Child Competent to Testify. — Juvenile court did not commit plain error in admitting the testimony of a four-year-old victim, despite defendant's argument that the victim was incompetent to testify in that she did not clearly communicate her understanding of the obligation to tell the truth or illustrate that she had the capacity to understand and relate facts since she provided inaudible responses to questions; the victim's story was consistent and corroborated by the testimony of her mother, her brother, her doctor, and the investigating officer and the evidence sufficiently demonstrated the use of force. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Retarded Victim Held Competent. — A mentally retarded 13-year-old victim, whose language abilities were that of a seven-year-old, read at a kindergarten level, and functioned socially and emotionally as a four- or five-year-old, and had a poor concept of time, but remembered details accurately, was held competent to testify. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Officer Who Interviewed Defendant. — Law enforcement officer who customarily spoke a different dialect of defendant's language was competent to testify about his interview of defendant, under G.S. 8C-1, Rule 601(a), as there was little difference between the two dialects and the officer had conducted numerous interviews of individuals who spoke defendant's dialect. State v. Aquino, 149 N.C. App. 172, 560 S.E.2d 552, 2002 N.C. App. LEXIS 122 (2002).

Witness of Low Mentality. — The fact that the court felt the witness was of low mentality did not disqualify her, and the record did not show that the witness was either incapable of expressing herself or incapable of understanding her duty to tell the truth such that the court should have disqualified her as a witness on its own motion. State v. Cox, 344 N.C. 184, 472 S.E.2d 760 (1996).

Defendant Suffering Brain Damage Held Competent to Confess and Stand Trial. — Defendant, who, as a result of a self-inflicted gunshot wound to the head and resulting surgery, had suffered damage to her brain which impaired her emotional response to situations, was competent to make a valid confession and stand trial; there was evidence that defendant had an I.Q. within the normal range and that she knew what the charges were and what could happen to her if she was convicted; if this did not worry or upset her because of her altered mental condition, it did not mean she did not understand these facts, and the court could find from this and other evidence that the defendant understood the nature and object of the proceedings against her and could comprehend her own situation in reference to the proceedings. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Witness with Illness Affecting Speech. — Trial court did not abuse its discretion in finding competent a witness who suffered from viral encephalitis, a motor disease that affected his speech, because the witness was sufficiently audible and understandable when he repeated his testimony. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Past Mental Illness. — Although codefendant had a past history of mental illness, the denial of the motion to preclude the witness from testifying was not error; the trial judge considered the psychiatric report from hospital which stated the witness had the capacity to proceed and determined that, in light of the fact that defendant presented no other evidence and based on his own observation of the witness, the witness was competent to testify. State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989).

Where executor does not qualify as a person interested in the outcome of the caveat proceeding, his testimony regarding oral communications with the decedent is competent. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Where the executor drafted the will, his testimony regarding decedent's mental capacity was properly admitted for the purpose of showing the basis for his opinion that at the crucial time decedent had the requisite mental capacity. In re Will of Hester, 84 N.C. App. 585, 353 S.E.2d 643, rev'd on other grounds, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Will Beneficiary Could Testify Against Self-Interest. — Trial court properly admitted a beneficiary of both the decedent's first will and the decedent's second will to testify that the decedent revoked and tore up the first will, under an exception to the Dead Man's Statute, because the beneficiary testified against the beneficiary's own interest in that she would receive less under the second will than under the first will. In re Will of Barnes, 157 N.C. App. 144, 579 S.E.2d 585, 2003 N.C. App. LEXIS 643 (2003), cert. denied, 357 N.C. 460, 586 S.E.2d 96 (2003), appeal dismissed, 357 N.C. 460, 586 S.E.2d 95 (2003), cert. denied, petition denied, 357 N.C. 460, 587 S.E.2d 94 (2003).

Waiver of Dead Man Protections. — Defendants, manufacturers of an amusement ride, waived any protection afforded by this rule when they deposed the mother of an injured boy regarding her conversation with the amusement ride operator who had since died, although they did not offer the testimony at trial. Breedlove v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 543 S.E.2d 213, 2001 N.C. App. LEXIS 147 (2001).

IV. DECISIONS UNDER FORMER § 8-51.

Editor's Note. *— The cases below were decided under the former Dead Man's Statute, former G.S. 8-51.*

A. General Consideration.

As to summary and analysis of former § 8-51, see Burnett v. Savage, 92 N.C. 10 (1885); Sumner v. Candler, 92 N.C. 634 (1885); Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890); Seals v. Seals, 165 N.C. 409, 81 S.E. 613 (1914); Fidelity Bank v. Wysong & Miles Co., 177 N.C. 284, 98 S.E. 769 (1919).

Purpose of Section. — The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

The purpose of this section was to exclude evidence of a personal transaction or communication between the witness and a person who by reason of death or lunacy cannot be heard. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

The reasoning behind this section was succinctly stated: Death having closed the mouth of one of the parties (with respect to a personal transaction or communication), it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the legislature, in its wisdom, has declared that an ex parte statement of such matters shall not be received in evidence. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960); Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate was intended as a shield to protect against fraudulent and unfounded claims. It was not intended as a sword with which the estate may attack the survivor. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966); Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

The rule that evidence offered is admissible if it is competent for any purpose ought not to be used as a sword with which to attack a decedent's estate by destroying the express provisions of this section. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

When Testimony Is Incompetent Under This Section. — This section did not render the testimony of a witness incompetent in any case unless these four questions required an affirmative answer: 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title? 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest? 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic? 4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969); Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969); Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Even in instances where these four things concurred, the testimony of the witness was nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, was examined in his own behalf, or the testimony of the deceased person or lunatic was given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

The testimony of a witness was incompetent under the provisions of this statute when it appeared (1) that such witness was a party, or interested in the event, (2) that his testimony related to a personal transaction or communication with the deceased person, (3) that the action was against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness was testifying in his own behalf or interest. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957); Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Reasons for Exclusion. — The exclusion of such testimony rested not merely upon the ground that the dead man could not have a fair showing, but upon the broader and more practical ground that the other party to the action had no chance by the oath of the relevant witness to reply to the oath of the party to the action. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Courts were not disposed to extend the disqualification of a witness under this section to those not included in its express terms. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

The provisions of this section could be waived by the adverse party. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

Where an administrator brought proceedings under former G.S. 1-569 et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waived the provisions of this section and the testimony thus taken could be introduced by the defendant in his own behalf. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

If the plaintiffs at a former trial called the defendant as an adverse witness, examined her in detail about her relations with deceased, such examination would seem to be a waiver of this section and would open the door for the defendant to testify in another trial in respect to the matters about which the plaintiffs examined her. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where a party claiming under a deceased person examined the attorney for the deceased in respect to the execution and delivery of deeds to the land in controversy and the consideration therefor, such examination constituted a waiver of this section in respect to communications or transactions with decedent, and the other party was entitled to cross-examine the attorney as to such transactions. However, the waiver did not apply to other and independent transactions. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where the plaintiffs adversely examined the defendant for the purpose of obtaining evidence for use in the trial as provided in former G.S. 1-568.1 through 1-568.16, that examination was a waiver of the protection afforded by this section to the extent that either party might use it upon the trial. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

But adverse examinations of defendant in regard to transactions with decedent, which examinations were taken in prior actions nonsuited, did not operate as a waiver of this section so as to render competent defendant's testimony in subsequent trials in regard to such transactions. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Where an action to recover for injuries to one passenger was consolidated with two actions for wrongful deaths of two other passengers against the same defendant, the admission of testimony of plaintiff passenger in regard to a transaction between defendant and one of the deceased passengers did not constitute a waiver of this section in regard to the two actions for wrongful death. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Under certain circumstances the personal representative could waive the protection afforded by this section, and when this is done, it is frequently referred to as "opening the door" for the testimony of the opposing party or interested survivor. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Province of Court to Decide What Testimony May "Come In". — When a personal representative "opens the door" by testifying to a transaction, it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may "come in." Mansfield v. Wade, 208 N.C. 790, 182 S.E. 475 (1935).

This section applied to actions in tort as well as actions on contract. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934). See Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section prohibited the surviving party from testifying in his own behalf with respect to personal transactions and communications between him and a deceased person in an action in which the survivor seeks to establish a claim, either in contract or in tort, against the estate of the deceased. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Itemized and Verified Accounts. — Section 8-45, relating to itemized and verified accounts, was subordinate to this section. See

William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923).

Testimony Not Barred by Section. — Where a widow was entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and she died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops was competent, not falling within the provisions of this section, and did not affect the title to other money owned by her husband at his death and given to her for life by his will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Same — Conversations with Living Persons. — Where the widow under the terms of the will of her husband could only dispose of the moneys in the bank to her credit, and not such as could at her death pass to the remainderman under his will, it could be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon conversations with other living parties interested under the husband's will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Testimony of conversations with party to action wherein witness related statements of decedent is not in contravention of this section. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Same — Rehearsal of Conversation. — Direct evidence of a conversation and understanding with the plaintiff's testator was, under this section, incompetent, but a rehearsal of that conversation was a part of the res gestae, and admissible. Gilmer v. McNairy, 69 N.C. 335 (1873).

Same — Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which were prohibited by the "dead man's statute." In re Will of McDowell, 230 N.C. 259, 52 S.E.2d 807 (1949).

Same — Testimony to Prove Time When Act Was Done. — Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court was established by evidence, an interested party could testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Same — Record Evidence. — While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses was not precluded by this section. Flippin v. Lindsey, 221 N.C. 30, 18 S.E.2d 824 (1942).

The death certificate of the daughter intestate recorded no transaction between the child's mother and the doctor, and even had that been the case, record evidence did not fall within the ban of this section. Spillman v. Forsyth Mem. Hosp., 30 N.C. App. 406, 227 S.E.2d 292 (1976).

Same — Testimony Competent as to Only One of Two Defendants Was Admissible. — When there was more than one defendant, testimony which was competent as to one party should not have been excluded by virtue of this section because it was not competent against another party in the suit. Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Instruction as to Use of Section Cannot Be Obtained by Declaratory Judgment. — In an action instituted under the Declaratory Judgment Act the court had no authority to instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

B. Parties to the Action.

A member of the board of county commissioners was not a competent witness as to transactions with the defendant's intestate in a suit by the board. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. Benedict v. Jones, 129 N.C. 475, 40 S.E. 223 (1901).

A defendant executor could not testify concerning a land transaction between himself and the intestate in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. State ex rel. Bryant & Bro. v. Morris, 69 N.C. 444 (1873); Grier v. Cagle, 87 N.C. 377 (1882).

Guardian. — Testimony of a guardian, suing an executor to establish a gift made by testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. Zollicoffer v. Zollicoffer, 168 N.C. 326, 84 S.E. 349 (1915).

A "next friend" is not a party to the suit.

But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. Mason v. McCormick, 75 N.C. 263 (1876). See McLeary v. Norment, 84 N.C. 235 (1881).

Original Beneficiary of Life Insurance Policy. — In an action by the person substituted as beneficiary in a policy of life insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured, the original beneficiary was precluded by this section from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome. Harrison v. Winstead, 251 N.C. 113, 110 S.E.2d 903 (1959).

Parties in Probate of Will. — In a proceeding for the probate of a will, both propounders and caveators were parties interested in the event within the meaning and spirit of this section. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

Under this section the beneficiary under a will could not testify to transactions and communications with the deceased, but he could in proceedings of devisavit vel non give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he had with him as being a part of the basis of his opinion, when evidence of this character was properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

A caveator or a propounder in a will contest was a "party" to whom the prohibitions and exceptions of this section apply. In re Will of Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977).

Partner. — Where one partner was a party to the action and was interested in the event of the action, and the other partner was dead, because his lips were sealed in death the living partner was incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the copartnership and to relate certain conversations he had with deceased about the assets of the partnership. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, was clearly inadmissible under this section. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

Party Acting in Corporate Capacity. — One who is a party to a suit, though in his corporate capacity, was not competent to testify as to a transaction with a deceased person. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

Payee of Promissory Note. — The Dead Man's Statute was clearly applicable to the testimony of a payee of a promissory note. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Surviving Occupant of Car. — Testimony of a surviving occupant in a car to the effect that he was not driving but that one of the other occupants killed in the accident was driving at the time of the accident came within the provisions of this section in actions against the surviving occupant for wrongful death. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Surviving Stockholders. — In an action by a corporation and the surviving principal stockholders against the widow of a deceased principal stockholder, involving the liability of the corporation under its contract for the purchase of the stock of the deceased stockholder, the surviving stockholders were incompetent to testify as to conversations between the stockholders modifying the stock purchase agreement in favor of the corporation or the surviving stockholders. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957).

Decedent's Tenant. — In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, was competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness was not a party to the action. Sorrell v. McGhee, 178 N.C. 279, 100 S.E. 434 (1919).

Surviving tenant by the entirety was the "survivor of a deceased person" within the meaning of this section in an action which attacked the validity of a deed by which the tenancy by the entirety was created. Gribble v. Gribble, 25 N.C. App. 366, 213 S.E.2d 376, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975).

Party May Testify as to Transaction with Deceased Agent of Opponent. — This section did not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960); Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Hence, where a note was executed to two payees jointly and one of them thereafter acquired the interest of the other and sued the makers of the note, after the death of the other payee, testimony of the maker as to a contemporaneous agreement with the deceased payee, acting for himself and as agent of the other payee, that the note should not become a binding obligation until the happening of a stated contingency, was competent as to plaintiff payee's original share of the note, even though it was incompetent as to the share acquired by him as assignee of the deceased payee. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960).

But This Rule Applies Only Where Agent Was Not Personally Liable. — The rule that this section did not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent was applied only in factual situations where the deceased agent was not personally liable in respect of the alleged cause of action. It had no application where the liability, if any, of the principal rested solely on the alleged tortious acts of the agent under the doctrine of respondeat superior. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony of the surviving occupant of car tending to show that the other occupant, killed in the accident, was driving at that time was incompetent in an action by the survivor against the owner of the vehicle sought to be held liable under the doctrine of agency, since the owner, after having paid such liability, would have had a right of action against the estate of the deceased, and therefore the transaction came within the spirit if not the letter of this section. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony by Agent of Adverse Party Admissible. — In an action on an insurance policy by the son of the deceased owner, testimony of insurer's agent that prior to his death the owner directed him to transfer the policy to the owner's son because the owner was giving the land to his son was not precluded by this section. King v. National Union Fire Ins. Co., 258 N.C. 432, 128 S.E.2d 849 (1963).

Action to Enforce Agreement to Bequeath Property in Consideration of Services. — Where the plaintiff, in her own right and as administratrix of her mother, sought to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it was incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she was a party interested, within the contemplation of the statute. Brown v. Adams, 174 N.C. 490, 93 S.E. 989 (1917).

C. Persons Interested in the Event of the Action.

Section Not Confined to Parties to Action. — The provisions of this section were not confined to the parties to the action, but extended to testimony of a witness interested in the result of the action. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

Test for Disqualifying Interest. — To determine when such interests existed as to render a person incompetent, the following rule was applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action; if not, he is not disqualified. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Henderson v. McLain, 146 N.C. 329, 59 S.E. 873 (1907).

Nature of Interest Involved. — This section does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914); In re Gorham, 177 N.C. 271, 98 S.E. 717 (1919); Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

It follows that a mere sentimental interest will not suffice. Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Porter v. White, 128 N.C. 42, 38 S.E. 24 (1901); Bennett v. Best, 142 N.C. 168, 55 S.E. 84 (1906); Walston v. Lowry, 212 N.C. 23, 192 S.E. 877 (1937).

To be disqualified as a "person interested in the event" the witness must have a direct legal or pecuniary interest in the outcome of the litigation. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Present Interest. — In Isler v. Dewey, 67 N.C. 93 (1872), the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles." See Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above stated. Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890).

Witness Having Dual or Alternative Interest. — To determine the competency of a witness who has a dual or alternative interest in the event of the action, the court must decide which of the two interests was the more immediately valuable. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

The competency of the interested witness is limited to the same transaction as the one testified about by the administrator or the deceased, or elicited from the witness himself by the administrator. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Agent of Payee of Note. — Testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, was not excluded under this section, the agent not being a party interested in the event within the meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. American Agrl. Chem. Co. v. Griffin, 204 N.C. 559, 169 S.E. 152 (1933).

Agent of Third Person in Transaction with Deceased. — Assuming that a collision between two motor vehicles was a "transaction" within the meaning of this section, then one who has acted as an agent for a third person in a transaction with a person since deceased was ordinarily competent to testify to conversations or transactions of the decedent. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Attorney Formerly Holding Note for Collection. — An attorney formerly holding a note for collection was not an interested party in an action on the note within the meaning of this section, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. Vannoy v. Stafford, 209 N.C. 748, 184 S.E. 482 (1936).

Brother-in-Law of Decedent in Action to Recover Embezzled Funds. — The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, was not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. Fort Worth & D.C. Ry. v. Hegwood, 198 N.C. 309, 151 S.E. 641 (1930).

Depositor's Son in Action to Recover Moneys Deposited. — In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial did not affect this result. Donoho v. Wachovia Bank & Trust Co., 198 N.C. 765, 153 S.E. 451 (1930).

Draftsman of Deed Sought to Be Reformed. — In an action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, was held not precluded by this section, the draftsman not being a party interested in the event as contemplated by the statute. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Holder of Insurance Policy. — A policy holder in a mutual life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916). See also Gwaltney v. Provident Sav. Life Assurance Soc'y, 132 N.C. 925, 44 S.E. 659 (1903); Gwaltney v. Provident Sav. Life Assurance Soc'y, 134 N.C. 552, 47 S.E. 122 (1904).

Husband and Wife. — A witness may have a very large pecuniary interest in fact, as the interest of a wife in an important lawsuit to which her husband is a party, and still be competent, while a comparatively slight legal interest will disqualify the witness. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

The prohibition against the testimony of a "person interested in the event" extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936).

Where husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate, it was held that each was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was not therefore an interested party in the other's action within the meaning of this section, the testimony not being as to a transaction between the witnesses and the deceased, but between a third party and deceased. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936).

Interest of Wife in Compensation Due Husband. — In an action against an administrator to recover the value of services which the plaintiff alleged he has rendered the deceased, the wife of the plaintiff had no interest in the event which would bar her testimony as to a transaction with the deceased, and it was competent for her to testify to the contract relied upon by her husband the plaintiff. Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914). See Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

Where plaintiffs acquired ownership as issue of devisee, devisee's husband had no pecuniary legal interest in plaintiffs' real property; therefore, his testimony as to the decedent's devise was not incompetent under this section. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Husband as Interested Party in Check Given Wife. — When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. Vannoy v. Green, 206 N.C. 80, 173 S.E. 275 (1934).

Husband as Interested Party in Deed Drawn by Wife. — The husband was an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife was being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him, she would give him a horse if he would leave, was incompetent. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. Whitty v. Barham, 147 N.C. 479, 61 S.E. 372 (1908).

Husband's Interest in Wife's Action to Recover for Services. — A husband was not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915).

Husband of Decedent Grantee. — Where the blind husband of a grantee, in a deed reserving a life estate in the grantor, was present and heard the grantor acknowledge its execution and delivery, he was a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son, in that his evidence disclosed no personal transaction or communication and he was not a party in interest within this section. Turlington v. Neighbors, 222 N.C. 694, 24 S.E.2d 648 (1943).

Husband of Donee of Gift May Testify as to Declarations Made by Donor to Donee. — The husband of the donee of a gift could testify as to directions given and declarations made by the donor to the donee, since the testimony was not in behalf of the husband or in behalf of a party succeeding to his interest nor as to a transaction or communication between him and the deceased the testimony being as to a transaction between donor and donee. Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E.2d 837 (1957).

Widower Has No Interest in Division of Wife's Lands Among Children. — When a husband and wife, each owning certain lands, entered into an agreement to pool their lands for division among their children, and the wife died intestate before her lands were deeded in accordance with the agreement, the husband had a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore had no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife was not precluded by this section. Coward v. Coward, 216 N.C. 506, 5 S.E.2d 537 (1939).

The interest of one who temporarily held the title to the lands in dispute prior to the defendant was a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. Dill-Cramer-Truitt Corp. v. Downs, 201 N.C. 478, 160 S.E. 492 (1931).

A partner in intestate's firm could not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. Fenner v. Tucker, 213 N.C. 419, 196 S.E. 357 (1938).

Nonmember of Partnership. — Where the defendant's liability depended upon whether he was a member of the defendant partnership at the time the firm contracted a debt, which was the subject of the action, with the plaintiff who had since died and whose administrator had been made a party to the action, a witness who was not a member of the firm was not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

Sheriff in Action by Deputy. — A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under this section. Allen v. Gilkey, 86 N.C. 64 (1882).

Stockholder's Interest in Recovery on Contract of Sale. — Where defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held that the witness was not interested in the event, and his testimony as to the transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. Winborne v. McMahan, 206 N.C. 30, 173 S.E. 278 (1934).

Trustor's Son Where Estate Insolvent. — In an action involving the validity of a deed of trust, where the trustor was dead and his estate insolvent, the son of the trustor was a competent witness as to his declarations concerning the trust; the disqualification of the son under this section was removed by the insolvency of his father's estate, for there was nothing for the children in any event of the action. Gidney v. Logan, 79 N.C. 214 (1878).

D. Persons Deriving Title or Interest Through Parties or Interested Persons.

In General. — The words "derives its interest or title by assignment or otherwise" meant gets from a source, some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. Carey v. Carey, 104 N.C. 171, 10 S.E. 156 (1889).

The exclusion under this section applied to privies as well as parties. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Deceased Assignee. — When deceased had no interest in lands, but was simply an assignee, evidence of his declarations was admissible as no claim of title was made under him. Condor v. Secrest, 149 N.C. 201, 62 S.E. 921 (1908).

Attorney. — The fact that an attorney has an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. Nor is an attorney of one of the parties precluded from testifying for his client concerning the agreement. Propst v. Fisher, 104 N.C. 214, 10 S.E. 295 (1889).

Testimony of Grantee of Deceased Debtor. — In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

Trustee. — In an action by trustors against a trustee to compel an accounting for the proceeds of a foreclosure sale, the incompetency of the trustor to testify as to transactions between himself and the deceased cestui que trust must be predicated upon the assumption that the trustee under the deed of trust derived his "title or interest from, through or under" the cestui, and furthermore that it is this interest which is attacked. Garrett v. Stadiem, 220 N.C. 654, 18 S.E.2d 178 (1942).

Trustor. — Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor was not excluded by this section from being a witness for the plaintiff, who also claimed title through him. Isler v. Dewey, 67 N.C. 93 (1872).

E. Testimony Disqualified.

Party May Not Contradict Former Witness. — A defendant having an interest in the event of an action was not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. Bushee v. Surles, 77 N.C. 62 (1877).

Where Adverse Party Non Compos Mentis. — A party interested in the event of the action could not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged non compos mentis. Price v. Whisnant, 232 N.C. 653, 62 S.E.2d 56 (1950).

Action Concerning Disputed Boundary. — Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed, and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, was that of a transaction or communication prohibited by this section. Poole v. Russell, 197 N.C. 246, 148 S.E. 242 (1929).

The defendant in an action for money demanded was disqualified by this section to testify as to the time and place of signing a receipt by the plaintiff's intestate in support of his plea of satisfaction. Sumner v. Candler, 86 N.C. 71 (1882).

Receipt of Money from Person Now Deceased. — Where, in an action to establish a claim against an estate, plaintiff introduced evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds was tantamount to testifying that decedent had not paid her any part thereof, and was incompetent under this section. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Testimony by the maker of notes as to transactions with deceased payee tending to establish nonliability was properly excluded as coming within prohibition of this section. Perry v. First Citizens Nat'l Bank & Trust Co., 226 N.C. 667, 40 S.E.2d 116 (1946).

In an action to recover for services rendered deceased, testimony by the plaintiff that plaintiff boarded deceased was incompetent under the provisions of this section. Price v. Pyatt, 203 N.C. 799, 167 S.E. 69 (1933).

Contest over Will. — As between the propounder or an interested executor and a person who is interested in the result of the trial, this section, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applied in a contest over a will, notwithstanding the proceeding is in rem. There was an exception when the evidence is directed solely towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, solely, however, as a basis for the opinion formed as to the mental condition or capacity of the deceased. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

F. Testimony Not Disqualified.

Party Testifying against Interest. — Under this section a witness could testify against his own interest, even if thereby other parties to the suit are injuriously affected; the disqualification applied only when a witness testifies in his own behalf. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it was not set aside may testify to declarations made by the testator after its execution which were competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, was not prohibited by this section. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); In re Will of Fowler, 159 N.C. 203, 74 S.E. 117 (1912).

When the witness was testifying not in his own behalf or interest, but against his interest, he was not disqualified by this section. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Testimony Not Against Representatives. — The administrator of a deceased guardian was a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. Thompson v. Humphrey, 83 N.C. 416 (1880).

Testimony in Favor of Representative. — Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony did not fall within the inhibition of this section, which was intended to protect the deceased person's representative or assignee who was suing or being sued. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Where the witness was testifying for, rather than against, the person deriving title or interest from, through or under a deceased person, such testimony did not come within the inhibitions of this section. Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951).

Representative Not a Party. — It was competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. Thomas v. Kelly, 74 N.C. 416 (1876).

Sureties Entitled to Same Protection as Representative. — The rule to be deduced from the authorities was that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and was entitled to the same protection as the representative of his deceased principal when sued. McGowan v. Davenport, 134 N.C. 526, 47 S.E. 27 (1904).

Conversations with Third Parties Present. — A witness was not incompetent, under this section, to testify to a conversation had with two persons, one of whom was dead at the time of the trial, in reference to a contract made between them and the witness. Peacock v. Stott, 90 N.C. 518 (1884).

This section made no exception where other parties were present but left these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. MacRae v. Molley, 90 N.C. 521 (1884).

Where the conversation was not strictly with the intestate, but was one held with him and two others who were associated with him in the transaction, then the provisions of this section did not incapacitate the party from testifying. Johnson v. Townsend, 117 N.C. 338, 23 S.E. 271 (1895).

Action for Breach of Contract. — In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933).

Action for Breach of Warranty. — In an action against an insane person for damages for breach of warranty in a deed, a witness who was not interested in the recovery was not disqualified by this section, though he might have an interest in the land. Lemly v. Ellis, 143 N.C. 200, 55 S.E. 629 (1906).

Action in Ejectment. — Where some of the witnesses in an action in ejectment were not interested in the event, their testimony did not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claimed as adverse possessor was reversible error entitling the plaintiff to a new trial. Pitman v. Hunt, 197 N.C. 574, 150 S.E. 13 (1929).

In an action to declare a deed void on the ground that it was never delivered to the grantee, since deceased, testimony offered by the grantor tending to show that the deed had not been delivered was not incompetent under this section. Gulley v. Smith, 203 N.C. 274, 165 S.E. 710 (1932).

Transactions with Partnership. — The death of one of the partners in a firm would not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, was living. Peacock v. Stott, 90 N.C. 518 (1884).

G. Subject Matter of the Transaction.

1. In General.

This section related not only to "personal transactions" but also to "communications" with a deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Not Applicable Unless Transaction Was Personal. — Under this section the parties in interest were disqualified from testifying only as to personal transactions with the deceased. McCall v. Wilson, 101 N.C. 598, 8 S.E. 225 (1888); Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899); Davidson v. Bardin, 139 N.C. 1, 51 S.E. 779 (1905).

Test as to When Transaction Was "Personal". — A fair test in undertaking to ascertain what was a "personal transaction or communication" with the deceased was to inquire whether, in case the witness testified falsely, the deceased, if living, could contradict it of his own knowledge. Sherrill v. Wilhelm, 182 N.C. 673, 110 S.E. 95 (1921); Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

A personal transaction or communication within the purview of this section was anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969); Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

A personal transaction or communication within the purview of this section was anything done or said between the witness and the deceased person tending to establish the claim being asserted against the personal representative of the deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968); Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

A personal transaction included that which was done by one person which affected the rights of another, and out of which a cause of action arose. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Caveat to Will. — On an issue of devastavit vel non it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. Linebarger v. Linebarger, 143 N.C. 229, 55 S.E. 709 (1906).

The interest which a married woman has in the real property of her husband before and during coverture came within the intent and meaning of this section, and would exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

Mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, was not a party interested in the event of the action whose evidence on the trial was excluded under the provisions of this section. Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930).

A husband has no vested interest in the real estate of his wife, and it would seem that he was not a "person interested in the event" within the contemplation of this section in an action involving his wife's title to realty. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Transaction Must Be Exclusive Source of Knowledge. — In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal transaction with the deceased person. Thompson v. Onley, 96 N.C. 9, 1 S.E. 620 (1887). And it was proper to show whether the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. Charlotte Oil & Fertilizer Co. v. Rippy, 123 N.C. 656, 31 S.E. 879 (1898), rehearing denied, State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973).

Testimony of a witness as to what he himself did in regard to the transaction did not come within the prohibition of this section when it did not relate to acts or communications with the deceased person in regard to such transaction. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Testimony as to Independent Facts. — A party in interest could testify to any substantive fact which was independent of any transaction or communication with the deceased or was based upon independent knowledge not derived from such source. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917). See also In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919); Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, was not rendered incompetent by this section, since in such instances the testimony did not relate to a personal transaction or communication between the witness and deceased and, accordingly, appellant's exceptions to the admission of such testimony were not sustained. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

This section did not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1939).

The disqualification of a party to the action to testify against the personal representative of a deceased person as to a transaction or communication with the deceased did not prohibit such interested party from testifying as to the acts and conduct of the deceased where the interested party was merely an observer and was testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

An interested party was not prohibited by this section from testifying concerning his independent acts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section did not preclude an interested party from testifying as to his own acts or the acts and conduct of the decedent when the witness was testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Any acts done in observation of a deceased person were considered independent acts and not within the statutory exclusion. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Acts of Deceased. — This section did not prohibit an interested party from testifying as to acts and conduct of the deceased where the interested party was merely an observer. Archer v. Norwood, 37 N.C. App. 432, 246 S.E.2d 37, cert. denied, 295 N.C. 645, 248 S.E.2d 249 (1978).

The prohibitions of this section did not prevent a witness from testifying as to the acts and conduct of the deceased where the witness was merely an observer and was testifying to facts based upon independent knowledge. In re Will of Simmons, 43 N.C. App. 123, 258 S.E.2d 466 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 9 (1980).

Same — Facts Occurring Out of Presence of Deceased. — A witness who offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person was not incompetent under this section. It was only when the transaction was between the deceased and the living party that the statute prohibits the latter from testifying. Lockhart v. Bell, 86 N.C. 443 (1882), appeal dismissed, 90 N.C. 499 (1884).

The acts of two independent drivers, total strangers to each other up to the point of impact, cannot be said to be acts done with a deceased person but are acts done in observation of a deceased person; thus, testimony as to these acts was not excluded by this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

A defendant was not prevented from describing the conduct and movements of a deceased's car by the phrase "concerning a personal transaction" when the movements were quite independent and apart from, and in no way connected with, or prompted or influenced by reason of, the conduct of the party testifying. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

In action for alienation of affections and criminal conversation against the administrators of the alleged tort-feasor, plaintiff's testimony that when he returned to his home at night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins was held competent as testimony of independent facts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

Action for Debt. — In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation was held admissible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

Testimony Concerning Mental Capacity. — Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions not applying as the subject was not a "transaction" within its meaning. McLeary v. Norment, 84 N.C. 235 (1881); Rakestraw v. Pratt, 160 N.C. 436, 76 S.E. 259 (1912).

Beneficiaries under the will are competent to testify as to transactions with the testator solely on the issue of testamentary capacity. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

A party interested in the event could testify as to transactions with a decedent when such testimony related solely to the issue of mental capacity. Goins v. McLoud, 231 N.C. 655, 58 S.E.2d 634 (1950).

The rule prohibiting an interested party from testifying as to a transaction with a decedent did not preclude a caveator from testifying as to his opinion of the mental condition of testator. In re Will of Thompson, 248 N.C. 588, 104 S.E.2d 280 (1958).

A person (who would otherwise be precluded from testifying by this section), after testifying as to the mental capacity of a deceased person, could testify to transactions and communications with deceased in order to show the jury that the opinion was well founded. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

However, such evidence would be rejected when it was offered for the purpose of proving and did tend to prove vital and material facts which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); In re Will of Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977).

A party or an interested witness could, notwithstanding this section, in an action to set aside a will, a deed or other writing, testify to communications or conversations with a deceased to show the basis upon which the party or witness had formed an opinion regarding the mental capacity of the deceased, when he testified to such an opinion, and when the lack of such capacity was a ground for setting aside the instrument. In re Will of Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977).

2. Particular Transactions.

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law would recognize as compulsion, was an inquiry that did not necessarily involve a transaction or communication with her husband which would disqualify her under this section. Hicks v. Hicks, 142 N.C. 231, 55 S.E. 106 (1906).

Driving of Car as "Transaction" Between Occupants of Same Car. — Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934).

Prior to the 1967 amendment to this section it was held that the surviving occupant of an automobile, in an action against the estate of the deceased occupant, was an incompetent witness as to the identity of the driver immediately preceding and at the time of the wreck. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962). See Davis v. Pearson, 220 N.C. 163, 16 S.E.2d 655 (1941).

Two occupants of the same automobile were engaged in a "personal transaction," thereby rendering incompetent the testimony of one against the personal representative of the other's estate. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

But a collision between two motor vehicles was not a "personal transaction" within the meaning of this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

And Section Did Not Exclude Testimony of Surviving Driver. — Considering the fact that the only relationship between a defendant and a decedent was the impact of their vehicles, such a collision was not a personal transaction within the meaning of the term, and this section was not applicable to the testimony of the surviving driver in a two-vehicle collision. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Conversation Between Decedent and Third Person. — This section did not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This was not testimony "concerning a personal transaction." Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

Testimony by a party as to a conversation between decedent and a third person did not concern a personal transaction or communication between the witness and the decedent; therefore it was not excluded by this section. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The transaction observed and testified to by the plaintiff mother of intestate was not one between her and the deceased doctor but was one between the deceased doctor and a third party, her daughter. Therefore, notwithstanding her interest, she was properly allowed to testify concerning it. Spillman v. Forsyth Mem. Hosp., 30 N.C. App. 406, 227 S.E.2d 292 (1976).

Proof of Handwriting. — A party interested in the event of a suit was not an incompetent witness, under this section, to prove the handwriting of the deceased person. Rush v. Steed, 91 N.C. 226 (1884); Hussey v. Kirkman, 95 N.C. 63 (1886); Armfield v. Colvert, 103 N.C. 147, 9 S.E. 461 (1889); Sawyer v. Grady, 113 N.C. 42, 18 S.E. 79 (1893); Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

The plaintiff on his examination-in-chief, in an action against an executor or administrator, was competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

A husband, who testified that he knew his wife's handwriting, was competent to testify after his wife's death, that her signature was on the note in question, and while his further testimony that she signed the instruments in question was technically incompetent under this section, such further testimony would not be held prejudicial when this fact was established by other competent testimony. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Claim That Intestate Was Holder in Due Course. — Where the administrator of the deceased claimed that his intestate was a holder of a negotiable instrument in due course for value, and relied upon his intestate's possession to make out a prima facie case, it was not a personal transaction or communication with the deceased, prohibited by statute, for it could have been shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Loan and Instrument Evidencing Same. — In an action by the widow against the executor of her husband upon an acknowledgment of indebtedness executed by the husband to her, the widow was incompetent to testify that she had loaned her husband the sum or that she saw him sign the instrument and that he delivered it to her. McGowan v. Beach, 242 N.C. 73, 86 S.E.2d 763 (1955).

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon "balance on account" was not to be taken as full settlement was incompetent as a transaction or communication with a deceased person prohibited by this section. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

Sale of Interest in Partnership. — This section did not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. Brantley v. Marshbourn, 166 N.C. 527, 82 S.E. 959 (1914).

Personal Services. — Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify directly that he rendered such services, nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

The performance of services by a witness for the deceased was held to be a personal transaction. Godwin v. Tew, 38 N.C. App. 686, 248 S.E.2d 771 (1978).

Services of Physician. — Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., was incompetent as being "personal" transactions with the deceased, prohibited by this section. Dunn v. Currie, 141 N.C. 123, 53 S.E. 533 (1906); Knight v. Everett, 152 N.C. 118, 67 S.E. 328 (1910).

In a civil action for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, was excluded by this section as personal transactions and communications with defendant's intestate. McMichael v. Pegram, 225 N.C. 400, 35 S.E.2d 174 (1945).

Sale of Property by Guardian. — It was competent for the plaintiff to prove the sale of his property by his guardian as this was not a personal transaction within the meaning of this section. State ex rel. Dobbins v. Osborne, 67 N.C. 259 (1872).

Possession of Stock. — See Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940).

Testimony Given in Former Trial. — It was competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such not being a personal transaction within the meaning of the provisions of this section. Costen v. McDowell, 107 N.C. 546, 12 S.E. 432 (1890); Worth v. Wrenn, 144 N.C. 656, 57 S.E. 388 (1907).

Testimony as to Placement of Deed. — This section did not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it did not involve a communication or transaction with him. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891); Carroll v. Smith, 163 N.C. 204, 79 S.E. 497 (1913).

Probate of Wills. — In Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899), it was held that this section did not apply to wills, but that they were governed by §§ 31-9 and 31-10; this was placed on the ground that this section applied where there was necessarily a contract or agreement between the parties, and in the case of a will there was ordinarily no transaction between the parties.

By the same reasoning it was held that attesting a will was not a "personal transaction," the witness being of the law and not of the party. Collins v. Collins, 101 N.C. 114, 7 S.E. 687 (1888).

But a beneficiary could not testify as to the leaving of a holograph will with her for safekeeping. McEwan v. Brown, 176 N.C. 249, 97 S.E. 20 (1918).

A beneficiary could, however, testify that when a will was opened it contained certain erasures and that they were not made by him. In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919).

Circumstances could arise, however, in which the person interested as a beneficiary could attempt to testify as to personal transactions or conversations with the deceased, and this testimony would, of course, be excluded. But the rule of exclusion did not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule did not exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Under this section a party interested in the results of the action was incompetent to testify to a declaration of the deceased, whose will was under attack, when the issue was as to undue influence. In re Will of Plott, 211 N.C. 451, 190 S.E. 717 (1937).

This section applied to caveat proceedings notwithstanding that they were in rem, with the exception that beneficiaries under the will were competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

A challenge to the testimony of a witness on the ground that any knowledge regarding a purported will and where it was located was obtained as the result of a personal transaction or communication with the testatrix was rejected. In re Will of Wilson, 258 N.C. 310, 128 S.E.2d 601 (1962).

This section operated to exclude evidence by the caveator in a caveat proceeding concerning any personal transactions or communications between him and decedent. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

Settlement of Estate. — Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee's administrator to recover assets. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

H. Exceptions.

This section contained only two exceptions, one of which related to the identity of the driver of a motor vehicle, and the other of which related to cases in which the representative of the lunatic or deceased person had "opened the door" by testifying or offering the testimony of the deceased or insane person. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

However, the Supreme Court stated what seemed to be another exception to this section, which provided that after a witness had stated his opinion as to the mental capacity of the deceased person, and where this opinion had been formed from conversations and communications with such person, it was competent to offer such in evidence as constituting the basis of such opinion. While it was conceded that a sane declaration by a person may have been some evidence of sanity, the statute as written by the legislature did not contain this exception. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

Exception for Similar Evidence Previously Introduced. — This section did not apply where evidence similar to that which was being introduced had previously been introduced and the door had been opened to the objecting party. Davison v. West Oxford Land Co., 126 N.C. 704, 36 S.E. 162 (1900).

When defendant, representative of deceased, was examined in behalf of himself and his corepresentative concerning a personal transaction between plaintiff and deceased, under this section, he thus opened the door and made competent the testimony of his adversary concerning the same transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

Testimony otherwise incompetent under this section was rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, was examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic was given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

But this section gave a personal representative no right to "open the door," over the other party's objection, by incompetent evidence. Gurganus v. Guaranty Bank & Trust Co., 246 N.C. 655, 100 S.E.2d 81 (1957).

Introduction by the opposing party of evidence of a transaction between plaintiff and decedent opened the door to plaintiff's testimony in regard thereto. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966).

The rule was that when incompetent evidence was admitted over objection, the admission of such evidence was cured where the same evidence, or evidence of substantially the same import, was thereafter admitted without objection. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Grounds for Exceptions. — The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There was nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. Pope v. Pope, 176 N.C. 283, 96 S.E. 1034 (1918).

Where the testimony of a deceased adverse party has been given and was available, the reason for the exclusion rule ceases. Phillips v. Interstate Land Co., 174 N.C. 542, 94 S.E. 12 (1917).

Limitation of Exception. — Where the door was opened to the opposing party to testify for himself, he could testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. Sumner v. Candler, 92 N.C. 634 (1885).

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence had to relate to the particular subject matter of the evidence testified to by the adverse party, or the same transaction, and the door was not necessarily opened to all transactions or fact situations growing out of the controversy. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

The door was opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opened the door as to one transaction, the other party could not swing it wide in order to admit another independent transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

The incompetence of the adverse party to testify may be removed by her being cross-examined as to the transaction in question. When the door was thus opened for the adverse party, it was only opened to the extent that he may testify as to the transaction about which he was cross-examined. Godwin v. Tew, 38 N.C. App. 686, 248 S.E.2d 771 (1978).

Illustrations. — Where the defendant executor testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it was competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant had himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, did not apply. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

It was incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered to the deceased as coming within her demand for damages, where the defendant had not "opened the door" by asking the plaintiff for an explanation as to why she had changed the amount at her demand. Pulliam v. Hege, 192 N.C. 459, 135 S.E. 288 (1926).

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence related solely to transactions with the deceased, and a beneficiary was competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

Where, in an action to recover upon a quantum meruit for personal services rendered deceased, defendant executor first testified as to his version of the services rendered, it did not violate this section for plaintiff to testify in rebuttal as to the services she rendered, since the "door had been swung wide" by defendant's prior testimony. Highfill v. Parrish, 247 N.C. 389, 100 S.E.2d 840 (1957).

If the challenged testimony violated this section, it was rendered admissible when the sister of intestate, as plaintiff's witness, testified that defendant was driving and that he was not intoxicated. This opened the door for defendant's version of the matter. Bryant v. Ballance, 13 N.C. App. 181, 185 S.E.2d 315 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

In an action to recover the amount of a note from the estate of the borrower's attorney-in-fact, there was no merit to defendant's contention that much of the affidavit testimony upon which the trial court based its decision should have been excluded under this section as testimony of transactions with a deceased person, since defendant, by offering evidence as to a completely independent transaction, opened the door for plaintiff to give an explanation by his own affidavit. Nye v. Lipton, 50 N.C. App. 224, 273 S.E.2d 313, cert. denied, 302 N.C. 630, 280 S.E.2d 441 (1981).

I. Pleading and Practice.

Admission. — Anything that a party to the action had said, if relevant to the issues and not subject to some specific exclusionary rule, was admissible against him as an admission. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Proper Objection Required. — In order to have the benefit of this section, a party had to lodge a proper objection at the time the incompetent testimony was offered. Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Effect of Failure to Object. — Objections to the competency of testimony had to be taken in due time; if not, they were waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. Meroney v. Avery, 64 N.C. 312 (1870).

Where a general objection as to witness' competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection was deemed waived. Norris v. Stewart, 105 N.C. 455, 10 S.E. 912, 18 Am. St. R. 917 (1890).

The objection will not be considered unless it is so specific as to show that the evidence is objectionable. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. Harris v. Harris, 178 N.C. 7, 100 S.E. 125 (1919).

The objecting party has the burden of establishing the incompetency of the evidence. Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Motion to Strike Out Incompetent Part of Answer. — The rule was that where a question asked a witness was competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that was objectionable. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

When Admission of Evidence Harmless. — The erroneous admission of evidence of transactions with deceased persons prohibited by this section becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. Ray v. Ray, 175 N.C. 290, 95 S.E. 550 (1918).

Determination on Appeal of Relevancy of Testimony. — Where testimony of transactions or communications with a decedent was properly excluded as irrelevant to the issue, its competency or incompetency under this section would not be determined on appeal. Pendleton v. Spencer, 205 N.C. 179, 170 S.E. 637 (1933).

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. (1983, c. 701, s. 1.)

COMMENTARY

This rule, which is identical to Fed. R. Evid. 602, restates the traditional common-law rule in North Carolina barring a witness from testifying to a fact of which he has no direct personal knowledge. See *Robbins* v. *C. W. Myers Trading Post, Inc.,* 251 N.C. 663 (1960). A witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and must have actually observed the facts. The Advisory Committee's Note states that:

"These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. *** It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy."

Preliminary determination of personal knowledge need not be explicit but may be implied from the witness' testimony.

Rule 602 applies to hearsay statements admitted under the hearsay exception rules in that admissibility of a hearsay statement is predicated on the foundation requirement of the witness' personal knowledge of the making of the statement itself. However, it is not intended that firsthand knowledge be required where a hearsay exception necessarily embraces secondhand knowledge (e.g. Rules 803(8)(C) and 803(23)).

Rule 602 is subject to Rule 703 relating to expert witnesses.

CASE NOTES

Admission of 911 Statements Held Proper. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Testimony Establishing Personal Knowledge. — Testimony of witness that she in fact heard the defendant make the statements in question ipso facto amounted to testimony that she had the ability to hear him make those statements. No more was required to establish her personal knowledge under this rule, but the defendant was free to cross-examine her as to such matters. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

Testimony properly allowed to draw an inference that defendant could not have known the caliber of the murder weapon at the time he made his inculpatory statement unless he was the murderer. State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994).

The witness' answer was not inadmissible opinion evidence but was testimony as to what was within his own personal knowledge, where in a prosecution for second degree murder the prosecutor asked the defendant's son about the meaning of his own statement of "I know" in response to the defendant's statement that he had made a big mistake, and the son replied that his father's statement referred to murdering the victim. State v. Marecek, 130 N.C. App. 303, 502 S.E.2d 634 (1998).

Officer's testimony as to what occurred after his conversation with informant consisted of details of the drug transaction derived from his subsequent participation in the deal and not from any prior conversation with the informant and was, therefore, admissible under this rule. State v. Broome, 136 N.C. App. 82, 523 S.E.2d 448 (1999), cert. denied, 351 N.C. 362, 543 S.E.2d 136 (2000).

Witness properly permitted to testify as to her degree of certainty in her testimony since such evidence was within the witness's personal knowledge. State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001), appeal dismissed, cert. denied, 356 N.C. 169, 568 S.E.2d 619 (2002), cert. denied, 537 U.S. 1203, 123 S. Ct. 1275, 154 L. Ed. 2d 1045 (2003).

Store clerk had personal knowledge of the robber when she was able to look at him through his mask and otherwise observe for 45 seconds during the robbery. State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005).

Investigator was permitted to testify that defendant had no brother based on research he conducted. State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Trial court did not commit plain error by admitting under G.S. 8C-1-602 a victim's testimony that defendant shot the victim even though the victim did not see defendant shoot the victim, since the victim's testimony was based on what the victim perceived as the shooting occurred, and the victim's brother testified that he also heard defendant's voice shortly after the shooting and that he had known defendant "since the day he was born"; the brother had sufficient personal knowledge to identify defendant and his opinion was rationally based on his perception of the shooting under G.S. 8C-1-701. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Testimony Properly Excluded. — Trial court did not err under N.C. R. Evid. 602 in prohibiting the owner of real property in a condemnation action from cross-examining pursuant to N.C. R. Evid. 613 a North Carolina Department of Transportation expert witness about the nature of an in-house transaction involving a comparable property as the witness stated that the witness did not know what the relationship between the parties in the transaction was. DOT v. Haywood Oil Co., — N.C. App. —, 673 S.E.2d 712, 2009 N.C. App. LEXIS 258 (2009).

Testimony Held Improper. — Husband's testimony that wife was familiar with the corporation's financial records and should have known about the $102,000 loan violated this rule since a witness may only testify as to matters of which he has personal knowledge and the evidence presented did not support the finding that wife was familiar with the corporation's books. Lee v. Lee, 93 N.C. App. 584, 378 S.E.2d 554 (1989).

Officer's testimony that it appeared just by looking over there that there had indeed been a break in at victim's home on the night in question constituted inadmissible opinion evidence. However, defendant was not entitled to a new trial unless the erroneous admission of this testimony prejudiced him. State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262, cert. denied, 333 N.C. 170, 424 S.E.2d 914 (1992).

Where witness could not identify the speaker, nor did she have personal knowledge of his voice, trial court properly excluded the testimony. State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (1996).

Assertions in Affidavit Held Improper. — Where an affidavit filed to support a motion to dismiss under N.C. R. Civ. P. 12(b)(2) contained assertions made "upon information and belief," the court would not consider those assertions because such an affidavit had to be based upon personal knowledge. Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005).

Testimony Held Improper But Not Prejudicial. — Witness testimony that the defendant intended to purchase a gun for the purpose of threatening the victim was admitted without a foundation in violation of this rule but did not prejudice the defendant where other evidence at trial pointed to premeditation and deliberation. State v. Harshaw, 138 N.C. App. 657, 532 S.E.2d 224, 2000 N.C. App. LEXIS 776 (2000).

Although a trial court erred in admitting a trooper's opinion testimony that defendant was impaired at the time of the collision when the testimony was not based on the trooper's personal knowledge but was based solely upon hearsay and conjecture, defendant failed to show any reasonable possibility that the jury would have reached a different verdict had the trial court properly excluded the inadmissible opinion testimony; the record showed overwhelming evidence that defendant: (1) drank heavily before operating his vehicle, (2) caused a tractor trailer truck to run off the road, (3) almost swerved into another truck, (4) struck a vehicle parked on the shoulder of the highway, (5) told the trooper he "had two beers," and (6) tested positive for the presence of amphetamines, marijuana, and opiates in his body. State v. Cook, — N.C. App. —, 666 S.E.2d 795, 2008 N.C. App. LEXIS 1750 (2008).

State of Mind Testimony Was Not Plain Error. — The testimony of a police officer as to defendant's state of mind neither constituted "a miscarriage of justice" nor did it probably cause the jury to reach a different verdict than it otherwise would have in light of defendant's confession, as well as his trial testimony concerning his involvement in these crimes. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

Testimony Held Proper. — Where all of the evidence challenged by the defendant, accused of murdering her grandmother in a nursing home, was either within the personal knowledge of the witness or was permitted due to the defendant's having opened the door to the subject on cross-examination, the court rejected the contention that the trial court erred by permitting various witnesses to offer a variety of speculative testimony. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999).

In a trial for attempted murder, the trial court properly admitted testimony by the victim that it was defendant who shot him, as the victim had sufficient personal knowledge under G.S, 8C-1, N.C. R. Evid. 602, and the victim's opinion was rationally based on his perception of the shooting as required by G.S. 8C-1, N.C. R. Evid. 701. State v. Watkins, 169 N.C. App.

518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

Although a witness did not have personal knowledge of the matters contained in documents in plaintiff's file, the documents were admissible in evidence under the business records exception to the hearsay rule; thus, the witness's subsequent testimony about the matters contained in the business records was admissible. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Detective's testimony about a dog's tracking was admissible as a matter about which the detective had personal knowledge. State v. Walston, — N.C. App. —, 666 S.E.2d 872, 2008 N.C. App. LEXIS 1749 (2008).

Applied in State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); State v. Jones, 98 N.C. App. 342, 391 S.E.2d 52 (1990); State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995); State v. King, 343 N.C. 29, 468 S.E.2d 232 (1996); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Cited in State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987); State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Givens, 95 N.C. App. 72, 381 S.E.2d 869 (1989); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Hester, 330 N.C. 547, 411 S.E.2d 610 (1992); State v. Dodd, 330 N.C. 747, 412 S.E.2d 46 (1992); State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993); State v. Kelly, 118 N.C. App. 589, 456 S.E.2d 861 (1995); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Redd, 144 N.C. App. 248, 549 S.E.2d 875, 2001 N.C. App. LEXIS 422 (2001); Elliott v. Muehlbach, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005).

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 603 and is in accord with North Carolina practice. The Advisory Committee's Note states that:

"The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required."

CASE NOTES

This rule merely provides that a witness before testifying must either by oath or affirmation declare that he will testify truthfully. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

Rule Not Applicable at Sentencing Hearing. — The trial court committed no error by allowing an unsworn victim impact statement at the sentencing hearing where the rules of evidence do not apply. State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896, 2000 N.C. App. LEXIS 794 (2000).

Indirect Reference by Prosecutor to Defendant's Affirmation. — Prosecutor's argument as to defendant's credibility held not to violate N.C. Const., Art. I, § 13, nor did it violate this rule or G.S. 8C-1, Rule 610, despite an indirect reference to defendant's affirmation as a witness. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

Competency of Child to Testify. — The competency of a child witness to testify at trial is not a proper subject for stipulation of counsel, absent the trial judge's independent finding pursuant to personally examining or observing the child on voir dire. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Inquiry into Sincerity of Oath. — Despite the prohibition of evidence of the beliefs or opinions of a witness on matters of religion, by questioning the sincerity and solemnity with which the witness took the oath, the defense exposed the witness to the same inquiry by the prosecution; thus, and there was no error in the prosecution's questioning of the witness because the defense had already "opened the door" to this line of inquiry. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Cited in State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993).

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 604. There are no North Carolina cases on this point.

Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. (1983, c. 701, s. 1.)

COMMENTARY

This rule, which is identical to Fed. R. Evid. 605, prevents a judge from testifying in a trial over which he is presiding. The Advisory Committee's Note states that:

"The rule provides for an 'automatic objection'. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector."

G.S. 15A-1223 requires a judge in a criminal case to disqualify himself if he is a witness in the case upon motion of the State or the defendant. Upon adoption of Rule 605, a conforming amendment should be made to G.S. 15A-1223 to remove the requirement for a motion to disqualify.

The question of whether a judge may testify in civil proceedings over which he is presiding does not appear to have arisen in North Carolina. See *Brandis on North Carolina Evidence* § 53, at 198 (1982).

CASE NOTES

Instruction Calling for an Opinion. — In a trial in which the defendant claimed to have multiple personalities, the trial court could not, as the defense requested, instruct the jury that the person sitting at the defense table was not "James Woodard," but instead was "Johnny Gustud" (the defendant's "alternate personality"). If the judge had done so, he would have impermissibly expressed his opinion as to whether the defendant in fact had multiple personalities. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

Rule 606. Competency of juror as witness.

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 606.

Subdivision (a) provides that a juror may not testify as a witness in the trial in which he is sitting as a juror. There are no North Carolina cases on this point.

The Advisory Committee's Note to subdivision (a) states:

"The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however, in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605."

Subdivision (b) concerns an inquiry into the validity of a verdict or indictment. The Advisory Committee's Note states:

"Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald* v. *Pless,* 238 U.S. 264 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. *** The authorities are in virtually complete accord in excluding the evidence. *** As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. *** However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox* v. *United States,* 146 U.S. 140, ... (1892). Under the federal decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde* v. *United States,* 225 U.S. 347, 382 (1912); a quotient verdict, *McDonald* v. *Pless,* 238 U.S. 264, (1915); speculation as to insurance coverage, *Holden* v. *Porter,* 405 F.2d 878 (10th Cir. 1969), *Farmers Coop. Elev. Ass'n* v. *Strand,* 382 F.2d 224, 230 (8th Cir. 1967), cert. denied, 389 U.S. 1014; misinterpretation of instructions, *Farmers Coop. Elev. Ass'n* v. *Strand,* supra; mistake in returning verdict, *United States* v. *Chereton,* 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, *United States* v. *Crosby,* 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox* v. *United States,* 146 U.S. 140 (1892). See also *Parker* v. *Gladden,* 385 U.S. 363 (1966)."

The exclusion is intended to encompass testimony about mental processes and testimony about any matter or statement occurring during the deliberations, except that testimony of either of these two types can be admitted if it relates to extraneous prejudicial information or improper outside influence.

The general rule in North Carolina has been that a juror's testimony or affidavit will not be received to impeach the verdict of the jury. *Brandis on North Carolina Evidence* § 65 (1982). The North Carolina rule, unlike Rule 606, does not apply to attempts to support a verdict. *Id.* An express, though limited exception to the anti-impeachment rule is provided in G.S. 15A-1240, which should be amended to conform to Rule 606.

Also, the Advisory Committee's Note states:

"This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity."

Legal Periodicals. — For article, "Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?," see 66 N.C.L. Rev. 509 (1988).

CASE NOTES

Extraneous Information. — Extraneous information is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence; it does not include information which a juror has gained in his or her experience which does not deal with the defendant or the case being tried. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

The Supreme Court of North Carolina has interpreted extraneous information under subsection (b) to mean information that reaches a juror without being introduced into evidence and that deals specifically with the defendant or the case being tried. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Defendant was entitled to a new trial because a detective's comments to a deputy, who was serving on the jury, about the deputy doing the right thing and notifying the deputy that defendant had flunked a polygraph, were intended to influence the verdict in defendant's case. State v. Lewis, 188 N.C. App. 308, 654 S.E.2d 808, 2008 N.C. App. LEXIS 65 (2008).

Official Comment Misstates Rule. — Hearing judge did not err by excluding juror testimony regarding how the extraneous information affected the jury's decision; although the official comment to this rule suggests that a juror is competent to testify regarding the effect of extraneous prejudicial information upon the juror's mental processes, the comment inadvertently misstates the rule since both subsection (b) of this rule and G.S. 15A-1240 unambiguously prohibit inquiry into the effect of anything occurring during deliberations upon jurors' minds. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Section 15A-1240 and Subsection (b) of This Rule Do Not Conflict. — Although subsection (b) of this rule is broader in some respects than G.S. 15A-1240, the two statutes do not conflict; the exceptions to the anti-impeachment rule listed in G.S. 15A-1240 are designed to protect the same interests as, and are entirely consistent with, the exceptions in subsection (b) of this rule. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Impeachment of Civil Verdict Not Permitted. — Prior to July 1, 1984, the effective date of the Rules of Evidence, a juror's testimony could not be received even to show that extraneous prejudicial information was improperly brought to the jury's attention. While such evidence could be received in a criminal case because of the constitutional right of confrontation, no such exception to the general anti-impeachment rule applied in civil cases. Therefore, it was error for judge to grant a conditional new trial on the basis of juror misconduct proved solely by the juror's affidavit and testimony. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Impeachment of Criminal Verdict Not Permitted. — Affidavits of three jurors, asserting that the jury's verdict, as reported by the foreman, was not a true verdict, but represented their answer to the foreman's question of whether defendant might have been guilty of some other offense, but also asserting that all 12 jurors, when polled, agreed with the verdict of guilty, were not admissible to impeach the verdict. State v. Costner, 80 N.C. App. 666, 343 S.E.2d 241, cert. denied, 317 N.C. 709, 347 S.E.2d 444 (1986).

Jurors May Testify to Objective Events But Not Subjective Effect. — Jurors may testify regarding the objective events listed as exceptions in the statutes, but are prohibited from testifying to the subjective effect those matters had on their verdict. State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Consideration of Possibility of Parole. — Allegations that jurors considered defendant's possibility of parole during their deliberations were allegations of internal influences on the jury; the information that defendant would be eligible for parole in about ten years was not information dealing with this particular defendant, but general information concerning the possibility of parole for a person sentenced to life imprisonment for first-degree murder; furthermore, there was no allegation that the jurors received information about parole eligibility from an outside source. State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991).

Writing on Letter as Extraneous Information and Matter Not in Evidence. — While viewing exhibit, juror peeled back the paper over the bottom of defendant's photograph, revealing the words, "Police Department, Wilson, North Carolina — 12291, 12-07-

81"; therefore, where the jurors discussed the writing on the photograph as evidence that defendant had been in area in December 1981, a fact which, if true, contradicted the testimony of defendant's alibi witnesses, the writing on defendant's photograph was both "extraneous information" within the meaning of subsection (b) of this rule and a matter not in evidence, which implicated defendant's confrontation right within the meaning of G.S. 15A-1240(c)(1). State v. Lyles, 94 N.C. App. 240, 380 S.E.2d 390 (1989).

Information allegedly received by jurors did not concern either the defendant or the case being tried, but was rather information about the foreman's belief or impression about the impact of punitive damage awards; therefore, the trial court correctly refused to consider the juror affidavits under section (b). Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Jurors' Affidavits Held Not Extraneous Information. — In prosecution for first-degree sexual offense where the court instructed the jury not to talk to anyone about the case and not to read, watch or listen to any publication or broadcast concerning the trial, affidavits containing statements by the jurors that the foreman of the jury had watched the program on child abuse and that the foreman told them about a 15 to 17 year old friend of his who had been raped, did not deal with extraneous information within the meaning of this rule. State v. Rosier, 322 N.C. 826, 370 S.E.2d 359 (1988).

Information contained in jurors' affidavits as to the reading of dictionary definitions of "malice" could not be used to impeach the verdict under G.S. 15A-1240 as under the caselaw, definitions in standard dictionaries were not extraneous information within the meaning of G.S. 8C-1-606(b). State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Juror's Question to Psychology Professor Did Not Entitle Defendant to Relief. — Defendant was not entitled to relief under subsection (b) where a juror, who was enrolled in a psychology class, asked his professor if schizophrenics or paranoid schizophrenics commit violent acts. State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), cert. denied, 520 U.S. 1122, 117 S. Ct. 1259, 137 L. Ed. 2d 339 (1997).

Admissibility of Jurors' Affidavits. — Subsection (b) reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to extraneous influences that may have affected the jury's decision. State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995).

Trial court properly received and considered affidavits of jurors which stated that one juror had provided the jurors with definitions of the words "willful" and "wanton" from a dictionary during juror deliberations. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

Evidence of a jury foreman's error in writing down the verdict was not excludable under this rule, as it dealt with a clerical error occurring after deliberations rather than with a matter occurring during deliberations. Chandler v. U-Line Corp., 91 N.C. App. 315, 371 S.E.2d 717, cert. denied, 323 N.C. 623, 374 S.E.2d 583 (1988).

Bible Reading by Juror. — Trial court did not abuse its discretion by failing to inquire further into allegation that a juror read the Bible aloud in the jury room prior to the commencement of deliberations and prior to the trial court's instructions to the jury as the alleged Bible reading was not directed to the facts or governing law at issue in the case. State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Testimony in Criminal Contempt Hearing. — Jurors' testimony regarding the alleged misconduct of a fellow juror was admissible in a criminal contempt hearing, fell within exception to subsection (b) of this rule, and did not frustrate public policy considerations underlying this rule. State v. Pierce, 134 N.C. App. 148, 516 S.E.2d 916 (1999).

Applied in Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Gregory v. Kilbride, 150 N.C. App. 601, 565 S.E.2d 685, 2002 N.C. App. LEXIS 685 (2002).

Cited in McClain v. Otis Elevator Co., 106 N.C. App. 45, 415 S.E.2d 78 (1992); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); State v. Smith, 138 N.C. App. 605, 532 S.E.2d 235, 2000 N.C. App. LEXIS 778 (2000); Call v. Polk, 454 F. Supp. 2d 475, 2006 U.S. Dist. LEXIS 68738 (W.D.N.C. 2006).

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 607. The rule abandons the traditional common law rule that a party "vouches" for a witness by calling him and, therefore, may not impeach his own witness. The traditional rule has been the subject of numerous exceptions. See N.C. Civ. Pro. Rule 43(b); *Brandis on North Carolina Evidence* § 40 (1982). The substantial inroads into the old rule made by statutes and decisions are evidence of doubts as to its basic soundness and workability. As the Advisory Committee's Note states:

"The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary."

The impeaching proof must be relevant within the meaning of Rule 401 and Rule 403 and must in fact be impeaching. See Ordover, *Surprise! That Damaging Turncoat Witness Is Still With Us,* 5 Hofstra L. Rev. 65, 70 (1976).

Legal Periodicals. — For note, "State v. Hunt: Rekindling Requirements for Impeaching One's Own Witness," see 68 N.C. L. Rev. 1236 (1990).

CASE NOTES

Prior Law Distinguished. — Prior to the adoption of the North Carolina Rules of Evidence, the general rule was that the State was prohibited from impeaching its own witness. However, this rule now provides that a witness may be impeached by any party, including the party who called him. State v. Covington, 315 N.C. 352, 338 S.E.2d 310 (1986).

The anti-impeachment rule and exceptions thereto were abolished with the adoption of the North Carolina Rules of Evidence. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986).

It is not the intent of this rule to provide a subterfuge for getting otherwise impermissible hearsay before the jury in the guise of impeachment, and this tactic is expressly disapproved. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

Prior statements by a defendant are a proper subject of inquiry by cross-examination. State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988).

Prior Statement Offered for Impeachment or Corroboration. — Prior statement which corroborated witness' direct testimony, although it tended to impeach his cross-examination testimony, was properly introduced where it was not offered as substantive evidence but was admitted for a limited purpose, impeachment or corroboration, whichever the jury found. State v. Ayudkya, 96 N.C. App. 606, 386 S.E.2d 604 (1989).

Whether or not a witness has given prior inconsistent statements is a collateral matter, and when a witness is cross-examined on a collateral matter, the party who draws out unfavorable answers will not be permitted to contradict them using other testimony. State v. Jerrells, 98 N.C. App. 318, 390 S.E.2d 722, cert. denied, 326 N.C. 802, 393 S.E.2d 901 (1990).

Use of Prior Inconsistent Statement for Corroborative Purposes. — Where State's witness admitted giving a statement, but denied the specifics of what the State claimed he said, the proper use of his prior statement for corroborative purposes was to have detective attest to the fact that a prior statement was indeed made, but not to prove the facts to which the statement purportedly related. State v. Jerrells, 98 N.C. App. 318, 390 S.E.2d 722, cert. denied, 326 N.C. 802, 393 S.E.2d 901 (1990).

Inquiry Prior to Allowing Impeachment of State's Witness. — The better practice continues to be for the trial court, before allowing impeachment of the State's own witness by a prior inconsistent statement, to make findings and conclusions with respect to whether the witness' testimony is other than what the State had reason to expect, or whether a need to impeach otherwise exists. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

Impeachment of Own Witness by State. — After State's witness testified that his identification of defendant was based on his prior photographic identification, the State had the right under this rule to elicit contradictory testimony. Furthermore, even under the old impeachment rule, this evidence would have been admissible. State v. Covington, 315 N.C. 352, 338 S.E.2d 310 (1986).

Where witness admitted that she had not told the police or the prosecutors during their meeting that she intended to change her version of the facts, that she felt as though the trial was her "chance to speak out" and that she was scared to tell the detectives prior to trial that defendant told her another person shot the victim, thus indicating that she had not spoken to the State about her change of testimony prior to trial, the State was surprised at trial by witness's change of her version of the facts, and the trial court properly allowed the State to impeach her with her prior inconsistent statement. State v. Williams, 341 N.C. 1, 459 S.E.2d 208 (1995), cert. denied, 516 U.S. 1128, 116 S. Ct. 945, 133 L. Ed. 2d 870 (1996).

The State properly impeached two of its witnesses concerning the inconsistencies in their prior statements where both admitted making statements to a detective in which they discussed details of the robbery and assault of the victim and implicated defendant but, then subsequently testified that certain parts of their statements as recounted were inaccurate. State v. Riccard, 142 N.C. App. 298, 542 S.E.2d 320, 2001 N.C. App. LEXIS 89 (2001).

Defendant cannot call witness and then attempt to impeach him by inquiring into prior charges or indictments against the witness. State v. Mills, 332 N.C. 392, 420 S.E.2d 114 (1992).

Prior bad acts and prior inconsistent statements are proper subjects for cross-examination. State v. Belton, 77 N.C. App. 559, 335 S.E.2d 522 (1985).

Impeachment Improper of Witness Where Officer Could Have Given Testimony. — Once the trial court determined that witness was a hostile or unwilling witness, it properly permitted the state to subject her to cross-examination. However, the trial court erred in permitting police officer to testify as to the substance of the prior statements denied by witness since the officer could properly have been called to contradict the fact, denied by witness, that she had made the statement to him on the specified date. But, it was improper to impeach her concerning what she had or had not told officer by offering the testimony of officer. State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989).

Admission of Impeachment Testimony Upheld. — Where prosecutor was unaware of witness's prior inconsistent statement until after he had testified, and defendant offered substantially the same evidence through his own witness, the admission of impeachment testimony without a preliminary inquiry by the trial court was not prejudicial error. State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987).

The state was permitted, under this rule, to question its witness about his prior criminal activity only after defendant himself had elicited the testimony on cross-examination, where the questions appeared to have been asked in order to clarify state witness' testimony on cross-examination. State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Statement Held Inadmissible for Impeachment. — Where witness never testified to his recollection of the events in question either before or after the court admitted his statement, he never testified to something with which his statement was inconsistent. Thus his statement was not admissible for the limited purpose of impeachment, and the court erred in admitting it. State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332, cert. denied, 320 N.C. 516, 358 S.E.2d 529 (1987).

Witness Summary Improperly and Prejudicially Admitted. — Defendant was entitled to yet another new trial where a witness' purported summary, allegedly written by an investigating officer who was not called as a witness by the State, was improperly and prejudicially admitted into evidence although it was not admissible as a recorded recollection under Rule 803(5), did not refresh the witness' recollection, was not properly used to impeach her under this rule and the witness, in fact, objected to parts of the statement. State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129, 1999 N.C. App. LEXIS 1298 (1999).

Questions to Rebuttal Witness. — Impeaching questions about a previous alleged knifing incident asked by prosecutor of rebuttal witness held not to constitute error. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

Cited in State v. Gardner, 312 N.C. 70, 320 S.E.2d 688 (1984); State v. McDonald, 312 N.C. 264, 321 S.E.2d 849 (1984); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985); State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986); State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988); State v. Hyleman, 89 N.C. App. 424, 366 S.E.2d 530 (1988); State v. Miller, 330 N.C. 56, 408 S.E.2d 846 (1991); State v. Goodson, 101 N.C. App. 665, 401 S.E.2d 118 (1991); State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996); State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Batchelor, 190 N.C. App. 369, 660 S.E.2d 158, 2008 N.C. App. LEXIS 894 (2008).

Rule 608. Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* — The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* — Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 608, except for the addition of the phrase "as provided in Rule 405(a)" to subdivision (a).

Subdivision (a) allows the credibility of a witness to be attacked or supported by evidence in the form of reputation or opinion. Admitting opinion evidence to prove character is a change in North Carolina practice. See Commentary to Rule 405. The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible.

The rule in North Carolina has been that evidence of a specific trait of character is admissible only if asked on cross-examination or if "volunteered" by the witness on direct examination in answer to a question which asks if the witness knows the general reputation or reputation and character of the subject. In both cases, the witness may testify to character traits that are wholly irrelevant to any issue in the case. *Brandis on North Carolina Evidence* §§ 114, 115 (1982). The North Carolina rule is unique, and appears to have its origin in a misinterpretation of earlier opinions. *Id.* § 114.

The first limitation of subdivision (a) changes this result by confining evidence of specific traits of a witness to character for truthfulness or untruthfulness and permitting counsel to ask questions regarding these traits on direct examination or cross-examination. However, evidence of *truthfulness* is permitted only after the character of the witness for truthfulness has been attacked.

In North Carolina the necessity for impeachment as a prerequisite to corroboration has been more theoretical than real. *Id.* § 50. Adoption of this rule strengthens the limitation. The Advisory Committee's Note states that:

"Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCormick § 49. (*Cf.* 4 Wigmore §§ 1108, 1109)."

As to the use of specific instances on direct by an opinion witness, see the Commentary to Rule 405, *supra.*

Subdivision (b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. Evidence of wrongful acts admissible under Rule 404(b) is not within this rule and is admissible by extrinsic evidence or by cross-examination of any witness.

There are two exceptions under subdivision (b). Conviction of a crime as a technique of impeachment is treated in detail in Rule 609 and is merely recognized in this rule as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

The second exception allows particular instances of conduct, though not the subject of criminal conviction, to be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Current North Carolina practice allows only inquiry concerning the specific acts of the principal witness himself. *Brandis on North Carolina Evidence* §§ 111, 115 (1982). The Advisory Committee's Note states that:

"Effective cross-examination demands that some allowance be made for going into matters of this kind, that the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that the probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment."

The last sentence of Rule 608 constitutes a rejection of the doctrine of such cases as *State* v. *Foster,* 284 N.C. 259 (1973), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. As the Advisory Committee's Note states:

"While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In *Griffin* v. *California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson* v. *Georgia,* 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick, § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy."

See *Brandis on North Carolina Evidence* § 111, at 409, n. 28 (1982).

Legal Periodicals. — For note on the future of character impeachment in North Carolina, in light of State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984), see 63 N.C.L. Rev. 535 (1985).

For essay, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale," see 1993 Duke L.J. 776.

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

CASE NOTES

I. General Consideration.
II. Opinion and Reputation Evidence of Character.
III. Specific Instances of Conduct.

I. GENERAL CONSIDERATION.

Departure from Former Practice. — Subsection (b) of this rule represents a drastic departure from former traditional North Carolina practice, which allowed a defendant to be cross-examined for impeachment purposes regarding any prior act of misconduct not resulting in conviction, so long as the prosecutor had a good-faith basis for the questions. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

This rule curtailed former North Carolina practice allowing cross-examination of a defendant for impeachment purposes regarding any prior misconduct not resulting in a conviction, as long as the prosecutor had a good-faith basis for the question. State v. Scott, 318 N.C. 237, 347 S.E.2d 414 (1986).

With the introduction of subsection (a) of this rule, the long-standing North Carolina rule against allowing a witness to testify as to his or her own opinion of another's character for truth and veracity was abrogated. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

Subsection (b) of this rule represents a drastic departure from former traditional North Carolina practice, which allowed cross-examination for impeachment purposes regarding any prior act of misconduct if the question was asked in good faith. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Subsection (b) of this rule limits the State in its inquiry to types of misconduct which involve truthfulness or untruthfulness. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

But State allowed questions about defendant's "Affidavit of Indigency". — Limited nature of questions permitted by the trial court in allowing the State to cross-examine the defendant regarding the contents of his "Affidavit of Indigency," filed in conjunction with his motion that counsel be appointed for trial, fell within the parameters of subsection (b). State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Prior statements by a defendant are a proper subject of inquiry by cross-examination. State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988).

Expert Opinion on Witness's Procedures And Practices. — The court rightfully refused the testimony of defendant's expert, a private detective and retired police officer of 30 years, where the jury was perfectly capable of judging the improper methods and procedures used by the undercover narcotics officer without the assistance of the expert; the testimony was irrelevant, had insufficient probative value on the facts to be proved, and violated the rule prohibiting expert testimony as to witness credibility, G.S. 8C-1, Rules 405(a) and 608, as read together. State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000).

Subsection (b) of this rule does not allow the use of extrinsic evidence concerning that misconduct to impeach a witness. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

North Carolina law prohibits the use of extrinsic evidence, i.e., the testimony of another witness, to attack a witness' credibility under G.S. 8C-1, N.C. R. Evid. 608(b). State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Section 8C-1, Rule 404(b) Distinguished. — Although subsection (b) of this rule and G.S. 8C-1, Rule 404(b) concern the use of specific instances of a person's conduct, the two rules have very different purposes and are intended to govern entirely different uses of extrinsic conduct evidence. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Subsection (b) of this rule governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic evidence. Under G.S. 8C-1, Rule 404(b), however, evidence regarding extrinsic acts is not limited to cross-examination and may be proved by extrinsic evidence as well as through cross-examination. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

"Extrinsic conduct evidence" refers to evidence of a specific prior or subsequent act, not charged in the indictment, which may be criminal but, as applied in subsection (b) of this rule, does not result in a conviction. Criminal convictions are included in Rule 404(b). State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

When § 8C-1, Rule 611 Applicable. — While specific instances of drug use or mental instability are not directly probative of truthfulness, they may bear upon credibility in other ways, in which case G.S. 8C-1, Rule 611 is applicable to the admission of such evidence rather than this rule. State v. Williams, 330 N.C. 711, 412 S.E.2d 359 (1992).

Violation of Rule Does Not Require New Trial. — Although extrinsic evidence of sexual misconduct is not in any way probative of a witness' character for truthfulness or untruthfulness, even so, any error in admitting evidence in violation of this rule does not require a new trial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. State v. Moore, 103 N.C. App. 87, 404 S.E.2d 695 (1991).

Discretion of Court. — Although this Rule allows evidence of prior acts or misconduct to be admissible for the purpose of impeaching the credibility of a witness, whether to admit such evidence is within the trial court's discretion and will not be overturned absent an abuse of discretion. Ferebee v. Hardison, 126 N.C. App. 230, 484 S.E.2d 857 (1997), rev'd in part, 347 N.C. 346, 492 S.E.2d 354 (1997).

It was within the court's discretion to allow the State to question defendant briefly as to his knowledge regarding insurance fraud committed by his brother and parents, where the possibility that he was aware of such a scam would arguably be probative of his truthfulness. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

Extrinsic Evidence Properly Excluded. — Trial court properly excluded testimony from a defense witness who claimed to have seen the prosecution's sole eyewitness assist a prisoner escape from jail; while defendant could have used cross-examination to challenge the eyewitness's credibility, G.S. 8C-1, N.C. R. Evid. 608(b), prohibited the use of extrinsic evidence, i.e., the testimony of another witness, to attack the eyewitness's credibility. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Applied in State v. Hamrick, 81 N.C. App. 508, 344 S.E.2d 316 (1986); Frye v. Anderson, 86 N.C. App. 94, 356 S.E.2d 370 (1987); State v. Russell, 91 N.C. App. 581, 372 S.E.2d 880 (1988); Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Stevenson, 328 N.C. 542, 402 S.E.2d 396 (1991); State v. Wills, 110 N.C. App. 206, 429 S.E.2d 376 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994); State v. McCarroll, 336 N.C. 559, 445 S.E.2d 18 (1994); State v.

Burton, 119 N.C. App. 625, 460 S.E.2d 181 (1995); State v. Grace, 341 N.C. 640, 461 S.E.2d 330 (1995); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); N.C. State Bar v. Gilbert, 151 N.C. App. 299, 566 S.E.2d 685, 2002 N.C. App. LEXIS 782 (2002); State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002); State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Cited in State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986); State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986); State v. Brewington, 80 N.C. App. 42, 341 S.E.2d 82 (1986); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760 (1986); State v. White, 82 N.C. App. 358, 346 S.E.2d 243 (1986); State v. McKoy, 317 N.C. 519, 347 S.E.2d 374 (1986); State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Clark, 319 N.C. 215, 353 S.E.2d 205 (1987); State v. Sullivan, 86 N.C. App. 316, 357 S.E.2d 414 (1987); State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987); State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987); State v. Autry, 321 N.C. 392, 364 S.E.2d 341 (1988); State v. Miller, 321 N.C. 445, 364 S.E.2d 387 (1988); State v. Martin, 322 N.C. 229, 367 S.E.2d 618 (1988); State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1994); State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994); State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); Holt v. Williamson, 125 N.C. App. 305, 481 S.E.2d 307 (1997); State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999); State v. Fluker, 139 N.C. App. 768, 535 S.E.2d 68, 2000 N.C. App. LEXIS 1026 (2000); State v. McGill, 141 N.C. App. 98, 539 S.E.2d 351, 2000 N.C. App. LEXIS 1284 (2000); State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360, 2003 N.C. App. LEXIS 1254 (2003); State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

II. OPINION AND REPUTATION EVIDENCE OF CHARACTER.

Before a witness may testify as to another witness's reputation, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable him or her to be qualified as knowing the general reputation of the person in question. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

The phrase "as provided in § 8C-1, Rule 405(a)" was inserted in subsection (a) of this rule to make clear that expert testimony on the credibility of a witness is not admissible. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986).

Opinion and Reputation Evidence on Credibility. — Both opinion and reputation evidence are admissible as evidence pertaining to a witness' credibility under this rule and Rule 405. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Expert Opinion on Credibility. — This rule and G.S. 8C-1, Rule 405(a), read together, forbid an expert's opinion as to the credibility of a witness. State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

In a prosecution for taking indecent liberties with a child, testimony of two witnesses for the State, a pediatrician and a child psychologist, that in their opinion the child had testified truthfully, did not meet the requirements for expert testimony, as it concerned the credibility of a witness, a field in which jurors are supreme and require no assistance, rather than some fact involving scientific, technical or other specialized knowledge, and as character evidence, the testimony violated the provisions of G.S. 8C-1, Rule 405(a) and this rule. State v. Holloway, 82 N.C. App. 586, 347 S.E.2d 72 (1986).

Testimony of pediatrician that in her opinion the victim of alleged sexual abuse was "believable" was inadmissible under this rule and G.S. 8C-1, Rule 405. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986).

This rule and G.S. 8C-1, Rule 405(a), read together, forbid an expert's opinion testimony as to the credibility of a witness. State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986).

Testimony of child psychologist as to child rape victim's truthfulness during her evaluation and treatment was not admissible, where her sessions with the child began as a result of the acts which resulted in charges against the defendant and involved psychotherapy to assist the victim in overcoming her negative responses to the incidents, as the question posed by the prosecutor to which this testimony was responsive clearly invoked the psychologist's status as an expert and sought to establish the credibility of the victim as a witness. State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d 347 (1986).

Section 8C-1, Rule 405(a) and subsection (a) of this rule, read together, forbids an expert's opinion testimony as to the credibility of a witness; this rule applies to child witnesses as well as adults. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1985), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

In prosecution for taking indecent liberties with children, the trial court committed prejudicial error in allowing a child psychologist to give his expert opinion as to whether children lie about sexual abuse, where his testimony referred in part to the individual witnesses and not just to children in general. State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986), cert. denied, 319 N.C. 675, 356 S.E.2d 791 (1987).

This rule and G.S. 8C-1, Rule 405(a) prohibit the admission of expert testimony on the issue of credibility of a witness. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, writ denied, 320 N.C. 175, 358 S.E.2d 66, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987), holding, however, that erroneous admission of testimony did not entitle defendant to a new trial absent prejudice.

Expert testimony as to the credibility of a witness is not admissible. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

In child sexual abuse case where the medical evidence was in conflict, testimony by doctor that was offered to show that the victim was being truthful about allegations was prejudicial. For this reason defendant was entitled to a new trial. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, Rule 702 allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a rape victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Trial court committed plain error in distributing to the jury an expert witness' report prepared following an evaluation of an alleged sexual assault victim, wherein the expert gave the opinion that the victim's disclosure of the alleged sexual assault was credible; the admission of that portion of the report constituted impermissible expert testimony on the credibility of the alleged sexual assault victim's testimony; moreover, because there was no physical evidence of abuse and the State's case was almost entirely dependent on the alleged victim's credibility with the jury, the admission of the statement was plain error. State v. O'Connor, 150 N.C. App. 710, 564 S.E.2d 296, 2002 N.C. App. LEXIS 639 (2002).

Trial court did not err under G.S. 8C-1, N.C. R. Evid. 405 and G.S. 8C-1, N.C. R. Evid. 608 in allowing an expert witness to testify as to the credibility of a minor victim because defendant's cross-examination was designed to elicit the type of response which the expert provided. Therefore, defendant could not contend that the expert's response, which might have rightfully been excluded had it been offered by the State of North Carolina, unfairly prejudiced defendant and warranted a new trial. State v. Crocker, — N.C. App. —, 676 S.E.2d 658, 2009 N.C. App. LEXIS 712 (2009).

Expert's Testimony Held Not Expression of Opinion. — In trial on first-degree rape charges where, when asked to "describe the victim emotionally" during counseling sessions, the victim's counselor, who was qualified as an expert, responded, "Genuine," the witness was testifying that the emotions of the victim during the counseling session were genuine emotions, and was not testifying that she believed what the victim told her was true, nor was she giving her opinion as to the victim's character for truthfulness in general; therefore, such a response was proper. State v. Wise, 326 N.C. 421, 390 S.E.2d 142, cert. denied, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990).

Testimony as to Credibility Distinguished from Testimony Relating to Diagnosis. — While the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence, those cases in which the disputed testimony concerns the credibility of a witness' accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

Tendency to Fabricate. — In prosecution for second degree rape and sexual offense, the trial court erred in permitting the prosecutor to pose a question to an expert in clinical psychology regarding whether the 13-year-old victim had a mental condition which would cause her to fabricate a story about the sexual assault. State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

Truthfulness of Witness. — Testimony by FBI agent regarding a State's witness was given for the purpose of laying the foundation for the agent's opinion as to the witness's truthfulness and was admissible. State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997), cert. denied, 523 U.S. 1097, 118 S. Ct. 1583, 140 L. Ed. 2d 797 (1998).

It was error to exclude opinion testimony of three defense witnesses as to a victim's character for untruthfulness under G.S. 8C-1-405(a) and G.S. 8C-1-608(a) as: (1) a foundation was not required for opinion testimony as to a witness's character for truthfulness or untruthfulness, nor did the victim have to have been shown to have been untruthful on a particular occasion; (2) defendant established that each of the three defense witnesses had personal knowledge of the victim and that each of the them had formed an opinion as to her character for truthfulness or untruthfulness; and (3) the defense witnesses testified to having personal knowledge of the victim and to having formed an opinion as to the victim's character for untruthfulness. State v. Valdez-Hernendez, 184 N.C. App. 344, 646 S.E.2d 579, 2007 N.C. App. LEXIS 1449 (2007).

Defendant was entitled to a new trial due to the improper exclusion of opinion testimony as to the truthfulness or untruthfulness of a victim under G.S. 8C-1-405(a) and G.S. 8C-1-608(a) as defendant was prejudiced under G.S. 15A-1443(a) since: (1) the state's case rested almost exclusively on the victim's testimony; (2) because the victim did not report the alleged rape until over two weeks after the night of the incident, and defendant admitted to having consensual sexual intercourse with the victim; and (3) the credibility of the victim was of significant probative value. State v. Valdez-Hernendez, 184 N.C. App. 344, 646 S.E.2d 579, 2007 N.C. App. LEXIS 1449 (2007).

Truthfulness of Defendant. — The prosecutor properly elicited information from defendant about his numerous prison infractions to show his character for untruthfulness where defendant testified on direct examination about the living conditions that he endured while on lockup and while on maximum security but never explained why he was confined in that manner. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Although the trial court erred in refusing to allow the admission of testimony regarding defendant's character for truthfulness after defendant's credibility was impugned by the State, the error was not prejudicial. State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Evidence of the competitors' reputation for truthfulness was properly admitted under G.S. 8C-1-608 since; (1) the case was a defamation case, which necessarily alleged that the competitors had made a false statement; (2) character evidence was admissible when character was directly in issue as in actions involving moral intent like defamation; and (3) each competitor for whom evidence of truthful character was admitted had already been called as a witness and questioned before the admission of the evidence of that competitor's truthful character. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Character for Untruthfulness. — Where defendant sought to reveal that two years ago witness had deceived a person he was investigating in an effort to obtain a confession for that crime, the evidence was probative of the witness's character for untruthfulness, was not too remote and was unfairly prejudicial; thus, the defendant was entitled to a new trial. State v. Baldwin, 125 N.C. App. 530, 482 S.E.2d 1 (1997), cert. granted, 345 N.C. 756, 485 S.E.2d 299 (1997), discretionary review improvidently allowed, 347 N.C. 348, 492 S.E.2d 354 (1997).

Ability to Distinguish Reality from Fantasy. — Question asked of expert as to whether or not mentally retarded adult who had been sexually assaulted had any mental condition which would generally affect her ability to distinguish reality from fantasy was within the scope of the expert witness' expertise and did not amount to an impermissible opinion with respect to defendant's guilt or innocence. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Evidence as to Plaintiff's Character in Civil Suit. — In a civil suit for assault and battery, where in addition to pleading self defense and alleging that plaintiff assaulted defendant, defendant sought to cast doubt on plaintiff's truthfulness by rigorously cross-examining him about his version of the incident, as well as about specific misdeeds that tended to sully plaintiff's character, plaintiff had a right to attempt to counteract these reflections upon his veracity and character with evidence as to his reputation for truthfulness, and as to his general character. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), modified on other grounds, 322 N.C. 425, 368 S.E.2d 619 (1988), rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Question of Truthfulness Held Proper on Redirect. — Where following cross-examination, during which defense counsel asked the child if she had ever told a lie, and where the State asked the child if she had testified truthfully, witness' statement that she had testified truthfully was not character evidence since the question was a proper one to ask on redirect examination. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Failure to Object to Expert Opinion on Credibility. — Defense counsel's failure to object to a social worker's testimony that child/victim's statements were believable did not constitute ineffective assistance of counsel, where testimony was elicited by defense counsel in an effort to show that child's sexual knowledge resulted from a prior incident of sexual abuse. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677, 1999 N.C. App. LEXIS 803 (1999), cert. denied, appeal dismissed, 351 N.C. 117, 540 S.E.2d 745 (1999).

Evidence Held Admissible. — In trial for sexual offense in the first degree, the trial judge did not err in permitting State's rebuttal witness, Chief Medical Examiner for the State, to testify that in his opinion scratch marks on child's back were not consistent with self-mutilation and in allowing pediatrician to offer her opinion that the injuries were neither accidental nor self-inflicted. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Psychologist's testimony that child victim responded to test questions in an "honest fashion … admitting that she was in a fair amount of emotional distress" did not constitute an expert opinion as to her character or credibility, but was merely a statement of opinion by a trained professional, based upon personal knowledge and professional expertise, that the test results were reliable because the victim seemed to respond to the questions in an honest fashion. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

In trial for sexual offense in the first degree, it was not improper to allow both psychologist and pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state the opinion that the symptoms exhibited by the victim were consistent with sexual or physical abuse. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

In prosecution in which defendant was convicted of taking indecent liberties with a minor, admission of testimony of psychologist who examined child at the request of DSS as to her anxiousness and anger during his examination of her and his professional expert opinion as to the relationship between her anxiousness and anger and the events which she described during the examination was not error. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

In a prosecution in which defendant was convicted of taking indecent liberties with a minor, it was not error for the trial court to permit social worker and pediatrician to give expert opinion testimony that child had been sexually abused. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

Where State asked child "Do you recall indicating earlier that you understood what it meant to tell the truth?", child's statements did not constitute improper character evidence since question was simply attempt by assistant district attorney to prompt child to speak. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Plaintiff's evidence placed defendant's reputation for truthfulness in issue when plaintiff testified that defendant paid fee to himself under power of attorney without her (plaintiff's) consent, thus implying that defendant had engaged in self-dealing in violation of his fiduciary duty to plaintiff; therefore, defendant was entitled to submit evidence of his reputation for truthfulness to help rebut any presumption that as a fiduciary he was guilty of constructive fraud in procuring a benefit for himself. Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553, cert. denied, 325 N.C. 437, 384 S.E.2d 547 (1989).

Where, on cross-examination of the victim, the defendant's attorney repeatedly attempted to impeach her by asking her about prior inconsistent statements made to her doctor, her mother, and at the preliminary hearing, this cross-examination constituted an attack on her credibility such that the State could then present reputation or opinion evidence as to the victim's reputation for truthfulness. State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990), rev'd on other grounds, 330 N.C. 808, 412 S.E.2d 883 (1990).

Guidance counselor's testimony that she believed the victim's account of rape, made in the context of her role as a guidance counselor who suspected a child had been abused and admitted for corroboration, was admissible. State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

Evidence Held Inadmissible. — Expert witness' answer on cross-examination that his opinion about the "improbability" of hair originating from a source other than defendant was based on nonscientific considerations, addressed the credibility of other witnesses and was an expression of opinion as to defendant's guilt and thus violated the Rules of Evidence. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

Witness statement that defendant had been in trouble with the law from the time that he was twelve years old was not admissible under either Rule 405(a) or subsection (a) of this rule. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

III. SPECIFIC INSTANCES OF CONDUCT.

Admissibility of Evidence Under Subsection (b). — Subsection (b) of this rule addresses the admissibility of specific instances of conduct, as opposed to opinion or reputation evidence, only in the very narrow instance where (1) the purpose of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; (2) the conduct in question is in fact probative of truthfulness or untruthfulness and is not too remote in time; (3) the conduct in question did not result in a conviction; and (4) the inquiry into the conduct takes place during cross-examination. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Inquiries concerning prior criminal acts or specific acts of misconduct must be limited to conduct which bears upon or is relevant to the witness' propensity to truthfulness or untruthfulness. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434, petition for cert. improvidently allowed, 318 N.C. 652, 350 S.E.2d 94 (1986).

Determination of admissibility under this rule rests on whether the alleged prior misconduct elicited at trial was probative of defendant's truthfulness or lack thereof. State v. Scott, 318 N.C. 237, 347 S.E.2d 414 (1986).

Specific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, may be inquired into on cross-examination of the witness only if they are "probative of truthfulness or untruthfulness." State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987).

Under subsection (b) of this rule, evidence of a specific instance of conduct is not admissible for impeachment purposes unless it is in fact probative of truthfulness. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Defendant's confrontation rights under N.C. Const. art. I, § 23 were not violated when the trial court refused to allow defendant to cross-examine the witness about the witness's disciplinary record, as there were confidentiality concerns about the record pursuant to G.S. 115C-402, and defendant failed to show how the disciplinary record was relevant to impeach the witness's credibility under G.S. 8C-1, Rule 608(b). State v. Oliver, 159 N.C. App. 451, 584 S.E.2d 86, 2003 N.C. App. LEXIS 1494 (2003).

Trial court did not err under G.S. 8C-1, Rule 608(b) in denying defendant the opportunity to cross-examine the school principal regarding the witness's disciplinary record, as G.S. 8C-1, Rule 608(b) prevented defendant from cross-examining the principal about specific instances of the witness's conduct if the principal had not already testified regarding that character. State v. Oliver, 159 N.C. App. 451, 584 S.E.2d 86, 2003 N.C. App. LEXIS 1494 (2003).

Although evidence of other acts is not permissible under G.S. 8C-1, N.C. R. Evid. 404(b) to show a propensity for violence solely because a defendant raised the claim of self-defense, such evidence may be used to refute specific evidence of a defendant's credibility under G.S. 8C-1, N.C. R. Evid. 608, when such credibility is at issue (such as when a criminal defendant introduces evidence of his good character, thereby placing his character at issue); when the criminal defendant introduces such evidence, the State in rebuttal can then introduce evidence of defendant's bad character, and under G.S. 8C-1, N.C. R. Evid. 405(a), and the State may do so by cross-examining a defendant's character witnesses as to relevant specific instances of conduct. State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005).

Trial court did not err in permitting witnesses to testify regarding an employee's conduct at the time of a motor vehicle accident as the testimony was relevant to show the employee's motivation in leaving the scene of the accident, G.S. 8C-1, N.C. R. Evid. 608(b). Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Evidence routinely disapproved of as irrelevant to the question of a witness' veracity includes specific instances of conduct relating to violence against other persons. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Prior bad acts and prior inconsistent statements are proper subjects for cross-examination. State v. Belton, 77 N.C. App. 559, 335 S.E.2d 522 (1985).

Cross-Examination on Witness' Prior Violent Conduct. — Trial court properly denied defendant the right to cross-examine a State's witness regarding his prior violent conduct. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Veracity or Lack Thereof Is Only Relevant Trait Under Subsection (b). — Because the only purpose for which evidence is sought to be admitted under subsection (b) of this rule is to impeach or bolster the credibility of a witness, the only character trait relevant to the issue of credibility is veracity or the lack of it. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Defendant's testimony as to his sexual assault victim's prior drug use could have been excluded under G.S. 8C-1, N.C. R. Evid. 608(b), because the fact of the victims's prior placement in a drug rehabilitation program was not probative of her character for truthfulness or untruthfulness. State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Probative Value Must Be Weighed Against Potential Prejudice. — If the proffered evidence meets the four enumerated prerequisites for admission under subsection (b) of this rule, before admitting the evidence the trial judge must determine, in his discretion, pursuant to G.S. 8C-1, Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

Questions About Collateral Misdeeds Must Have Good Faith Basis. — A defendant who takes the stand may be asked about collateral misdeeds that tend to show his criminal conduct, intent or motive in the case being tried. But such questions must have a good faith basis. State v. Flannigan, 78 N.C. App. 629, 338 S.E.2d 109 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 572 (1986).

And Must Be Supported by Evidence. — The State, by questions put to a defendant during cross-examination, may not inform the jury of purported misdeeds by the defendant that firsthand knowledge of its source does not support. State v. Flannigan, 78 N.C. App. 629,

338 S.E.2d 109 (1985), cert. denied, 316 N.C. 197, 341 S.E.2d 572 (1986).

The prior use of false identification is probative of a witness' tendency to be truthful. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

Extrinsic evidence of sexual misconduct is not in any way probative of a witness' character for truthfulness or untruthfulness. State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986); State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987).

Adultery is not the type of misconduct which falls under Rule 608(b). State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied and appeal dismissed, 329 N.C. 504, 407 S.E.2d 550 (1991).

Prior Drug Deals. — Court's ruling that defendant's prior drug deals could only come in if he "opened the door" by taking the stand and denying he had ever dealt drugs was upheld where defendant did not show prejudice because he did not make an offer of proof regarding his testimony, and there was no evidence as to what his factual defense would have been had the State revealed to him those acts it intended to prove, under G.S. 8C-1, Rule 404(b), and those acts it would attempt to elicit, should he testify, under section (b) of this rule. State v. Manning, 139 N.C. App. 454, 534 S.E.2d 219, 2000 N.C. App. LEXIS 983, cert. denied and appeal dismissed, 353 N.C. 273, 546 S.E.2d 385 (2000), aff'd, 353 N.C. 449, 545 S.E.2d 211 (2001).

Alcohol Use. — Evidence of drug use alone is not admissible, however, a witness may be impeached by evidence showing mental or physical impairment affecting his ability to observe and remember the events in question; impeachment of a witness concerning alcohol use near the time of the observed incident is permissible to show such impairment. State v. Alkano, 119 N.C. App. 256, 458 S.E.2d 258, appeal dismissed, 341 N.C. 653, 467 S.E.2d 898 (1995).

Where the prosecutor limited his questions on alcohol use to substances used on the day and evening of the incident and did not ask questions about addiction or habitual use, this was permissible impeachment. State v. Alkano, 119 N.C. App. 256, 458 S.E.2d 258, appeal dismissed, 341 N.C. 653, 467 S.E.2d 898 (1995).

Other Tort Suits. — In an action to recover for injuries allegedly sustained when struck by defendant's car in a shopping center parking lot, testimony that following the parking lot accident plaintiff contacted his lawyer before he did his doctor, that between the time this accident occurred and the trial, five years later, he sued two others, alleging that they ran their car over his foot and injured him, and that he also sued the county sheriff, alleging that deputy gave him a severe beating and seriously injured him, was relevant to the issue being tried and was also admissible for the purpose of impeaching plaintiff's credibility and showing his bias as a witness. Thompson v. James, 80 N.C. App. 535, 342 S.E.2d 577 (1986).

Cross-Examination Held Proper. — A specific instance of false swearing is clearly probative of untruthfulness; thus, it was permissible for the prosecutor to impeach and cast doubt upon the defendant witness's testimony in a murder case by cross-examining him concerning a previous false statement made under oath to a magistrate. State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986), cert. denied, 319 N.C. 226, 353 S.E.2d 410 (1987).

Where defendant in a capital murder case testified that he had not robbed or injured the victim or anyone else, the accuracy of the assertion that he had not injured anyone else was probative of his truthfulness or untruthfulness and the trial court could, in its discretion, allow cross-examination regarding the statement. State v. Darden, 323 N.C. 356, 372 S.E.2d 539 (1988).

Trial court's decision to allow prosecution's cross-examination of defendant in murder trial concerning numerous prior acts, which tested the plausibility of the defense theory that while in the Navy defendant developed a drinking problem which, over the years, became a chronic disease rendering him nonculpable on the night in question by seeking to show that defendant's Navy service was, in fact, replete with instances of bad conduct, did not constitute plain error. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Defendant, on trial for the murder of his wife, opened the door to the cross-examination regarding specific instances of misconduct toward both his wife and children where defendant testified on direct examination that he was a loving and supportive husband and father, that he did not intend to hurt his wife but rather unintentionally, or in self-defense, struck back at her with the screwdriver, trying only to get her to stop moving the car. The state was entitled to cross-examine defendant concerning the specific acts of prior misconduct—including threats, arguments, and acts of violence toward both his wife and children—to explain and rebut defendant's direct examination testimony. State v. Syriani, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993), reh'g denied, 510 U.S. 1066, 114 S. Ct. 745, 126 L. Ed. 2d 707 (1994).

Subsection (b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking his credibility, but such testimony was relevant where the state was not attempting to impeach either witnesses' general reputations for veracity but was trying to rebut their testimony on direct examinations. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

The admission of evidence regarding a witness's pending burglary charge under this section was not plain error in view of the admission under G.S. 8C-1, Rule 609 of his first-degree burglary conviction and his own testimony that he consumed "four 40[-]ounce beers" on the evening of the shooting. State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792, 2001 N.C. App. LEXIS 35 (2001), cert. dismissed, 353 N.C. 392, 548 S.E.2d 151 (2001), cert. denied and appeal dismissed, 353 N.C. 392, 548 S.E.2d 152 (2001).

The prosecutor did not exceed the scope of this rule by exploring the facts on cross-examination after defendant tended to minimize the seriousness of his criminal involvement, for example, characterizing the attack on an officer at a youth prison facility as "[getting] into some trouble." State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Defendant was properly cross-examined regarding his prior violent behavior because defendant opened the door to his nonviolent nature when he and his uncle testified that he was not violent. State v. Ammons, 167 N.C. App. 721, 606 S.E.2d 400, 2005 N.C. App. LEXIS 11 (2005).

State was properly allowed to cross-examine and impeach defendant by questing defendant about false statement made to police. State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

By defendant's own admission, G.S. 8C-1-608 was inapplicable because the state's questioning on cross-examination about defendant's prior convictions was neither a reference to a specific act, nor probative of defendant's truthfulness. State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411, appeal dismissed, cert. denied, 637 S.E.2d 187 (N.C. 2006).

Trial court did not violate G.S. 8C-1-608(b) and G.S. 8C-1-609(a) in allowing the state to cross-examine a robbery defendant about his criminal history; by testifying on direct that he was not a violent person and had never robbed anyone, defendant had opened the door to this questioning. State v. Blair, 181 N.C. App. 236, 638 S.E.2d 914, 2007 N.C. App. LEXIS 85 (2007), cert. denied, appeal dismissed, 361 N.C. 570, 650 S.E.2d 815 (2007).

Cross-Examination Held Improper. — Prosecutor's cross-examination of defendant concerning an alleged specific instance of misconduct, i.e., two assaults by pointing a gun at two people during the same incident, was improper under subsection (b) of this rule, because extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness. State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986).

In prosecution for rape, sexual offense and crime against nature, cross-examination of defendant with regard to other nonconsensual sexual activity with another woman was not relevant on the question of the victim's consent, and where defendant's only defense was consent, this cross-examination inquiry was clearly prejudicial and required a new trial. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434, petition for cert. improvidently allowed, 318 N.C. 652, 350 S.E.2d 94 (1986).

In a prosecution for first degree sexual offense involving three and four year old victims, testimony elicited from defendant during cross-examination, involving instances of sexual relations or proclivities, fell outside the bounds of admissibility under this rule. State v. Scott, 318 N.C. 237, 347 S.E.2d 414 (1986).

Cross-examination concerning defendant's drug addiction was improper under subsection (b) of this rule, because extrinsic evidence of drug addiction, standing alone, is not probative of a defendant's character for truthfulness or untruthfulness. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550 (1988).

Where defendant testified and denied he had ever sexually abused any of the witnesses and the State then cross-examined defendant about his prior acts of sexual misconduct it was error for the trial court to allow this cross-examination but the error did not require defendant a new trial. State v. Frazier, 121 N.C. App. 1, 464 S.E.2d 490 (1995), aff'd, 344 N.C. 611, 476 S.E.2d 297 (1996).

The trial court properly precluded questions concerning the witness' history of domestic violence for which he had not been convicted, where such evidence had no bearing on the witness' truthfulness or untruthfulness in the capital murder prosecution. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Limiting Cross-Examination Held Proper. — Trial court did not abuse its discretion in preventing defendant's cross-examination of witness about theft of restaurant ribs, when defendant had already impeached witness with evidence that he waited four months before admitting that he knew about the robbery, had experienced a messy break-up with defendant's sister, and had "bad blood" with defendant. State v. Grigsby, 134 N.C. App. 315, 517 S.E.2d 195 (1999), rev'd on other grounds, 351 N.C. 454, 526 S.E.2d 460 (2000).

Factors Affecting Mental State. — Defendant was properly permitted to cross-examine plaintiff about other factors in her life which had a bearing upon her mental state such as acts of wrong-doing on the part of her children. Pelzer v. UPS, Inc., 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. denied, 346 N.C. 549, 488 S.E.2d 808 (1997).

Evidence Held Admissible. — Evidence in a malicious prosecution action involving the institution of a child support claim, concerning a bribe by plaintiff to alter a blood grouping test, was not introduced for the purpose of attacking plaintiff's credibility, but was offered as relevant noncollateral evidence of plaintiff's knowledge of the surrounding facts and circumstances of the case, and hence, such evidence was not inadmissible under subsection (b) of this rule. Lay v. Mangum, 87 N.C. App. 251, 360 S.E.2d 481 (1987).

Trial court's failure to rule on defendant's motion in limine to prohibit the prosecutor from cross-examining her with the allegedly inadmissible evidence of her involvement in her husband's murder did not impermissibly chill her exercise of her constitutional right to testify on her own behalf in indictment for murder of her stepson; the State could have legitimately cross-examined defendant about her involvement in her husband's murder for impeachment purposes to the extent such evidence was probative of defendant's truthfulness or to the extent that defendant "opened the door" to such testimony. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Trial court properly allowed evidence of a paid confidential informant's prior conviction but properly excluded the details of the conviction under G. S. 8C-1, N.C. R. Evid. 608(b). State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002), cert. denied, 356 N.C. 173, 569 S.E.2d 273 (2002).

Trial court properly admitted evidence that the defendant had previously become angry and had broken the mirror on his truck to test the truthfulness of the defendant's answer and to determine his presence with friends at a restaurant. State v. Taylor, 154 N.C. App. 366, 572 S.E.2d 237, 2002 N.C. App. LEXIS 1463 (2002).

Evidence Held Inadmissible. — In trial for murder of defendant's husband, specific instances of conduct regarding defendant's alleged participation in three previous unrelated murders were not probative of defendant's character for truthfulness under subsection (b) of this rule, and were not admissible to prove motive under G.S. 8C-1, Rule 404(b). Thus the trial court committed prejudicial error in denying defendant's motion in limine to prevent the district attorney from using the inadmissible evidence to impeach defendant. State v. Lamb, 84 N.C. App. 569, 353 S.E.2d 857 (1987), aff'd, 321 N.C. 633, 365 S.E.2d 600 (1988).

Where the victim testified that defendant stated "they are never going to take me in again alive," the statement was probative of defendant's knowledge of his guilt, and defendant made no showing that the probative value of the statement was substantially outweighed by its prejudicial effect. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

The trial court erred by allowing the teacher of an alleged victim of sexual abuse to testify on direct examination regarding specific instances of the alleged victim's conduct which tended to establish her truthfulness. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

Instances of alleged prior and unrelated acts of larceny and possession of marijuana, without more, were not necessarily probative of a prosecution witness's propensity for truthfulness or untruthfulness under the standard imposed by subsection (b). State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Evidence of defendant's prior use of cocaine and marijuana was irrelevant and inadmissible under subsection (b), and under G.S. 8C-1, Rule 611(b), because defendant was not a key prosecution witness. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870, cert. denied, 341 N.C. 424, 461 S.E.2d 768 (1995).

Medical examinations of several minor children who allegedly participated and witnessed the abuse of the victims who testified at trial were inadmissible extrinsic evidence. State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995).

The trial court erred in allowing the introduction of evidence of plaintiff's prior use of illegal drugs in sexual molestation case, such information was highly prejudicial and defendants proffered no permissible use of such information. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, 467 S.E.2d 713 (1996).

Extrinsic Conduct Evidence Held Inadmissible. — Prosecutor's questions upon cross-examination of defendant, regarding a fight he was involved in at the hospital where his competency evaluation took place, were not addressed to the issue of defendant's credibility and it was error for such extrinsic conduct evidence to be admitted. State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Where, in an attempt to undercut defendant's testimony about her abuse by her first husband who was drug addict, and by her second who was an alcoholic, district attorney asked, "Well, you sort of enjoyed smoking marijuana, didn't you?" and defendant responded, "I did on occasion sir," the question was error; defendant's admission to having smoked marijuana had no conceivable tendency to prove or disprove her truthfulness and G.S. 8C-1, Rule 404(b) prohibits evidence of other crimes, wrongs, or acts to prove the defendant acted in conformity with a character trait those acts exhibit. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Evidence showing that the victim had let the air out of the tires of the defendant's vehicle months before the kidnapping was properly excluded pursuant to this section. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Refusal to Exclude Evidence of Other Crimes Held Prejudicial. — In trial for murder of defendant's husband, rulings of the trial judge denying defendant's motion in limine to exclude evidence implicating her in other killings held to have impermissibly chilled her right to testify in her own defense. State v. Lamb, 321 N.C. 633, 365 S.E.2d 600 (1988).

Exclusion of Evidence Not Prejudicial Error. — Defendant's intended question to state's witness, concerning an attempt by that witness to lure his acquaintance away from his home so his accomplices could break into the residence and steal the property inside, should have been allowed as bearing on the witness' propensity to deceive and defraud others, but the exclusion of this testimony did not constitute prejudicial error. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

No error by prohibiting defendant from cross-examining witness regarding the lawsuit that he had brought against law enforcement officers in which he made false allegations because there was no reasonable possibility that the outcome of the trial would have been different if the excluded evidence had been admitted. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Admission of Evidence Not Prejudicial Error. — Where defendant did not object to the prosecutor cross-examining him as to his alleged prior assaults, the appellate court's review of the record and transcripts satisfied that court that the defendant did not meet the test for finding plain error because the State presented strong evidence of defendant's guilt through the testimony of three eyewitnesses who were present when the victim, a police officer, was shot, with all three giving consistent testimony identifying defendant as the shooter; therefore it was not possible for the appellate court to say that the cross-examination amounted to a miscarriage of justice or denied defendant a fundamental right. State v. Augustine, 359 N.C. 709, 616 S.E.2d 515, 2005 N.C. LEXIS 836 (2005).

Testimony by a witness as to defendant's having lied to the witness about an unrelated matter was not admissible under G.S. 8C-1, N.C. R. Evid. 608 because there was no other purpose for the testimony than to attack defendant's credibility. However, the error was not reversible under G.S. 15A-1447(a), because defendant failed to show prejudice resulting from the admission of the evidence given the other evidence presented by witnesses at defendant's trial. State v. Lee, 189 N.C. App. 474, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (2008).

Rule 609. Impeachment by evidence of conviction of crime.

(a) *General rule.* — For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon.* — Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) *Juvenile adjudications.* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (1983, c. 701, s. 1; 1999-79, s. 1.)

COMMENTARY

Subdivision (a) differs from Fed. R. Evid. 609(a), which permits, for purposes of attacking the credibility of a witness, evidence of conviction of a felony or a crime that involves dishonesty or false statement. The current practice in North Carolina is that any sort of criminal offense may be the subject of inquiry for the purpose of attacking credibility.

Subdivision (a) provides that evidence of a crime punishable by more than 60 days confinement shall be admissible. This is the standard used in the Fair Sentencing Act in defining an aggravating factor. See G.S. 15A-1340.4(a)(1)(o). This includes convictions occurring in other states, the District of Columbia, and the United States even though the crime for which the defendant was convicted would not have been a crime if committed in this state.

Under current North Carolina practice a witness' denial of a prior conviction "may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted." However, this prohibition has often been circumvented. *Brandis on North Carolina Evidence* § 112, at 414 (1982). Subdivision (a) allows the record of the conviction to be introduced.

Subdivision (a) also deletes the requirement in Fed. R. Evid. 609(a) that the court determine that the probative value of admitting evidence of the prior conviction outweighs its prejudicial effect to the defendant.

Subdivision (b) is identical to Fed. R. Evid. 609 (b) and departs from the common law in North Carolina in providing a time limit on the use of prior convictions. Generally, evidence of a prior conviction is not admissible under subdivision (b) if more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date. Evidence of such a conviction is admissible, however, if the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. A party must give written notice if he intends to use a conviction falling outside the 10-year period.

Subdivision (c) differs from Fed. R. Evid. 609(c) and provides an absolute prohibition of evidence of a conviction that has been pardoned. Current North Carolina practice does not prohibit evidence of such convictions.

Subdivision (d) is identical to Fed. R. Evid. 609(d) and provides that evidence of a juvenile adjudication is generally inadmissible. However, the court in a criminal case may "allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." This is intended to satisfy the requirement of *Davis* v. *Alaska,* 415 U.S. 308 (1974). G.S. 7A-677, which provides that the defendant or another witness in a criminal case may be ordered to testify with respect to whether he was adjudicated delinquent, should be amended to conform to this subdivision. Conforming amendments also should be made to G.S. 15-223(b) [see now 15A-145], G.S. 90-96, and G.S. 90-113.14.

Subdivision (e) is the same as Fed. R. Evid. 609(e) and conforms to current North Carolina practice. See *Brandis on North Carolina Evidence* G.S. 112, at 411 (1982).

Editor's Note. — Section 7A-677, referred to in the Official Commentary above, has been repealed. See now G.S. 7B-3201.

Legal Periodicals. — For note, "The Death of Discretion: Prior Felony Convictions Automatically Admissible in Civil Actions — Green v. Bock Laundry Mach. Co.," see 12 Campbell L. Rev. 319 (1990).

For essay, "Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale," see 1993 Duke L.J. 776.

For article, "What Went Wrong with FRE Rule 609: A Look at How Jurors Really Misuse Prior Conviction Evidence," see 23 N.C. Cent. L.J. 14 (1997).

CASE NOTES

Applicability. — G.S. 8C-1, Rule 609 addresses the use of evidence of prior convictions to impeach a testifying witness; a trial court did not err in holding that G.S. 8C-1, Rule 609 was inapplicable to statements made by a nontestifying defendant. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

The State is prohibited from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under section (a) of this Rule in the guilt-innocence phase of a criminal trial (overruling State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 and State v. Gibson, 333 N.C. 29, 47-48, 424 S.E.2d 95, 105 (1992)). State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

A no contest plea can properly be admitted under subsection (a) of this rule for purposes of impeachment. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

For the purposes of impeachment, a witness, including defendant, may be cross-examined with respect to prior convictions. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Defendant's argument that a prayer for judgment continued was not a final judgment and should not be treated as a conviction for purposes of this rule was without merit. State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994).

Question as to Whether Witness Had Been Charged with a Crime Error. — It was error for the court to allow a question on cross-examination as to whether the defendant had been charged with a crime. State v. Jones, 329 N.C. 254, 404 S.E.2d 835 (1991).

When Evidence of Defendant's Prior Convictions Is Admissible. — This rule allows defendant's prior conviction to be offered into evidence when defendant takes the stand and thereby places his credibility at issue. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

Evidence pertaining to defendant's prior convictions for possession with intent to manufacture, sell, and deliver cocaine was properly admitted under G.S. 8C-1, Rule 404(b) to show intent and knowledge, and the trial court properly gave a limiting instruction to the jury; furthermore, while testimony from the deputy clerk was inadmissible under G.S. 8C-1, Rule 404(b), the error was harmless when defendant testified and was properly cross-examined about the convictions. State v. Renfro, 174 N.C. App. 402, 621 S.E.2d 221, 2005 N.C. App. LEXIS 2483 (2005), aff'd, — N.C. —, 627 S.E.2d 463 (2006).

Trial court did not err by admitting into evidence at defendant's first degree murder trial defendant's prior conviction from more than ten years earlier because (1) the prior conviction showed that defendant's status as a convicted felon made it illegal for him to possess the firearm with which he shot the victim; (2) the prior conviction, as did defendant's trial, involved eluding the police; and (3) the prior conviction was for aggravated assault, manifesting extreme indifference to the value of human life, and recklessly causing serious bodily injury. State v. Kaher Maruf Muhammad, 186 N.C. App. 355, 651 S.E.2d 569, 2007 N.C. App. LEXIS 2192 (2007).

Where a conviction is established for impeachment purposes, there may be further inquiry into the time and place of the conviction and the punishment imposed. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Scope of Inquiry into Prior Convictions. — Inquiry into prior convictions which exceeds the limitations established in State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977), is reversible error. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

The prosecution's repeated inquiries into the facts of prior crimes improperly exceeded the limitations on admissibility of evidence of prior convictions for impeachment purposes under section (a) of this Rule established in State v. Finch, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977). State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993).

In defendant's trial on a charge of felony possession of cocaine, the trial court erred by allowing a deputy clerk to testify regarding defendant's prior convictions for possession with intent to sell and deliver cocaine and sale of cocaine, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), without requiring evidence of the underlying facts of the prior convictions to show similarities between the prior convictions and the offense charged; although the jury could have considered the evidence of defendant's prior convictions, pursuant to G.S. 8C-1, N.C. R. Evid. 609(a), for the limited purpose of assessing defendant's credibility, the trial court improperly instructed the jury that they could consider defendant's prior drug convictions for Rule 404(b) purposes, and the error was not harmless. State v. Hairston, 156 N.C. App. 202, 576 S.E.2d 121 (2003).

The permissible scope of inquiry into prior convictions for impeachment purposes is restricted to the name of the crime, the time and place of the conviction, and the punishment imposed. State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997), cert. denied, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997).

This rule is much more restrictive than the former law; it limits admissible evidence of prior convictions to those convictions less than 10 years old and punishable by more than 60 days confinement. Alston v. Herrick, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

Comparison to Federal Rule. — North Carolina's version of subsection (a) of this rule is more permissive than its federal counterpart in that its only limitation on evidence of a witness's convictions is that the crime be punishable by more than sixty days confinement. The federal rule requires (1) that the crime be punishable by death or imprisonment for more than one year, and that the court balance the probative weight of the evidence against its prejudicial effect, or (2) that the crime involve "dishonesty or false statement, regardless of the punishment." State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Subsection (b) of this rule is identical to the federal rule. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Inapplicability of Time Limit to Trials Held Before July 1, 1984. — The trial court did not err in permitting the prosecutor to ask the defendant on cross-examination whether he had been convicted of several larceny charges more than 10 years before the date of trial, where the Rules of Evidence became effective the week following his trial, as the court had no authority to implement a statute before its effective date. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Legislative Intent as to Time Limit. — The legislative intent behind this rule is not to forbid the admission of evidence of a prior conviction where a period of more than 10 years has elapsed since the date of conviction or the date of defendant's release from confinement, but rather, as affecting admissibility, to balance the prejudicial effect of the remoteness of the conviction against the probative value of the conviction as evidence. State v. Ragland, 80 N.C. App. 496, 342 S.E.2d 532 (1986).

Subsection (b) requires the court to conduct a balancing test to see whether the probative value substantially outweighs the prejudicial effect. State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996).

In order to adequately review the careful weighing of probative value and prejudicial effect necessitated by an evidentiary rule, an appellate court must consider the factual context of the entire trial, including the testimony of the defendant. State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996).

In order to preserve rulings made under subsection (b) for appeal, a defendant must testify. State v. Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996).

Subsection (b) of this rule does not forbid the admission of a prior conviction more than 10 years old as a matter of law. Rather, as in the federal rule, the court must weigh the probative value of the conviction against its possible prejudicial effect. State v. Blankenship, 89 N.C. App. 465, 366 S.E.2d 509 (1988).

Failure to Make Required Findings of Fact. — Court erred by admitting into evidence defendant's convictions for contributing to the delinquency of a minor and assault on a juvenile which were more than 10 years old where the court did not make findings of fact to support its determination that the probative value of the convictions outweighed the prejudicial effect. State v. Farris, 93 N.C. App. 757, 379 S.E.2d 283 (1989), discretionary review improvidently allowed, 326 N.C. 45, 387 S.E.2d 54 (1990).

Finding of Specific Facts and Circumstances. — A conclusory finding that the evidence would attack defendant's credibility without prejudicial effect does not satisfy the "specific facts and circumstances" requirement of subsection (b) of this rule. State v. Hensley, 77 N.C. App. 192, 334 S.E.2d 783 (1985), cert. denied, 315 N.C. 393, 338 S.E.2d 882 (1986).

Evidence Must Be Probative of Defendants' Credibility. — Where defendant was accused of sexually attacking and murdering a woman in 1983, the trial court's determination that defendant's 1957 and 1967 convictions for assault on a female with intent to commit rape and assault on a female were admissible, was erroneous; the trial court failed to comply with this rule by identifying any fact or circumstance indicating that this evidence was probative of defendant's credibility. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

In first-degree murder trial, specific facts and circumstances articulated by trial court as underlying its determination that introduction of defendant's 13-year-old convictions were more probative than prejudicial violated principle that when witness is the accused, his past convictions should be offered for what they indicate about his credibility, not for what they indicate about his character; court singled out and permitted evidence that defendant had committed prior assaults because they involved the use of violence; furthermore, court's conclusory remark that the only purpose for admission through cross-examination would be to impeach the credibility or truthfulness of defendant was not a "fact" or "circumstance" vouching for an appropriate balance of probative over prejudicial weight. State v. Carter, 326 N.C. 243, 388 S.E.2d 111 (1990).

Evidence of Prior Convictions Held Admissible on Issue of Credibility. — Where trial court conducted an extensive hearing and entered findings of fact revealing that the credibility of defendant's testimony, in which he claimed he acted in self-defense, was central to the resolution of the case and that evidence of a 1981 conviction was therefore more probative than prejudicial, evidence of the old attempted robbery was properly presented to the jury for its consideration. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Trial court did not commit reversible error by allowing the State to question a defense witness as to defendant's prior conviction for forcible robbery because evidence of defendant's prior conviction was admissible to attack defendant's credibility as a hearsay declarant; the defense witness's testimony assisted in establishing an alibi for defendant and was hearsay because it was offered for the truth of the matter asserted. State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776, 2002 N.C. App. LEXIS 1274 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 440 (2003).

Evidence of Prior DWI Convictions Admissible for Impeachment Purposes. — Trial court properly denied defendant's motion in limine to suppress and bar the use of his prior DWI convictions, as a DWI conviction was a class 1 misdemeanor and, thus, was admissible for impeachment purposes under G.S. 8C-1, N.C. R. Evid. 609(a). State v. Gregory, 154 N.C. App. 718, 572 S.E.2d 838, 2002 N.C. App. LEXIS 1534 (2002).

Evidence Admitted Despite Failure to Disclose Crimes Punishable by 60 Days Confinement. — State properly introduced public records which indicated that defendant had pled guilty in its rebuttal to certain crimes, even though the records of conviction did not disclose that the offenses were punishable by confinement of greater than 60 days as (1) defendant first brought his prior convictions to the jury's attention in his own testimony, (2) without objection on cross-examination defendant admitted his prior convictions, and (3) when defendant denied that he had pled guilty to the charges against him, the State, as a basis for attacking his credibility, was entitled to show on rebuttal that defendant had in fact pled guilty to those charges. State v. Dalton, 96 N.C. App. 65, 384 S.E.2d 573 (1989).

Waiver of Objection to Introduction of Prior Convictions. — Since the introduction of evidence of defendant's prior convictions more than 10 years old was not forbidden by statute, it was incumbent upon defendant to timely object in order to present the question of admissibility for review on appeal. Defendant's failure to object constituted a waiver of the right to do so. State v. Ragland, 80 N.C. App. 496, 342 S.E.2d 532 (1986).

Even if trial court erred by ruling that the State would be permitted to cross-examine a murder defendant about his conviction which was more than 10 years old, this objection was waived when defendant himself testified as to the convictions on direct examination. State v. Ross, 100 N.C. App. 207, 395 S.E.2d 148 (1990), aff'd, 329 N.C. 108, 405 S.E.2d 158 (1991).

Defendant's Out-of-Court Statements Implying Prior Conviction Held Admissible. — Where the victim testified that defendant stated "they are never going to take me in again alive," the statement was probative of defendant's knowledge of his guilt, and defendant made no showing that the probative value of the statement was substantially outweighed by its prejudicial effect. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Convictions Resulting from Nolo Contendere Plea. — Since in State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987) the Supreme Court held, under G.S. 15A-2000(e) that a nolo contendere plea may be used to aggravate a crime so as to sustain a death sentence, evidence of past convictions resulting from a nolo plea should also be properly admitted under subsection (a) for purposes of impeachment especially when a defendant has voluntarily taken the stand to testify and be cross-examined, at which time he could explain his plea if he desired and assert his innocence. State v. Outlaw, 94 N.C. App. 491, 380 S.E.2d 531 (1989), aff'd, 326 N.C. 467, 390 S.E.2d 336 (1990).

Under G.S. 15A-1022(c), when a plea of no contest is now entered there must be a finding by a court that there is a factual basis for the plea. This finding and the entry of a judgment thereon constitute an adjudication of guilt. This adjudication would be a conviction within the meaning of subsection (a) of this rule, and as a conviction it may then be used in another case to attack the credibility of a witness. State v. Outlaw, 326 N.C. 467, 390 S.E.2d 336 (1990).

Use of Juvenile Adjudication Orders. — Court did not err where pursuant to the discretion afforded in subsection (d) of this rule, the court allowed juvenile adjudication orders concerning a witness to be used by defendant on cross-examination for impeachment purposes but denied defendant's request to introduce them into evidence at the close of defendant's evidence. State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Trial court applied the correct standard that evidence of juvenile convictions were not necessary for the fair determination of of guilt or innocence even though it stated that "the probative value of the evidence of the juvenile petitions and convictions is far outweighed by the prejudice that may be committed and the creation of ancillary issues." State v. McAllister, 132 N.C. App. 300, 511 S.E.2d 660 (1999), aff'd, 351 N.C. 44, 519 S.E.2d 524 (1999).

Juvenile Convictions Properly Excluded. — The trial court did not abuse its discretion by excluding evidence of a witness's juvenile convictions committed subsequent to her sexual assault and initial accusations against defendant, where at the time she made the accusations she was a thirteen year old child with good grades and no history of criminal activity. State v. McAllister, 132 N.C. App. 300, 511 S.E.2d 660 (1999), aff'd, 351 N.C. 44, 519 S.E.2d 524 (1999).

The trial court did not abuse its discretion when it allowed the State's pre-trial motion in limine to prohibit defendant from cross-examining a witness concerning her juvenile adjudication of guilt of involuntary manslaughter in South Carolina. State v. Deese, 136 N.C. App. 413, 524 S.E.2d 381, 2000 N.C. App. LEXIS 8 (2000), cert. denied, 351 N.C. 476, 543 S.E.2d 499 (2000).

Allowing Prosecutor to Question Defendant About Juvenile Convictions Not Plain Error. — Because defense counsel only made general objections to the prosecutor's questions when defendant was cross-examined during his trial for first degree murder and failed to state specific grounds for his objections, defendant's claims that the prosecutor improperly questioned him about prior bad acts and his juvenile convictions were not preserved for review; and the appellate court held that the trial court did not commit plain error by allowing the prosecutor to ask defendant about his juvenile convictions. State v. Perkins, 154 N.C. App. 148, 571 S.E.2d 645, 2002 N.C. App. LEXIS 1403 (2002).

Exclusion of Juvenile Convictions did not Violate Confrontation Clause. — The trial court did not violate the confrontation clause of the Sixth Amendment where it refused to allow the defendant to impeach a witness's credibility with evidence of juvenile offenses committed well after the commission of the defendant's offense where that evidence was not relevant or necessary for the fair determination of guilt or innocence. State v. McAllister, 132 N.C. App. 300, 511 S.E.2d 660 (1999), aff'd, 351 N.C. 44, 519 S.E.2d 524 (1999).

Attorney Disciplinary Proceedings. — Disciplinary Hearing Commission of the North Carolina State Bar did not violate G.S. 8C-1, N.C. R. Evid. 609(a) when it considered the fact that an attorney had two misdemeanor convictions that were almost 20 years old, after it found that the attorney was guilty of professional misconduct, because the convictions were used to consider an appropriate sanction, not to impeach the attorney's testimony. N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004).

Exclusion of Victim's Prior Convictions Upheld. — Trial court did not abuse its discretion by refusing to allow defendant to impeach the State's primary witness, the victim, with her prior convictions from more than 20 years earlier, where the jury heard about the victim's earlier conviction and imprisonment for possession of stolen goods, other various larceny offenses, a guilty plea to providing false information to police, her use of various aliases, dates of birth, and social security numbers under different names, and defense counsel's unconfirmed suggestions to the witness that she had a history of cocaine and alcohol abuse; in light of all these other facts elicited about the victim's background, the probative value of the stale convictions was slight. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

Exclusion of Victim's Prior Convictions Upheld. — Evidence relating to instances of domestic violence that occurred more than 10 years before the instant offense was perjudicial and thus, not admissible. State v. Ray, — N.C. App. —, 678 S.E.2d 378, 2009 N.C. App. LEXIS 1069 (July 7, 2009).

Cross-Examination Upheld. — Where defendant testified on direct examination that he had been convicted of assault, the prosecutor's question as to whether the assault involved a shooting was basically no more than an inquiry into whether the conviction was, in reality, one for a more serious offense, i.e., assault with a deadly weapon, and even if the inquiry was error, the error was not of such magnitude as to require a new trial under the test of prejudicial error contained in G.S. 15A-1443(a). State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Where, when defendant took the stand, defense counsel posed questions about his convictions within the last ten years, and defense counsel also asked defendant whether those convictions were the only convictions he had, and defendant replied in the affirmative, such a statement opened the door and allowed the State to go into a 1972 conviction. Defendant's testimony created favorable inferences as to his entire criminal record. Therefore, on cross-examination, the State could inquire into defendant's record and rebut his statement that he had not been convicted of anything other than the crimes mentioned in his testimony. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

The prosecutor's cross-examination of the defendant regarding his past convictions did not exceed the scope allowed by this rule, where after the defendant denied knowing about certain past convictions, the prosecutor provided sufficient detail about the offenses to jog the defendant's memory. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Considering defendant's testimony on direct examination, which tended to minimize the seriousness of his criminal involvement (which consisted of two counts of first-degree murder, four counts of robbery with a dangerous weapon, second-degree kidnapping, larceny of a motor vehicle, assault with a deadly weapon, and numerous misdemeanors such as "traffic offenses, simple assault, and misdemeanor breaking and entering") the prosecutor did not exceed the scope of proper examination when he explored the fact scenarios behind some of the incidents. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

State did not exceed the scope of proper cross-examination under G.S. 8C-1-609 when, in response to defendant's testimony, the state suggested the reason police officers searched defendant's home was because they knew defendant had been convicted of selling drugs. State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411, appeal dismissed, cert. denied, 637 S.E.2d 187 (N.C. 2006).

Trial court did not violate G.S. 8C-1-608(b) and G.S. 8C-1-609(a) in allowing the state to cross-examine a robbery defendant about his criminal history; by testifying on direct that he was not a violent person and had never robbed anyone, defendant had opened the door to this questioning. State v. Blair, 181 N.C. App. 236, 638 S.E.2d 914, 2007 N.C. App. LEXIS 85 (2007), cert. denied, appeal dismissed, 361 N.C. 570, 650 S.E.2d 815 (2007).

The trial court properly used this section as guide in limiting the defendant's cross-examination of State's witness as to her criminal record where the defendant did not give notice of his intent to impeach her, nor make an offer of proof as to: (1) whether she was actually convicted of the offenses, (2) what the convictions were, (3) the exact nature of the offenses involved, or (4) how long ago the convictions were obtained. State v. Greene, 351 N.C. 562, 528 S.E.2d 575, 2000 N.C. LEXIS 355 (2000), cert. denied, 531 U.S. 1041, 121 S. Ct. 635, 148 L. Ed. 2d 543 (2000).

Prosecutor's Argument Held Improper. — Where evidence of defendant's past convictions was offered and admitted solely to impeach defendant's credibility, and this was the only legitimate purpose for which the evidence was admissible, it was error for the prosecutor in his argument to use defendant's prior convictions primarily to characterize him as a bad man of a violent, criminal nature and more likely to be guilty of the crime charged. State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Line of Questioning Held Improper. — When prosecutor asked defendant if he had the money or the gun on him during a crime which was the basis for a prior conviction, the prosecutor was trying to prejudice the jury by aligning the prior conviction with the current offense, and trial court committed reversible error in allowing that line of questioning. State v. Wilson, 98 N.C. App. 86, 389 S.E.2d 626 (1990).

As prosecutor's questions on cross-examination were inquiries which went beyond the time and place of defendant's convictions and the punishment imposed, and as case turned on credibility, the defendant was prejudiced by the trial judge's overruling defendant's objections to such questions. State v. Gallagher, 101 N.C. App. 208, 398 S.E.2d 491 (1990).

Testimony regarding prior conviction was admissible, under this Rule 404(b) and was not precluded under this Rule; therefore, the trial court did not err in admitting it and there was no plain error. State v. Sexton, 336 N.C. 321, 444 S.E.2d 879, cert. denied, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), 343 N.C. 516, 472 S.E.2d 23 (1996).

Trial court did not err in denying the defendant's motion in limine seeking to exclude from cross-examination his prior conviction for malicious wounding, as the trial court had no discretion under G.S. 8C-1, Rule 609 to conduct a balancing test as the admission of the evidence was mandatory under Rule 609(a) and a balancing test was only required under Rule 609(b) if the conviction was more than 10 years old, which it was not. State v. Brown, 357 N.C. 382, 584 S.E.2d 278, 2003 N.C. LEXIS 834 (2003), cert. denied, 540 U.S. 1194, 124 S. Ct. 1447, 158 L. Ed. 2d 106 (2004).

Testimony Regarding Prior Conviction Inadmissible. — Although the State exceeded the permissible scope of inquiry into defendant's prior criminal conviction under this section by delving into his motivation for his "forgery activity," the evidence that defendant previously committed forgery to finance his drug habit could properly be admitted under G.S. 8C-1, Rule 404(b), not to show defendant had a propensity to commit forgery or other crimes, but rather to show that his need to support his drug habit and his lack of finances were the motive for the robbery and murder of the victim. State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001).

Under G.S. 8C-1, Rule 609(b), defendant was improperly cross-examined about a 15 year old aggravated battery conviction, because the conviction was stale, it shed no light on his veracity, and substantial likelihood of prejudice outweighed the minimal impeachment value of the evidence. State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002).

Trial court did not err in holding that evidence of defendant's prior conviction for driving while impaired was of little probative value because the evidence of the prior conviction in an unrelated matter was highly prejudicial in nature. Headley v. Williams, 162 N.C. App. 300, 590 S.E.2d 443, 2004 N.C. App. LEXIS 131 (2004), cert. denied, 358 N.C. 375, 598 S.E.2d 136 (2004).

Testimony Regarding Reversed Convictions Not Admissible. — Where the principal to voluntary manslaughter pled guilty for a reduced sentence after the original conviction was reversed, the trial court which tried defendant for accessory after the fact to voluntary manslaughter did not err in denying defense counsel's attempt to elicit testimony from the principal regarding the reversed sentence because the reversal had the force of a "not guilty" verdict. State v. Jordan, 162 N.C. App. 308, 590 S.E.2d 424, 2004 N.C. App. LEXIS 125 (2004).

The trial court properly restricted defendant's questioning of state's witness on his prior convictions for breaking and entering and larceny on the time and place of the convictions and the penalties imposed thereon. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Testimony Regarding Prior Arrests Properly Denied. — Trial court properly denied defendant's motion to question victim about prior arrests, where the arrests showed nothing beyond the facts that victim was arrested and there was insufficient evidence to proceed with the charges. State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (1998).

Error Not Prejudicial. — Although in a personal injury action it was error for defendant to elicit from plaintiff on cross-examination that he had been convicted of speeding, this error was not prejudicial, where there was no reasonable probability that the jury would find plaintiff's testimony incredible merely because he had been convicted on one occasion of speeding. Alexander v. Robertson, 81 N.C. App. 502, 344 S.E.2d 352 (1986).

Even if admission of two cases in which the defendant was not actually involved constituted error, it was not so prejudicial as to justify a mistrial. State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

Admission of evidence concerning the defendant's convictions for failure to follow a truck route and improper turning was improper under this rule, but the error was not prejudicial to the defendant in prosecution for driving while his license was revoked, where defendant admitted driving the van while his license was revoked. State v. Gainey, 84 N.C. App. 107, 351 S.E.2d 819 (1987).

Where it was entirely proper for prosecutor to cross-examine defendant concerning the existence of his prior conviction, prosecutor's limited inquiry as to date of arrest, while improper, did not rise to level of prejudicial error necessary to require a new trial. Knowledge that defendant committed another property crime around same time period could clearly have been gained by permissible cross-examination as to date and place of conviction. State v. Von Cunningham, 97 N.C. App. 631, 389 S.E.2d 286, cert. denied, 326 N.C. 802, 393 S.E.2d 905 (1990).

Although it appeared from the record that defendant chose not to testify at least in part because he feared being impeached with a 1975 conviction which should have been excluded, his failure to take the stand did not rise to the level of prejudicial error, where there was overwhelming evidence of his guilt. State v. Norris, 101 N.C. App. 144, 398 S.E.2d 652 (1990), discretionary review denied, 328 N.C. 335, 402 S.E.2d 843 (1991).

Admission of defendant's 19-year-old sodomy conviction where trial court's finding described no specific facts and circumstances indicating that the probative value of the conviction substantially outweighed its prejudicial effect was harmless error where there was substantial evidence of defendant's homosexuality and overwhelming evidence of defendant's guilt. State v. Ross, 329 N.C. 108, 405 S.E.2d 158 (1991).

Where the jury knew when the witness was tried for his crime, the date he was convicted, and the name of the crime that he had been convicted of, and also knew that the witness had received five years' probation for this crime, the actual date on which one count of the crime occurred could not add any impeachment value to the information about the prior conviction and the failure to allow this question was harmless. State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994), cert. denied, 513 U.S. 1134, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995), cert. dismissed, 342 N.C. 417, 465 S.E.2d 547 (1995).

The admission of evidence regarding a witness's pending burglary charge under G.S. 8C-1, Rule 608 was not plain error in view of the admission under this section of his first-degree burglary conviction and his own testimony that he consumed "four 40[-]ounce beers" on the evening of the shooting. State v. McEachin, 142 N.C. App. 60, 541 S.E.2d 792, 2001 N.C. App. LEXIS 35 (2001), cert. dismissed, 353 N.C. 392, 548 S.E.2d 151 (2001), cert. denied and appeal dismissed, 353 N.C. 392, 548 S.E.2d 152 (2001).

If it was error for the trial court to preclude defendant from cross-examining a prosecution witness about prior shoplifting convictions, nevertheless, as a second offense of shoplifting was a class 2 misdemeanor, concerning which the witness could be cross-examined under G.S. 8C-1, Rule 609(a), defendant did not show prejudice from this error. State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

Even if there were any error in permitting questions about defendant's prior convictions, the evidence against defendant was otherwise overwhelming, and defendant failed to show that, absent the error, the jury would have reached a different result; defendant's convictions were affirmed. State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509 (2004), cert. denied, 359 N.C. 196, 608 S.E.2d 65 (2004).

Because a steamroller driver's convictions for driving without a license and driving with a revoked license were admissible under G.S. 8C-1, N.C. R. Evid. 609(a), and because the trial court had no discretion to exclude such evidence under G.S. 8C-1, N.C. R. Evid. 403, the trial court erred in granting the driver's motion in limine, but defendants had not demonstrated how they were specifically prejudiced by the trial court's error, nor had they alleged the jury verdict would have been different had the convictions been admitted. Therefore, the trial court's error was harmless. Outlaw v. Johnson, 190 N.C. App. 233, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Limiting Instruction Held Proper. — In a robbery prosecution, an instruction that the jury could consider defendant's prior crimes together with all other facts and circumstances bearing upon defendant's truthfulness in deciding whether to believe his testimony, but not as evidence of his guilt, was proper as the instruction explicitly left to the jury the determination of whether the prior convictions bore on defendant's truthfulness. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

No Limiting Instruction on Prior Convictions. — Where defendant initially offered testimony regarding his prior crimes on his direct examination, he was not entitled to a special instruction limiting consideration of such testimony to his "truthfulness" under G.S. 8C-1, N.C. R. Evid. 609. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Defamation Privilege for Statements Made in Course of Judicial Proceeding. — Dismissal of a defamation suit against a lawyer that was based on the lawyer's alleged statement to a witness concerning plaintiff's possible drug use was proper because, under G.S. 8C-1, N.C. R. Evid. 609, the statement was related to plaintiff's credibility, and thus was related to the subject matter of an underlying case against plaintiff, and so the privilege for statements made in course of a judicial proceeding controlled. Jones v. Coward, — N.C. App. —, 666 S.E.2d 877, 2008 N.C. App. LEXIS 1747 (2008).

Applied in Frye v. Anderson, 86 N.C. App. 94, 356 S.E.2d 370 (1987); State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (1994); State v. Conaway, 339 N.C. 487, 453 S.E.2d 824 (1995); In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553, 2000 N.C. App. LEXIS 820 (2000); State v. Weaver, 160 N.C. App. 61, 584 S.E.2d 345, 2003 N.C. App. LEXIS 1671 (2003); State v. Little, 163 N.C. App. 235, 593 S.E.2d 113, 2004 N.C. App. LEXIS 376 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Cited in State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986); State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250 (1987); State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992); State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994); State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Best, 342 N.C. 502, 467 S.E.2d 45 (1996); State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (1997); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Stanfield, 134 N.C. App. 685, 518 S.E.2d 541 (1999); State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547, 2002 N.C. App. LEXIS 411 (2002); State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266, 2002 N.C. App. LEXIS 710 (2002); State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360, 2003 N.C. App. LEXIS 1254 (2003); State v. Edwards, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005); State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005); State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006); State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006); State v. Badgett, 361 N.C. 234, 644 S.E.2d 206, 2007 N.C. LEXIS 416 (2007); State v. Lee, 189 N.C. App. 474, 658 S.E.2d 294, 2008 N.C. App. LEXIS 647 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008); State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 610 except for the proviso that explicitly states that evidence of religious beliefs or opinions may be admitted to show interest or bias. The rule clarifies unsettled law in North Carolina concerning whether, for impeachment purposes, a witness may be cross-examined as to his religious beliefs. See *Brandis on North Carolina Evidence* § 55, at 205 (1982). Evidence probative of something other than veracity is not prohibited by the rule.

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This rule is a rule of evidence and does not affect jury arguments, except in support of the rule that counsel ordinarily may not argue matters not supported by the evidence. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

Counsel may not attack the credibility of a witness because of the witness's religious beliefs or rights of conscience. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

But Evidence of Beliefs May Be Admitted to Show Interest or Bias. — This rule proscribes the admissibility of evidence of the religious beliefs or opinions of a witness for the purpose of attacking his credibility. Such evidence may be admitted to show interest or bias of the witness. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

Indirect Reference by Prosecutor to Defendant's Affirmation. — Prosecutor's argument as to defendant's credibility held not to violate N.C. Const., Art. I, § 13, nor did it violate this rule or G.S. 8C-1, Rule 603, despite an indirect reference to defendant's affirmation as a witness. State v. James, 322 N.C. 320, 367 S.E.2d 669 (1988).

In prosecution charging defendant with being an accessory before the fact to second degree murder, where the real effect of questions about devil worship, satanic bibles, graveyard seances, and the like, could only have been to arouse the passion and prejudice of the jury, and where the relative veracity of the State's two accomplice witnesses and the defendant was critical, the trial court committed reversible error in permitting the district attorney, over objection, to ask defendant questions about devil worshipping activities. State v. Kimbrell, 320 N.C. 762, 360 S.E.2d 691 (1987).

Cited in State v. Reilly, 71 N.C. App. 1, 321 S.E.2d 564 (1984); State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24; State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009).

Rule 611. Mode and order of interrogation and presentation.

(a) *Control by court.* — The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* — A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) *Leading questions.* — Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. (1983, c. 701, s. 1.)

COMMENTARY

This rule, except for subdivision (b), is identical to Fed. R. Evid. 611.

The rule sets forth the objectives the court should seek to obtain rather than spelling out detailed rules. Specific statutes relating to the mode and order of interrogating witnesses and presenting evidence, e.g., G.S. 15A-1226 dealing with when rebuttal evidence may be presented, will not be overridden by the general guidelines set by this rule.

The Advisory Committee's Note says that:

"Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford* v. *United States,* 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which 'go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate,' this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger* v. *United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule."

Subdivision (b) deals with the scope of cross-examination. "In North Carolina the substantive cross-examination is not confined to the subject matter of direct testimony plus impeachment, but may extend to any matter relevant to the issues." *Brandis on North Carolina Evidence* § 35, at 143 (1982). Subdivision (b) rejects the more restricted approach to cross-examination found in Fed. R. Evid. 611(b) and adopts the current North Carolina wide-open cross-examination rule.

Subdivision (c) continues the traditional view that the suggestive powers of the leading question are as general propositions undesirable. Within this tradition numerous exceptions have achieved recognition: The witness who is hostile, unwilling or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778; *State* v. *Greene,* 285 N.C. 482 (1974). As the Advisory Committee's Note points out: "The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command."

The Note states that:

"The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff."

The last sentence of subdivision (c) deals with categories of witnesses automatically regarded and treated as hostile. N.C. Civ. Pro. Rule 43(b) permits leading questions to "an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party." The phrase of the rule "witness identified with" an adverse party is designed to enlarge the category of witnesses who may safely be regarded as hostile without further demonstration. Upon adoption of this rule, N.C. Civ. Pro. Rule 43(b) should be repealed. N.C. Civ. Pro. Rule 30 should be amended to state that depositions are subject to the North Carolina Rules of Evidence.

Editor's Note. — Session Laws 2004-124, ss. 14.5 (a)-(d), provide: "(a) The Administrative Office of the Courts shall conduct a pilot program in Superior Court District 27B for the provision of State Bureau of Investigation lab analyst testimony by videoconference. Notwithstanding any provision of law to the contrary, lab analysts with the State Bureau of Investigation may provide courtroom testimony by means of videoconferencing to courtrooms in Superior Court District 27B for purposes of participating in this pilot project.

"(b) Of the funds appropriated to the Judicial Department in this act, the Department shall use up to the sum of ninety-three thousand two hundred twenty-nine dollars ($93,229) for the 2004-2005 fiscal year for equipment and other expenses to conduct a pilot program in Superior Court District 27B for the provision of SBI lab analyst testimony by videoconference to courtrooms in District 27B.

"(c) Of the funds appropriated to the Department of Justice in this act, the Department shall use up to the sum of forty-eight thousand four hundred fifty dollars ($48,450) for equipment, set-up charges, telecommunication charges, and other expenses associated with providing lab analyst testimony by videoconference from the SBI laboratory.

"(d) The Judicial Department, in consultation and cooperation with the Department of Justice, shall study the feasibility of statewide implementation of a program to allow lab analysts with the State Bureau of Investigation to provide their testimony establishing chain-of-custody and any other necessary courtroom testimony by means of videoconferencing or other remote means. In conducting this study, the departments shall determine the most efficient and cost-effective means of providing such testimony and agree upon the appropriate equipment needed for the provision of testimony in that manner. The departments shall report their findings and recommendations to the Chairs of the House and Senate Appropriations Subcommittees on Justice and Public Safety and the Chairs of the House and Senate Appropriations Committees by January 1, 2005."

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

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The scope of cross-examination is limited to those matters that are relevant to issues before the jury. State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified, 318 N.C. 330, 348 S.E.2d 805 (1986).

Defendant was entitled to a new trial because the trial court erred in depriving defendant of the right to the closing argument to the jury where defendant did not introduce any evidence within the meaning of N.C. Gen. R. Prac. Super. & Dist. Ct. 10 during defendant's cross-examination of a witness about inconsistencies between two statements the witness gave about the shooting. State v. Wells, 171 N.C. App. 136, 613 S.E.2d 705, 2005 N.C. App. LEXIS 1167 (2005).

Scope of Cross-Examination Is Subject to Court's Control. — Cross-Examination of an adverse witness is a matter of right, but the scope of cross-examination is subject to appropriate control by the court. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986); State v. Allen, 90 N.C. App. 15, 367 S.E.2d 684 (1988).

Although cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Trial court did not err in its rulings regarding the railroad's cross-examination of witnesses; in particular, it did not err in not allowing the railroad to cross-examine the expert for the employee, who had brought a negligence action against the railroad for exposure to asbestos, as cross-examination regarding a pathology report would not have been proper since the expert was not relying on the report. Williams v. CSX Transp., Inc., 176 N.C. App. 330, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

Scope of Testimony on Redirect Examination. — Where witness' testimony on redirect examination went beyond the scope of her testimony during direct and cross-examination but the testimony was relevant and otherwise admissible and after its admission, the trial court provided the defendant an opportunity to recross-examine the witness, the trial court did not abuse its discretion. State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994).

Control of Court over Mode and Order of Questioning. — The trial court has authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence pursuant to subsection (a) of this rule. State v. Allen, 90 N.C. App. 15, 367 S.E.2d 684 (1988).

Where counsel for the defendant asked over 60 questions referencing an action arising out of events occurring some 12 to 14 years earlier and these inquiries related to an extremely remote event, they were minimally probative when compared to their prejudicial effect, and were therefore proscribed by Rule 403. Further, the continued repetitive questioning reflected the harassment and "needless consumption of time" that subsection (a) prohibits. Weston v. Daniels, 114 N.C. App. 418, 442 S.E.2d 69 (1994), cert. denied, 336 N.C. 785, 447 S.E.2d 433 (1994).

Trial court exercised its duty to reasonably control the mode and order of interrogating witnesses, and presenting evidence, in order to avoid needless consumption of time as contemplated by G.S. 8C-1, N.C. R. Evid. 611(a). Thus, defendant in a case where defendant was charged with and convicted of voluntary manslaughter did not have the examination of defendant's witnesses improperly limited, as the record in the case indicated that inquiries made by defense counsel on direct, redirect, and cross-examination were repetitive, especially since counsel had just asked, and the witnesses had just answered, the same questions either on direct examination or only moments earlier on cross-examination. State v. Moore, — N.C. App. —, 671 S.E.2d 545, 2009 N.C. App. LEXIS 30 (2009).

Trial court may depart from the regular order of presentation of evidence so as to make that presentation more effective for the ascertainment of the truth, and will be reversed only for abuse of discretion. State v. Brice, 320 N.C. 119, 357 S.E.2d 353 (1987).

Plaintiffs' attempt to generate an exhibit during trial while a witness was undergoing cross-examination, by extracting and charting portions of the testimony, was governed by subsection (a) of this rule, not by Rule 1006, and the trial court acted within its discretion in disallowing it as a kind of premature final argument. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

Harassment of Witness. — Where expert witness was insulted, maligned, continually interrupted and bullied, though she weathered it all with considerable fortitude, the net result may still have been a less than complete, or less than accurate, statement of her opinion; thus, the court could not conclude that the prosecutor's improper conduct toward this witness caused no prejudice to defendant. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

Consolidation of Testimony Not Improper. — Where the trial court in annexation case allowed consolidation of a fire chief's testimony so that he would not have to be recalled, and where petitioners failed to demonstrate that the trial court abused its discretion in allowing the chief to testify as an expert during cross-examination, trial court did not err. Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts of the case. Any circumstance tending to show a defect in the witness' perception, memory, narration or veracity is relevant to this purpose. Medina v. Town & Country Ford, Inc., 85 N.C. App. 650, 355 S.E.2d 831, appeal of right allowed pursuant to Rule 16(b) and petition allowed as to additional issues, 320 N.C. 513, 358 S.E.2d 521 (1987), aff'd, Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

Use of Videotape on Cross Examination. — The trial court did not err when it refused to allow the defendant to cross examine a witness with a tape recording of a call she made to a 911 operator after the witness testified on direct examination that she did not remember the details of the conversation; the trial judge ruled that the defendant could not play a tape recording on cross-examination, although he might introduce the tape during his case in chief. State v. Mason, 144 N.C. App. 20, 550 S.E.2d 10, 2001 N.C. App. LEXIS 339 (2001).

Rule Applicable to Cross-Examination of Experts. — As to the admission of expert opinions during cross-examination, this Rule provides that the court shall exercise reasonable control over the interrogation of witnesses and the presentation of evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

Cross-Examination of Expert Upheld. — State's questions regarding an expert's familiarity with relevant diagnostic treatises, reliability or truth of defendant's statements, and the degree of reliance placed upon them by the expert witness in forming his opinion, and its effort to impeach defendant's stated memory loss, were all well within the bounds of a proper cross-examination. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Trial court properly permitted the prosecutor to question whether defendant's forensic psychologist adequately considered certain recorded statements in diagnosing defendant because the impeachment of the testimony given by the psychologist on direct examination was within the broad scope of cross-examination allowed by the courts in North Carolina. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Prosecutor did not violate G.S. 8C-1, N.C. R. Evid. 611(b) by questioning an expert in forensic psychiatry regarding the expert's forensic practice, the contents of the records to which the expert referred on direct examination, the expert's status as a paid witness for the Center for Death Penalty Litigation, and the expert's potential bias. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Limitation on Cross-Examination of Expert Upheld. — Sexual assault victim's previous sexual abuse at the hands of her father properly excluded from defendant's cross examination of child psychologist since (1) the credibility of the psychologist's and the victim's testimony were not at issue, and (2) defendant made no showing that the trial court's limitation of the cross examination could have improperly influenced the jury's verdict. State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001).

Substantive cross-examination is not confined to the subject matter of direct testimony plus impeachment, but may extend to any matter relevant to the issues. State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987).

But evidence of defendant's prior use of cocaine and marijuana was irrelevant and inadmissible under G.S. 8C-1, Rule 608(b), and under Rule subsection (b) of this rule, because defendant was not a key prosecution witness. State v. Wilson, 118 N.C. App. 616, 456 S.E.2d 870, cert. denied, 341 N.C. 424, 461 S.E.2d 768 (1995).

The qualification "ordinarily," used in subsection (c) of this rule, is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact. The authority to sustain objections to leading questions directed to friendly witnesses in such situations is inherent in the discretion granted the trial court in this rule. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986).

The application of subsection (c) of this rule is within the discretion of the trial judge and the ruling is reversible only for abuse of discretion. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Discretion of Trial Judge to Allow Leading Questions on Direct Examination. — It is within the discretionary power of the trial judge to allow leading questions on direct examination. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

A ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion. State v. Howard, 320 N.C. 718, 360 S.E.2d 790 (1987).

Trial court did not abuse its discretion in declaring a witness against defendant to be declared a hostile witness and in allowing the State to ask leading questions, as the witness refused to answer some questions and was evasive when he did respond since he and defendant had "made up" after defendant had shot at him. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Trial court did not abuse its discretion in allowing the state to use leading questions in its direct examination of one of its witnesses because the witness's testimony demonstrated her bias in favor of defendant, and, therefore, her adversity to the state; the witness testified that she had been defendant's girlfriend for eleven years, that she loved defendant, that they had two children together, and that she did not want defendant to go to jail. State v. Applewhite, 190 N.C. App. 132, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008).

Counsel may be allowed to lead a witness on direct examination when the witness has difficulty in understanding the question because of immaturity or advanced age. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

When the witness has difficulty in understanding the question because of age or maturity, or where inquiry is made into a subject of a delicate nature, such as sexual matters, leading questions are necessary to develop the witness' testimony. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

The use of leading questions is a matter of right during cross-examination. State v. Mitchell, 317 N.C. 661, 346 S.E.2d 458 (1986).

Review of Rulings on Leading Questions. — Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986); State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990); State v. Holmes, 101 N.C. App. 229, 398 S.E.2d 873 (1990), aff'd, 330 N.C. 826, 412 S.E.2d 660 (1992).

Leading Question Permitted. — Where the record disclosed that at the time of the crime the prosecuting witness was 14 years old, and that at the time of the trial she was 15, and her testimony, in open court, pertained to sexual matters of a delicate, sensitive, and embarrassing nature, leading questions on direct examination were permissible under such circumstances to develop the witness' testimony. State v. Dalton, 96 N.C. App. 65, 384 S.E.2d 573 (1989).

Because victim was 10 years old at the time of trial and was not only testifying about sexual matters, but was testifying against her father who was present in the courtroom, leading questions were appropriate. State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990).

The defendant failed to show abuse of discretion by the court in allowing the use of leading questions when questioning the victim's mother where the witness was having trouble answering questions that were put to her. State v. Cox, 344 N.C. 184, 472 S.E.2d 760 (1996).

The court did not abuse its discretion in allowing the prosecutor to use leading questions to extract the testimony of his chief witness during the defendant's capital murder trial, where the witness was the former girlfriend of the defendant, who had murdered the girlfriend's grandmother and the grandmother's friend, and she was not articulate and was nervous at testifying and seeing the defendant for the first time in a long while. State v. White, 349 N.C. 535, 508 S.E.2d 253 (1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2376, 144 L. Ed. 2d 779 (1999).

Where the record showed that the questions that the defendant objected to during trial were not so much "leading" as they were "bridges" or summaries of testimony, and where the case was long and complicated, the court did not err in allowing the district attorney to direct witness's attention to a certain topic by asking leading questions. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999).

While the State's question to a witness asking her to describe the clothes defendant was wearing when he shot the victim may have been a leading question, it was not objectionable, because the question was merely reiterating and further developing the witness's previous statement in which she had stated that defendant shot the victim. State v. Stafford, 150 N.C. App. 566, 564 S.E.2d 60, 2002 N.C. App. LEXIS 578 (2002), cert. denied, 357 N.C. 169, 581 S.E.2d 444 (2003).

Leading Questions Upheld When Delicate Subject Matter Was Involved. — Where the subject matter of the young victim's testimony, whether and how sexual act was committed, was a delicate matter, the trial judge did not abuse his discretion by allowing the district attorney to ask leading questions of the victim. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

In an action charging defendant with six counts of first-degree statutory sexual offense, two counts of attempted first-degree statutory sexual offense, seven counts of taking indecent liberties with a minor, and six counts of lewd and lascivious conduct with a minor, the State was properly permitted to ask leading questions of the child victim where the victim, who was 11 years old at the time of trial, was hesitant to answer questions regarding sexual matters of a delicate nature. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Leading Question to Refresh Memory Upheld. — The prosecutor's leading question eliciting the fact that the defendant spat on the decedent after shooting him was permissible where he used it in an attempt to refresh the witness' memory. State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Misconstruction of Answers by Questioner. — The questioner may not distort the witness' testimony by purposely misconstruing answers and cross-examining the witness on the basis of the misconstruction. State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (1994).

Trial court did not abuse its discretion in requiring list of defense witnesses so that jurors, during voir dire, could look at the list and answer questions concerning their knowledge of and relationship to any of the witnesses who might be called to testify. State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987).

No Abuse of Discretion By Judge. — Where judge did no more than ensure that defense counsel was not consuming the court's time with irrelevant material and, once assured by counsel that the evidence had relevance, the court permitted the questioning to continue without further comment and expressed no opinion on the evidence, the court in no way abused its discretion nor approached the level of interference which would be error. State v. Harris, 338 N.C. 129, 449 S.E.2d 371 (1994), cert. denied, 514 U.S. 1100, 115 S. Ct. 1833, 131 L. Ed. 2d 752 (1995).

Trial court did not abuse its discretion in limiting defendant's cross-examination of a witness for hearsay reasons. State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005).

Cross-Examination of Defendant Upheld. — Where defendant testified in his own behalf and denied his guilt, it was appropriate for the State to ask him to explain, if he could, the State's evidence which was inconsistent with this denial. Such cross-examination properly challenged defendant's credibility, which ultimately was a question for the jury. State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987).

Where the State, on cross-examination, introduced evidence of defendant's phone conversation in which defendant allegedly made an admission that conflicted with defendant's trial testimony, this did not violate G.S. 8C-1-611(b); testing credibility and impeaching explanations were relevant and within scope of cross-examination. State v. Phillips, 171 N.C. App. 622, 615 S.E.2d 382, 2005 N.C. App. LEXIS 1369 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

Prosecutor was entitled to cross-examine defendant regarding statements referring to an officer's testimony given during trial to challenge the credibility of defendant's testimony. State v. Parker, 187 N.C. App. 131, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

Refusal of Cross-Examination Upheld. — Court's refusal to permit defendant to cross-examine detective about police department's having used defendant as an informant was proper. Defendant's purpose was to show that he had credibility with the police department, but at that time only the State had presented evidence, defendant's credibility had not been attacked, and he was not entitled to bolster it in advance. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Because a sheriff had a nondelegable duty to provide medical care to inmates, defendant, who was employed by prison health services as a mental health clinician, was an agent of the sheriff as a matter of law; in a prosecution for sexual activity by a custodian, the trial court did not err in barring in limine the introduction of a contract, which according to defendant showed that he was an independent contractor and not an agent or employee of the sheriff's office, because as a matter of law defendant was acting as agent of sheriff when the crimes were allegedly committed. State v. Wilson, 183 N.C. App. 100, 643 S.E.2d 620, 2007 N.C. App. LEXIS 844 (2007), aff'd, 362 N.C. 162, 655 S.E.2d 359 (2008), State v. Wilson, 183 N.C. App. 100, 643 S.E.2d 620, 2007 N.C. App. LEXIS 844 (2007).

Defendant was not prejudiced, as contemplated by G.S. 15A-1443(a), by a trial court's limitation on cross examination pursuant to N.C. R. Evid. 611(b): (1) defense counsel was permitted to question a child victim about the child's relationship with the child's mother, the child's belief that the child's mother preferred the child's sisters over the child, and the child's frustration with the child's living conditions; and (2) to the extent that counsel was limited in some respects when cross-examining the child, counsel was able to elicit comparable testimony from other witnesses, defendant, and the child's mother. In light of this extensive evidence, admission of testimony about the kinds of fights the child had with the child's mother, the child's crying about having to do housework, how the child expressed the child's frustration, and the child's desire that defendant and the child's mother not marry could not have affected the verdict. State v. Cook, — N.C. App. —, 672 S.E.2d 25, 2009 N.C. App. LEXIS 112 (2009).

Questions to Rebuttal Witness. — Impeaching questions about a previous alleged knifing incident asked by prosecutor of rebuttal witness held not to constitute error. State v. Price, 118 N.C. App. 212, 454 S.E.2d 820 (1995).

Cross-Examination of Defendant's Mother. — The prosecutor properly cross-examined the murder defendant's mother regarding a letter she wrote to the defendant stating that she understood the defendant's role in the murder "and everyone else that had a part in it," since the statement went to the issue of the witness' understanding or knowledge that roles or parts were played by the coconspirators in the murder. State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999).

Relationship Between Counsel and Witness Should Be Considered. — The rule prohibiting leading questions is not based on a technical distinction between direct examination or cross-examination, but on the alleged friendliness existing between counsel and his witness. Therefore, the trial court should consider the true relationship between the interrogator and the witness in ruling on the propriety of leading questions during either direct examination or cross-examination. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986).

Findings as to Hostility or Friendliness of Witness. — While the better practice would be for the trial court to make findings and conclusions and declare formally that a witness is friendly to the party cross-examining him or adverse to the party calling him as a witness, when the record on appeal manifestly shows that the witness was only ostensibly the witness of the party calling him or her and was entirely friendly to the party cross-examining him or her, the trial court does not commit reversible error by failing to make such a formal declaration. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986).

Prohibition of Leading Questions Upheld. — In a prosecution for rape and incest, the trial court did not err by sustaining the State's objections to leading questions asked of defendant's wife, a State's witness who was only nominally adverse to the defendant. State v. Hosey, 318 N.C. 330, 348 S.E.2d 805 (1986).

Although the witness was called to contradict the testimony of a prior witness, defendant failed to argue the exception at trial and failed to cite any case law in support of its application in his brief on appeal; therefore, there was no abuse of discretion where the trial court sustained the timely objection of the State to what was a leading question posed by counsel on direct examination of a non-hostile witness. State v. Wiggins, 136 N.C. App. 735, 526 S.E.2d 207, 2000 N.C. App. LEXIS 149 (2000).

Trial court properly sustained the State's objections to six leading questions put to defendant on direct examination, where defendant had already had an opportunity to deny the charges against him and, therefore, did not need leading questions to help him do that. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

Compensation of Expert Witness. — The subject of compensation of a defendant's expert witness is clearly an appropriate matter for cross-examination. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

The State may cross-examine a court-appointed and state-funded expert witness about any potential bias resulting from compensation as a defense witness. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

Cumulative Character Evidence. — It was not error for the trial judge, in a trial for first degree sexual offense, after the defendant had called and examined six character witnesses, to ask him to list his seven remaining character witnesses and have them stand and state their names and addresses, where the jury was informed by the comments of the court and counsel that these witness were present to attest to the defendant's good character and reputation in the community. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

Factors Affecting Mental State. — Defendant was properly permitted to cross-examine plaintiff about other factors in her life which had a bearing upon her mental state such as acts of wrong-doing on the part of her children. Pelzer v. UPS, Inc., 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. denied, 346 N.C. 549, 488 S.E.2d 808 (1997).

Illustrative Cases. — The prosecutor's questions of a murder defendant's expert witness were well within the bounds of cross-examination, where the defendant's mental health expert had testified that the disparity between the defendant's answers, which were like those that only a profoundly mentally ill, psychotic, or crazy person would have given, and all other indications, which were that he was not profoundly mentally ill, could be interpreted as a cry for help, while the prosecutor's questions merely presented the alternative theory that the defendant was lying. State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998), cert. denied, 525 U.S. 1180, 119 S. Ct. 1119, 143 L. Ed. 2d 114 (1999).

The trial court properly excluded testimony of defendant and two witnesses regarding the general availability of weapons at the prison where he and the victim were incarcerated where the officer had already testified that he did not know how frequently the victim's cell block was searched and that he could not recall whether he or any other officers had ever found knives during a search of the victim's cell block; where defendant had already testified extensively regarding frequent violence among the inmates and that, during a cell-block search following a violent incident, officers discovered knives in twenty of the twenty-four cells in his and the victim's cell block; and where a former legal services attorney who visited the prison was in no better position than the jury to give his opinion about the prevailing conditions there at the time of the murder. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Questions to defendant regarding the existence and location of a rubber vagina were premissible where the pupose of the questions was used to impeach defendant. State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

It was error to exclude under G.S. 8C-1, N.C. R. Evid. 403, testimony that in a questionnaire the victim had stated that she sometimes saw herself as if she were looking at someone else, that she was sometimes not sure whether something that happened was real or a dream, and that she sometimes heard voices inside her head; the evidence should have been admitted under G.S. 8C-1, N.C. R. Evid. 611(b), because it went to the credibility of the victim, whose testimony was crucial to the state's case, because the victim's testimony was contradicted by two eyewitnesses, and because attacking the victim's credibility was the defense's main theory. State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008).

Prosecutor's questions relating to an expert's records did not violate G.S. 8C-1, N.C. R. Evid. 611; the questions were straightforward without any intimation of wrongdoing or of falsifying records. Therefore, defendant's contention that the prosecutor's cross-examination of the expert opened the door to defense counsel's question, "You didn't doctor any of these records at all because you're being paid, did you?" was without merit. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Defendant failed to show error in the trial court's failure to restrict the scope of defendant's wife's cross-examination, as any error in the questioning regarding defendant's stepdaughter's statements to a social worker was not prejudicial and the trial court did sustain defendant's objections to argumentative questions. State v. Reaves, — N.C. App. —, 676 S.E.2d 74, 2009 N.C. App. LEXIS 523 (2009).

Caution in the Examination of Physical Evidence by Jury. — The trial court's jury instruction that jury members could wear rubber gloves while examining exhibits did not indicate that the trial judge believed testimony that the defendant had HIV, but rather, was the proper exercise of reasonable control over presentation of evidence. State v. Monk, 132 N.C. App. 248, 511 S.E.2d 332 (1999).

Payment of a State's witness after her cooperation in an operation that led to defendant's arrest and prior to his trial did not render the witness's testimony inherently unreliable; the witness and a police sergeant were vigorously cross-examined and there was no evidence that the payments were quid pro quo for the witness's testimony. State v. Brice, 167 N.C. App. 72, 604 S.E.2d 356, 2004 N.C. App. LEXIS 2054 (2004).

Applied in State v. Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985); Burriss v. Heavner, 83 N.C. App. 538, 350 S.E.2d 897 (1986); York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987); State v. Barnes, 91 N.C. App. 484, 372 S.E.2d 352 (1988); State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988); State v. Jones, 98 N.C. App. 342, 391 S.E.2d 52 (1990); State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808 (1993); State v. Wilson, 335 N.C. 220, 436 S.E.2d 831 (1993); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994); State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994); State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994); State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995); State v. Alkano, 119 N.C. App. 256, 458 S.E.2d 258; State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995); State v. Frazier, 121 N.C. App. 1, 464 S.E.2d 490 (1995); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002).

Cited in State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448; State v. Perry, 69 N.C. App. 477, 317 S.E.2d 428 (1984); Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 97 N.C. App. 511, 389 S.E.2d 576 (1990); State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990), cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992); State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992); State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993); State v. Pharr, 110 N.C. App. 430, 430 S.E.2d 267 (1993); State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994); State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995); In re Stradford, 119 N.C. App. 654, 460 S.E.2d 173 (1995); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); Jones v. Rochelle, 125 N.C. App. 82, 479 S.E.2d 231 (1996); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997); State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998); State v. Shuler, 135 N.C. App. 449, 520 S.E.2d 585, 1999 N.C. App. LEXIS 1144 (1999); State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858, 2000 N.C. App. LEXIS 986 (2000); State v. McGill, 141 N.C. App. 98, 539 S.E.2d 351, 2000 N.C. App. LEXIS 1284 (2000); State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000); State v. Rourke, 143 N.C. App. 672, 548 S.E.2d 188, 2001 N.C. App. LEXIS 336 (2001); State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002).

Rule 612. Writing or object used to refresh memory.

(a) *While testifying.* — If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before testifying.* — If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and conditions of production and use.* — A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial. (1983, c. 701, s. 1.)

COMMENTARY

This rule is a reorganization of Fed. R. Evid. 612 and differs substantively from the federal rule in five ways. The rule omits a reference to the Jencks Act. Also, it states explicitly that it applies to trials, hearings and depositions and that it applies to objects as well as writings. The rule explicitly provides for inspection of the writing or object if production of the object or writing at the trial is impracticable. Finally, subsection (c) adds privileged information to the grounds which may be the basis of an *in camera* examination and excision by the court.

If the writing is used by the witness while testifying to refresh his memory, the adverse party is entitled to production. If the writing is used before testifying for the purpose of testifying, disclosure is in the discretion of the court. Requiring disclosure of writings used before testifying is a change in North Carolina practice. See, e.g., *State* v. *Cross,* 293 N.C. 296 (1977).

As the Advisory Committee's Note points out: "The purpose of the phrase 'for the purpose of testifying' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness."

The phrase "for the purpose of testifying" read together with the phrase "and the court in its discretion determines that the interests of justice so require" are intended to maintain the work product "privilege" for lawyers and others who assist in preparation for trial and in most instances it is likely that the judge will exercise his discretion in such a manner to prevent discovery of statements used before testifying to refresh a witness' recollection. Saltzburg and Redden, *Federal Rules of Evidence Manual,* p. 417 (3d ed. 1982).

In subsection (c), by adding privileged information to those items which the court may consider *in camera* with possible excision of the material, the intention was to make it clear that the rule does not invade the existing authority of the court in areas such as protecting the confidentiality of the informants.

On the other hand, exculpatory writings are available to criminal defendants irrespective of Rule 612. See *United States* v. *Agurs,* 427 U.S. 97 (1976); *United States* v. *Nobles,* 422 U.S. 225 (1975); *Brady* v. *Maryland,* 373 U.S. 83 (1963); *State* v. *Hardy,* 293 N.C. 105 (1977).

CASE NOTES

Witness Need Not Establish Foundation for Use of Notes. — Defendant's assertion that this rule requires a witness to establish a foundation for the use of notes to refresh his memory was without merit; this rule stands for nothing other than the requirement that an adverse party is entitled to production of the writing or object which a witness used to refresh his or her memory. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Notes Carried to Witness Stand. — It is not error for the trial court to refuse to afford defendant access to notes carried to the witness stand by an investigating officer who does not refer to them during his testimony. State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992), citing State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

Records Prepared in Normal Course of Business. — An accident report was subject to disclosure under G.S. 8C-1, N.C. R. Evid. 612(b), as discovery material because it was prepared as part of a corporation's accident control program in the ordinary course of business and not for the purpose of obtaining legal advice or in anticipation of litigation. Fulmore v. Howell, 189 N.C. App. 93, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

This rule does not provide for the admission into evidence of writings used to refresh a witness' memory, because the admissibility of these writings is subject to the same rules of admissibility that apply to any evidence. State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994).

Trial court did not abuse its discretion in compelling, in accordance with G.S. 8C-1, N.C. R. Evid. 612, the discovery of non-privileged documents the employee reviewed in anticipation of his deposition because, although defendants argued that documents reviewed by the employee were either protected by the attorney-client privilege or the doctrine of work product, defendants failed to submit the allegedly privileged documents to either the trial court, in camera, or to the court of appeals, offering a specific explanation as to why the documents were protected. Fulmore v. Howell, 189 N.C. App. 93, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

Applied in In re Helms, 77 N.C. App. 617, 335 S.E.2d 917 (1985).

Cited in State v. Steele, 86 N.C. App. 476, 358 S.E.2d 98 (1987); Myers v. Liberty Lincoln-Mercury, Inc., 89 N.C. App. 335, 365 S.E.2d 663 (1988); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993).

Rule 613. Prior statements of witnesses.

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to subdivision (a) of Fed. R. Evid. 613. There are no North Carolina cases on the subject matter of subdivision (a).

The Advisory Committee's Note states:

"The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. This rule abolishes this useless impediment to cross-examination. *** Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily."

The federal rule includes a subdivision (b) barring evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny it. Since subdivision (b) is omitted, foundation requirements for admitting inconsistent statements will be governed by case law. See *Brandis on North Carolina Evidence* § 48 (1982).

CASE NOTES

Statement Unfairly Prejudicial. — Where improperly admitted hearsay statement was admitted under the guise of corroboration, defendant was unfairly prejudiced and was entitled to a new trial. State v. Frogge, 345 N.C. 614, 481 S.E.2d 278 (1997).

Witness's prior statement, which contained information manifestly contradictory to his testimony at trial, did not corroborate his testimony and was improperly admitted under the guise of corroborating testimony made at trial. State v. Frogge, 345 N.C. 614, 481 S.E.2d 278 (1997).

Failure to Prove Prior Statement Was Requested. — When defense counsel failed to request that a bench conference be recorded, resulting in a lack of proof that defense counsel asked for and failed to receive the contents of defendant's prior statement, there was no violation of G.S. 8C-1, N.C. R. Evid. 613. State v. Turner, 177 N.C. App. 423, 628 S.E.2d 464, 2006 N.C. App. LEXIS 979 (2006), cert. denied, 361 N.C. 226, 643 S.E.2d 398 (2007).

Restricting Cross-Examination. — Trial court did not err under N.C. R. Evid. 602 in prohibiting the owner of real property in a condemnation action from cross-examining pursuant to N.C. R. Evid. 613 a North Carolina Department of Transportation expert witness about the nature of an in-house transaction involving a comparable property as the witness stated that the witness did not know what the relationship between the parties in the transaction was. DOT v. Haywood Oil Co., — N.C. App. —, 673 S.E.2d 712, 2009 N.C. App. LEXIS 258 (2009).

Cited in State v. Frogge, 351 N.C. 576, 528 S.E.2d 893, 2000 N.C. LEXIS 357 (2000).

Rule 614. Calling and interrogation of witnesses by court.

(a) *Calling by court.* — The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* — The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* — No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled. (1983, c. 701, s. 1.)

COMMENTARY

Subdivisions (a) and (b) of this rule are identical to Fed. R. Evid. 614(a) and (b).

Subdivision (a) authorizes the court to call witnesses and is consistent with North Carolina practice. See *Brandis on North Carolina Evidence* § 37 (1982).

Subdivision (b) authorizes the court to examine witnesses, whether called by itself or by a party, and is consistent with North Carolina practice. *Id.*

It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances.

The court may not in calling or interrogating a witness do so in a manner as to suggest an opinion as to the weight of the evidence or the credibility of the witness in violation of G.S. 15A-1222 or G.S. 1A-1, Rule 51(a). *Id.*

Subdivision (c) differs from Fed. R. Evid. 614(c) by providing for an automatic objection to the calling or interrogation of witnesses by the court. Subdivision (c) is consistent with N. C. Civ. Pro. Rule 46(a)(3) which provides that no objections are necessary with respect to questions propounded to a witness by the court.

CASE NOTES

Clarification of Testimony. — The court may question a witness for the purpose of clarifying the witness' testimony and for promoting a better understanding of it. Such examination must be conducted with care and in a manner which avoids prejudice to either party. State v. Chandler, 100 N.C. App. 706, 398 S.E.2d 337 (1990).

The court properly uses its authority under subsection (b) of this rule when it questions witnesses in order to clarify ambiguous testimony and to enable the court to rule on the admissibility of certain evidence and exhibits. State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991).

Questions by judge to expert witness did not denigrate defendant's witness of her evidence, but instead helped to develop testimony favorable to the defense and assist the trial court in its task of deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence. State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994), cert. denied, 516 U.S. 834, 116 S. Ct. 111, 133 L. Ed. 2d 63 (1995).

The court's questioning of witness to clarify the usual practice of mediation at the sheriff's department when trouble was brewing was proper since such questioning did not suggest that the court was expressing an opinion about the legitimacy of such a practice and did not aid the prosecution's case. State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996).

Trial judge did not err in questioning witnesses where the questions were designed to clarify the sequence of events and the trial court did not state an opinion as to the facts or the witnesses' credibility. State v. Smarr, 146 N.C. App. 44, 551 S.E.2d 881, 2001 N.C. App. LEXIS 789 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 500 (2002).

Trial court did not abuse its discretion in questioning witnesses in front of the jury to clarify the evidence and testimony being presented. The court's questioning during the sentencing phase, when no jury was present, was also proper. State v. Mack, 161 N.C. App. 595, 589 S.E.2d 168, 2003 N.C. App. LEXIS 2253 (2003).

Pursuant to G.S. 8C-1, N.C. R. Evid. 614(b), a court properly interrogated a witness as to the degree of penetration there could be inside the vagina of a female with a "fixed septum"; the judge's questions were necessary to clarify a critical element of the case, and the jury could not have reasonably inferred that the judge was expressing an opinion as to the facts of the case. State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004).

Trial court asking questions of a witness during defendant's felonious breaking and entering trial was upheld on appeal, because the trial court was merely seeking clarification of the testimony and did not rise to the level of expressing an opinion that defendant was guilty. State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

Defendant's conviction of first-degree murder under G.S. 14-17, was affirmed; the trial court properly denied defendant's requested jury instructions on voluntary intoxication and second-degree murder, as defendant showed no signs of intoxication when he committed the crime, and the evidence of premeditation was very strong, and the trial court did not abuse its authority to question witnesses under G.S. 8C-1, N.C. R. Crim. P. 614(b), as the trial court only questioned jurors to focus the witness, or to clarify the testimony. State v. Rios, 169 N.C. App. 270, 610 S.E.2d 764, 2005 N.C. App. LEXIS 685 (2005), appeal dismissed, cert. denied, — N.C. —, 623 S.E.2d 37 (2005).

Trial court did not err when it asked a juvenile court counselor to state the juvenile's probation terms and conditions; the question clarified the testimony and provided the trial court with a better understanding of the recommended disposition, and the juvenile failed to show how the trial court's question prejudiced him. In re D.A.S., 183 N.C. App. 107, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Trial court did not commit error or show bias in questioning an expert witness in a medical malpractice trial where the questions focused on the mechanics of scientific concepts involved in child delivery, the questions were clearly for the jury's benefit, and the trial court had asked the plaintiffs several times, out of the jury's presence, to put on record any questions by the court that they found prejudicial, but the plaintiffs had not done so. O'Mara v. Wake Forest Univ. Health Scis., 184 N.C. App. 428, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007), petition allowed as to additional issues, 362 N.C. 468 (2008).

Ability to Call Witnesses. — Under G.S. 8C-1, N.C. R. Evid. 614(b), a deputy commissioner presiding over a workers' compensation case was authorized to order the deposition of the claimant's physician and to submit a written hypothetical and written follow-up questions to the physician, without violating the employer's due process right to an impartial decision maker. Handy v. PPG Indus., 154 N.C. App. 311, 571 S.E.2d 853, 2002 N.C. App. LEXIS 1442 (2002).

Trial court did not err in calling a mother as a witness pursuant to G.S. 8C-1-614(b) in a review hearing in which it considered a change in a child's permanent plan where the dangers of expressing an opinion as to the weight of the testimony and its credibility did not exist in a bench proceeding. In re L.B., 184 N.C. App. 442, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

When Judge's Question Constitutes Expression of Opinion. — A trial judge's question, propounded for the purpose of clarification, is an expression of opinion only if a jury reasonably could infer that the question intimated an opinion as to a factual issue, the witness' credibility or the defendant's guilt. State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986).

Partiality of Judge. — Defendant's rights were not violated when the trial court "moved the trial forward" by maintaining control over certain witness examinations by defense counsel; while the trial court was not allowed to show partiality toward a party, it did have the discretionary power to supervise and control the trial and no abuse of that discretion was shown. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Applied in State v. Hill, 105 N.C. App. 489, 414 S.E.2d 73 (1992).

Cited in State v. Bright, 320 N.C. 491, 358 S.E.2d 498 (1987); Grasty v. Grasty, 125 N.C. App. 736, 482 S.E.2d 752 (1997).

Rule 615. Exclusion of witnesses.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice. (1983, c. 701, s. 1.)

COMMENTARY

This rule is similar to Fed. R. Evid. 615 except that the word "shall" in the first sentence has been changed to "*may* order witnesses excluded," and the phrase "a person whose presence is determined by the court to be in the interest of justice" has been added as a fourth exception.

The use of "*may* order witnesses excluded" rather than "shall," as in the federal rule, is intended to preserve discretion in the trial judge, allowing him to take into account such things as the physical setting of the trial. However, the practice should be to sequester witnesses on request of either party unless some reason exists not to.

In North Carolina the usual practice has been to separate witnesses and send them out of the hearing of the court when requested, but this has been discretionary with the trial judge and not a matter of right. See *Brandis on North Carolina Evidence* § 20 (1982). G.S. 15A-1225, which codifies this practice, should be amended to conform to Rule 615.

The Advisory Committee's Note states:

"The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *** Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. *** (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4."

A government investigative agent would be within the second exception. See S. Rept. No.

93-1277, 93d Cong., 2d Sess. (1974). The third category would include an expert listening to testimony for the purpose of testifying in his capacity as an expert.

A fourth exception to Rule 615 was added to provide that the rule does not authorize the exclusion of a person whose presence is determined by the court to be in the interest of justice. For example, when a minor child is testifying the court may determine that it is in the interest of justice for the parent or guardian to be present even though the parent or guardian is to be called subsequently. When this exception is relied upon the court should state the reasons supporting its determination that the presence of the person is in the interest of justice.

CASE NOTES

Purpose of Sequestration. — The aim of sequestration is two-fold; first, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (1998).

Denial of Motion to Sequester Witnesses Held Proper. — Where before denying defendant's motion to sequester witnesses, the court determined that there were no eyewitnesses to the crimes and that defendant had copies of the pre-trial statements of the witnesses to use in cross-examination, defendant failed to establish an abuse of discretion in the denial of his motion. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Denial of defendants' motions to sequester was not improper where the trial court's ruling showed adequate deliberation and weighing of the merits, and neither defendant identified any instance of a witness conforming testimony to that of another witness. State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

Review on Appeal. — The trial court's ruling on the motion to sequester is reviewable on appeal only upon a showing of abuse of discretion. State v. Russell, 84 N.C. App. 383, 352 S.E.2d 922, appeal dismissed, 319 N.C. 677, 356 S.E.2d 784, cert. denied, 484 U.S. 946, 108 S. Ct. 336, 98 L. Ed. 2d 363 (1987); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Applied in State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994); State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Cited in State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.

(a) *Definitions.* — The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) *Remote Testimony Authorized.* — A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) *Hearing Procedure.* — Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) *Order.* — An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.
(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.
(3) State any special conditions necessary to facilitate the cross-examination of the witness.
(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.
(5) State any other conditions necessary for taking or presenting testimony.

(e) *Testimony.* — The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) *Nonexclusive Procedure and Standard.* — Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, s. 1.)

Editor's Note. — Session Laws 2009-514, s. 3, provides: "This act becomes effective December 1, 2009, and applies to any hearings or trials held on or after that date. Nothing in this act shall be construed to abrogate any judicial rulings or decisions prior to the effective date of this act that allowed or disallowed witness testimony in any criminal proceeding or abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness."

ARTICLE 7.

Opinions and Expert Testimony.

Rule 701. Opinion testimony by lay witness.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 701.

Limitation (a) retains the traditional requirement that lay opinion be based on firsthand knowledge or observation. See *Brandis on North Carolina Evidence,* § 122, at 468 (1982).

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. This is a different test from the more traditional "collective facts exception" which allows lay opinions or inferences only where a shorthand expression is "necessary" because articulation of more primary components is impossible or highly impracticable. P. Rothstein, *Rules of Evidence for United States Courts and Magistrates,* at 257 (1980). See *Brandis on North Carolina Evidence* § 125, at 474-76 (1982). Nothing in the rule would bar evidence that is commonly referred to as a "shorthand statement of fact." *Id.* at 476.

As the Advisory Committee's Note points out: "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. *** If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule."

CASE NOTES

Section 8C-1, Rule 704 does allow the admission of lay opinion evidence on ultimate issues, but to qualify for admission, the opinion must be helpful to the jury. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Test for the admissibility of an opinion of either a lay or expert witness under this rule and G.S. 8C-1, Rule 702, respectively, is helpfulness to the trier of fact. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Trial court did not err in admitting the testimony of the employee's former co-workers as lay opinion testimony regarding the employee's exposure to asbestos, as the employee showed that the former co-workers had rationally based perceptions since they worked around the employee and that their testimony would be helpful to understanding the employee's exposure to asbestos. Williams v. CSX Transp., Inc., 176 N.C. App. 330, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

Shorthand Statements of Fact. — This exception includes what are frequently called shorthand statements of fact. The comment "he was enjoying what he was doing" represents an instantaneous conclusion of the witness based on his perception of defendant's appearance, facial expressions, mannerisms, etc., and as such, it is a shorthand statement of fact. State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (1994), cert. denied, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995).

Witness's testimony that defendant was "going to do something" and that they did not have time to leave before defendant approached, represented an instantaneous conclusion based on observation of a variety of facts, and could be characterized as a "shorthand statement of fact". State v. Johnston, 344 N.C. 596, 476 S.E.2d 289 (1996).

Witnesses' testimony of their impressions of the murder victim, the defendant/wife, and their problematic marital relationship was properly admitted in the wife's murder prosecution since the impressions were based on their personal observations and were as such shorthand statements of fact. State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999).

The witness' statement that it looked to him like the defendant was trying to shoot the decedent in the head was a permissible opinion in the form of a "shorthand statement of fact;" asking the witness to recite the precise position of the decedent, the stance of the defendant, and the angle of the gun would have been impractical. State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

The following testimony was admissible under this rule as shorthand statements of fact: An officer's testimony that the victim's screaming sounded like somebody fearing for his life and that the crime scene was worse than a hog killing; another officer's testimony that defendant looked guilty when, as defendant saw the officer approaching, he immediately raised his hands; and, finally, the testimony of two other witnesses that defendant appeared calm, relaxed, and without remorse. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Challenged testimony by a sexual abuse victim's mother concerning her observations of the abuser related to conclusions as to the mental state of the abuser derived from observation of a variety of facts and circumstances, and the testimony was properly admitted under G.S. 8C-1, N.C. R. Evid. 701, as shorthand statements of facts. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

As a victim's statement was properly admissible as a shorthand restatement of the victim's perception at the time of the attack that defendant was the aggressor and would have done the victim severe bodily harm, the supreme court could not say that the trial court abused its discretion by admitting this statement into evidence. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Trial court properly admitted, under G.S.

8C-1, Rule 701, G.S. 8C-1, Rule 704, lay opinion testimony of various law enforcement officers that defendant "tried to kill" one of the responding officers because their testimony amounted to nothing more than shorthand statements of fact based on their knowledge and observations and did not implicate defendant's guilt, mental state, or intent. The officers' testimony was based on their perceptions after witnessing defendant shoot the officer, and was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

In defendant's trial for burglary and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by admitting testimony from two officers that when they approached the victim's house they saw the door standing ajar but still bolted with a splintered door frame as the testimonial statements were simply instantaneous conclusions drawn by the witnesses upon seeing the door and were shorthand statements of fact not barred by N.C. R. Evid. 701. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007), review denied, appeal dismissed, 362 N.C. 477, 666 S.E.2d 765 (2008).

Foundation for Lay Person's Opinion Required. — Where there was no foundation showing that the opinion called for was rationally based on a lay witness' perception, the opinion was inadmissible. Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

The trial court properly refused to admit testimony by an officer about the trajectory of a bullet fired from defendant's pistol without some showing that the witness was qualified to testify, either as a lay witness or as an expert. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Instantaneous Conclusions of the Mind. — A witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999).

Witnesses were permitted to testify, based on their personal observations, about the mental state of the victim shortly after a pawnshop confrontation with the defendant, in which the defendant threatened to get the victim. State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Detective's testimony about his observations regarding the demeanor of the State's main witness, a co-perpetrator of the sex crimes that were charged against defendant, was lay opinion testimony because it was based on the detective's observations of defendant and was not expert testimony because the detective was not testifying to anything concerning specialized knowledge; while that testimony should not have been admitted because the detective vouched for the veracity of the witness and the detective's testimony was thus not helpful to the jury, the error in admitting the testimony was not plain error since defendant was impeached by other evidence apart from the detective's testimony. State v. Gobal, 186 N.C. App. 308, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

It is not necessary for a witness to have observed the action described continuously; it is only necessary that the witness have perceived the incident sufficiently to have gained a rational basis on which to formulate an opinion. Eason v. Barber, 89 N.C. App. 294, 365 S.E.2d 672 (1988).

The relevant weight to be given lay opinions is within the province of the jury. State v. Davis, 321 N.C. 52, 361 S.E.2d 724 (1987).

A hypothetical question posed to a lay witness was held impermissible, where nursing home administrator was asked whether a fire station would be able to provide an adequate response to a nursing home fire if a particular road were blocked. Matheson v. City of Asheville, 102 N.C. App. 156, 402 S.E.2d 140 (1991).

Lay Opinion on Speed of Vehicle. — The general rule for admission of opinion testimony on speed is that a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed. State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998).

A non-expert may not testify as to the speed of a vehicle involved in an accident if that individual did not actually witness the accident. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Lay Opinion on Location of Boundary. — Testimony of a lay witness is admissible concerning the location of a boundary in a boundary dispute case. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Lay Opinion on Acting in Concert. — Where testimony was helpful to a clear understanding of a fact in issue, whether defendant acted in concert, testimony was admissible. State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

Lay Opinion on Ownership of Church

Property. — Although trial court may have erred in admitting, over objection, certain lay opinion testimony regarding the ownership of church property, this did not constitute reversible error. Fire Baptized Holiness Church of God of Ams., Inc. v. McSwain, 134 N.C. App. 676, 518 S.E.2d 558 (1999).

Opinion of the Value of Personal Property. — A nonexpert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property. Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992), cert. denied, 333 N.C. 345, 426 S.E.2d 707 (1993).

Lay Opinion Regarding Property Value in Condemnation Proceeding. — Trial court in a condemnation proceeding did not err in excluding opinion testimony as to property value offered by four witnesses, where the opinions were based upon prior condemnation sales, which were an improper basis for valuing property in a current condemnation proceeding, or based on sales of property which was insufficiently similar to the property in question. City of Charlotte v. Ertel, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

Lay Opinion on Profits and Lost Profits. — The trial court properly permitted the plaintiff's witness to testify as to the percentage of profits realized on plaintiff's gross revenues, and as to plaintiff's lost profits due to defendant's use of the cost history records in securing eight contracts where his opinion testimony was based on his recollection of the revenues realized by plaintiff on the contracts and his knowledge, based on experience, of plaintiff's percentage of profit on gross sales. Byrd's Lawn & Landscaping, Inc. v. Smith, 142 N.C. App. 371, 542 S.E.2d 689, 2001 N.C. App. LEXIS 99 (2001).

Lay Opinion on Impressions. — Testimony by crime scene technician that impressions in the dirt around victim's house were similar to the cinder block and rock tied to the victim's body was rationally based on his personal perception and was helpful to the jury. State v. Rick, 126 N.C. App. 612, 486 S.E.2d 449 (1997).

Lay Opinion On Drugs. — Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eight-ball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Testimony and opinions of woman who, with victim who died from smoking methamphetamine (meth) and defendant, smoked an eight-ball of it was admissible based upon her six-year meth smoking experiences, that it was meth and that the victim smoked some of it. The testimony was admissible to prove elements of the charged crimes and to prove that defendant possessed the meth and gave it to the victim, and assisted the jury to otherwise understand what transpired. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Trial court did not commit plain error in allowing an officer to testify that the substance seized was crack cocaine because the officer had been with the police department for eight years, the officer had been in contact with crack cocaine between 500 and 1000 times, and the testimony was helpful for a clear understanding of the officer's overall testimony and the facts surrounding defendant's arrest. State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876, 2007 N.C. App. LEXIS 1805 (2007), appeal dismissed, 362 N.C. 178, 657 S.E.2d 663 (2008).

Trial court did not err in admitting the testimony in defendant's drug trafficking cases of two detectives who testified as lay witnesses regarding identification of a substance found at defendant's second residence. The testimony was admissible pursuant to G.S. 8C-1, N.C. R. Evid. 701 because it was rationally based on their training and experience with controlled substances, and was helpful regarding the issue of identification of the substance as cocaine. State v. Llamas-Hernandez, 189 N.C. App. 640, 659 S.E.2d 79, 2008 N.C. App. LEXIS 714 (2008), rev'd, 363 N.C. 8, 673 S.E.2d 658 (2009).

Lay Opinion on Psychiatric Diagnosis. — The admission of testimony by a lay witness that defendant suffered from multiple personality disorder, in violation of this section, was not prejudicial in light of the other evidence properly admitted at trial. State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Police officer was not qualified as an expert in the field of psychology, and should not have testified to defendant's "paranoia;" however, where, after being questioned by the trial court, the officer explained to the jury exactly what was meant by the term, "paranoia," any error was harmless. State v. Carmon, 156 N.C. App. 235, 576 S.E.2d 730, 2003 N.C. App. LEXIS 109 (2003), aff'd, 357 N.C. 500, 586 S.E.2d 90 (2003).

Lay Opinions on Sanity. — The adoption of this rule did not effect a substantive change in the law regarding the admissibility of lay opinions of sanity. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

Under this rule, lay opinions regarding a defendant's insanity are admissible if they are based on first-hand knowledge and if they are helpful to the jury. State v. Davis, 321 N.C. 52, 361 S.E.2d 724 (1987).

The mental condition of another is an appropriate subject for lay opinion. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997).

Same — Murder Trial. — To offer admissible, lay opinion testimony as to defendant's sanity in a murder trial, witnesses had to have personal knowledge of defendant and their opinions had to be helpful to the jury. However, the fact that neither witness had the opportunity to observe defendant immediately before the crime did not require exclusion of their testimony. State v. Davis, 321 N.C. 52, 361 S.E.2d 724 (1987).

The trial court in a murder case did not err when it allowed the State to ask defendant's wife whether defendant knew the difference between right and wrong at the time of the killing and when it allowed her affirmative response. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

It would have been error not to allow lay witness who had known defendant for 3 to 5 years and had spent several hours with him on the date in question to testify to his opinion as to whether defendant was in his right mind and knew the difference between right and wrong. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

Murder defendant was mentally retarded so he was not sentenced to death under G.S. 15A-2005(a)(1); but (1) experts testified he was competent under G.S. 15A-1001(a) to stand trial; and (2) evidence and his girlfriend's opinion testimony under G.S. 8C-1, N.C. R. Evid. 701, that he was "fine" and "not mentally retarded," indicated he was able to form the requisite "deliberation" and "cool state of blood" (as defined State v. Ruof jury instructions and which were properly given to the jury in response to a deliberation question under G.S. 15A-1234(a)(1)) when he shot a coworker who teased him about being mentally retarded. State v. McClain, 169 N.C. App. 657, 610 S.E.2d 783, 2005 N.C. App. LEXIS 804 (2005).

Lay Opinion on Defendant's Remorse. — Trial court did not commit error, much less plain error, in allowing the opinion of an officer, who had spent five hours with the defendant, that he demonstrated no remorse for his previous two murders. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

In defendant's trial on a charge of murder in the first degree, the trial court properly excluded testimony by a lay witness that "I think if he could take it back, he would." State v. Latham, 157 N.C. App. 480, 579 S.E.2d 443, 2003 N.C. App. LEXIS 743 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Lay Opinion on Victim's Viability. — Court properly allowed lay opinion that the victim remained alive for a period of time following shooting. State v. Hedgepeth, 350 N.C. 776, 517 S.E.2d 605, 1999 N.C. App. LEXIS 883 (1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1274, 146 L. Ed. 2d 223 (2000).

Capacity of Defendant to Commit Rape. — "Rape" is a legal term of art and accordingly witness' opinion testimony concerning whether defendant was "capable of rape" was properly excluded. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

Question as to Fault Properly Struck. — In an action for personal injuries arising out of a car accident, the court did not err in striking question and answer as to whether the accident was the fault of one defendant, elicited on cross-examination of one plaintiff. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Sound alone is sufficient for a lay witness to give his opinion of the speed of a vehicle in relative terms, such as "fast," "flying by," etc. Hicks v. Reavis, 78 N.C. App. 315, 337 S.E.2d 121 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

But Not for Giving Opinion on Actual Speed. — Sound alone does not provide sufficient perception for a layman to have a rational basis for giving an opinion on actual speed of a vehicle. Hicks v. Reavis, 78 N.C. App. 315, 337 S.E.2d 121 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

Opinion on Actual Speed Based on Physical Evidence Is Not Admissible. — With respect to the actual speed of a vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene. Hicks v. Reavis, 78 N.C. App. 315, 337 S.E.2d 121 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

Implicit Finding of Lay Witness as Expert. — Although State did not tender lieutenant in city fire department as an expert, the trial court implicitly found him to be an expert on arson, therefore, any error in permitting the witness to state opinions as an expert was harmless. State v. Greime, 97 N.C. App. 409, 388 S.E.2d 594 (1990).

Police sergeant, who also worked part time at a car repair workshop, was qualified to give testimony that he found red oxide primer rather than blood on the inside of defendant's truck. State v. Kandies, 342 N.C. 419, 467 S.E.2d 67 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

Police Officer's Testimony Regarding Intoxication. — A police officer with more than three years' experience in the enforcement of motor vehicle laws and who had been personally involved in the investigations of nearly 200 driving while impaired cases was competent to express an opinion that the defendant was under the influence of alcohol when he collided with the victims' vehicle. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

The opinion testimony of a police officer, who posited that the defendant was impaired at the time of the accident, was admissible for purposes of showing malice; notwithstanding his cross-examination testimony which tended to show that he relied on the moderate to strong odor of alcohol coming from the defendant almost two hours after the accident in forming his opinion, the Supreme Court believed him to have based his opinion not only on the odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers. State v. Rich, 351 N.C. 386, 527 S.E.2d 299, 2000 N.C. LEXIS 239 (2000).

Where the voluntariness of a defendant's confession was at issue, a police officer who had observed the defendant over an extended period of time, interviewed the defendant, and observed the defendant speaking to other individuals was properly allowed to state his opinion as to whether defendant was intoxicated during their conversation. State v. Patterson, 146 N.C. App. 113, 552 S.E.2d 246, 2001 N.C. App. LEXIS 856 (2001), cert. denied, 354 N.C. 578, 559 S.E.2d 549 (2001).

Deputy's testimony that defendant fell over when the deputy asked defendant to stand on one leg and hop was relevant to the deputy's lay opinion that defendant was impaired. State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323, 2005 N.C. App. LEXIS 1190 (2005).

Trial court did not err in allowing a deputy to testify as to the deputy's opinion that defendant was impaired because there was no dispute that the deputy personally observed defendant and that the deputy's opinion was based on those observations. State v. Johnson, 186 N.C. App. 673, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007).

Deputy's Testimony Regarding Fingerprinting Technique. — Deputy's testimony regarding fingerprinting techniques was properly admitted under G.S. 8C-1, N.C. R. Evid. 701, because, as the officer in charge of the investigation, the deputy was in a position to review the facts more accurately than anyone and his testimony aided the jury in understanding why fingerprints were not recovered from the stolen property. State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004).

Opinion Based on Personal Observation of Intoxicated Person. — A lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants. State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

Testimony of a Case Worker and a Juvenile Investigator Upheld. — In prosecution for the first-degree rape of defendant's nine year old stepdaughter, the trial court did not err by allowing a case worker and a juvenile investigator to testify to the characteristics of sexually abused children, as the nature of their jobs and the experience which they possessed made them better qualified than the jury to form an opinion as to the characteristics of abused children. State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988).

Testimony of Psychological Associate. — Testimony by a licensed psychological associate was admissible under this rule, where she testified that a child sexual abuse victim "illustrated" fellatio and anal intercourse with anatomically correct dolls, and this testimony represented her non-expert instantaneous conclusion based on her perception of the child's appearance, condition, and actions, which constituted a "short-hand statement of fact." State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Testimony of Detectives At Time of Confession. — The detectives' testimony was properly admitted where their opinions were based upon their personal perception of defendant at the time of the confession and helped the trial court determine the ultimate issue of the voluntariness of the defendant's statement. State v. Johnson, 136 N.C. App. 683, 525 S.E.2d 830, 2000 N.C. App. LEXIS 164 (2000).

Testimony by Police Officer Which Required No Expertise Upheld. — Opinion that two shoes share wear patterns could properly be given by police officer, since it required no expertise, and defendant's argument that this testimony was outside the witness' realm of expertise was untenable. State v. Shaw, 322 N.C. 797, 370 S.E.2d 546 (1988).

Trial court did not abuse its discretion by admitting testimony of police captain concerning the gait of a robber on a surveillance tape where the officer testified that, as part of his training as an undercover narcotics officer, he studied different mannerisms and characteristics of people and was trained to notice differences in the actual ways people walk; furthermore, he was experienced in watching people both in person and on film and had attended several schools for electronic and technical surveillance, and his testimony bore on the jury's determination of the identity of the perpetrator and was not barred by G.S. 8C-1, Rule 701. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Officer's opinion that defendant appeared to be high and that he had consumed an impairing substance, was based on his personal observation and was helpful to the jury as to defendant's condition. Therefore, the trial court correctly allowed him to offer his opinion on this matter. State v. Adkerson, 90 N.C. App. 333, 368 S.E.2d 434 (1988).

Testimony of police officers which stemmed from their personal experience combined with their observation of defendant and was helpful to a clear understanding of a relevant issue — defendant's demeanor shortly after the crime — was admissible under this rule and relevant under Rule 401. State v. Lambert, 341 N.C. 36, 460 S.E.2d 123 (1995).

A police officer did not have to be qualified as an expert to testify that the markings of the shoes worn by the defendant when he was picked up for questioning in an armed robbery were "very consistent" with the shoes worn by the perpetrator in a video. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

The police officer's opinion that the defendant appeared intoxicated was rationally based on her perception, and the trial court did not err in allowing the police officer to answer the question of whether defendant appeared intoxicated. State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Arresting officers properly testified as to their opinion that defendant's demeanor was unusually calm after his arrest for murder, as the probative value of the testimony was not substantially outweighed by unfair prejudice. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Narcotics detective's testimony concerning the detective's personal observation of events surrounding defendants' check-in at a motel was admissible in defendants' cocaine trafficking and possession trial, as the detective was merely explaining why the detective became suspicious of defendants after observing their conduct. State v. Diaz, 155 N.C. App. 307, 575 S.E.2d 523 (2002), cert. denied, 357 N.C. 464, 586 S.E.2d 271 (2003), cert. denied, 357 N.C. 659, 590 S.E.2d 396 (2003).

Court properly allowed a police officer to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

Police Officer's Testimony Regarding Investigation Procedure. — Detective's testimony was in accordance with the rule for lay opinion testimony as the detective was not offering an opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why the detective did not pursue as much scientific testing of physical evidence as the detective would a murder case because the victim survived and was able to identify the assailant. State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002), cert. denied, 358 N.C. 158, 593 S.E.2d 397 (2004).

Testimony Upheld. — In a prosecution under G.S. 14-72.1(a) for willfully concealing merchandise, testimony of witness who characterized defendant's activities in store as "concealing" merchandise merely described, in a shorthand form, the actions the witness observed defendant make, and no error was committed. State v. Daye, 83 N.C. App. 444, 350 S.E.2d 514 (1986).

In murder trial, it would not have been error to admit officer's testimony to the effect that he observed that the victim had been shot, as he was stating the instantaneous conclusions of his mind as to the appearance or condition of the victim, and such testimony was admissible as a shorthand statement of facts; thus it was not error for the court to fail to instruct the jury to disregard such testimony. State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987).

Witnesses who were 17 and 18 years old and had only nine and 14 months of driving experience, respectively, were nevertheless competent to testify as to the speed of plaintiff's motorcycle as it approached intersection. Eason v. Barber, 89 N.C. App. 294, 365 S.E.2d 672 (1988).

In a case involving first-degree sexual offense, testimony of one officer that two conversations which he had had, one with another officer and the other with the victim himself, revealed, in his opinion, the same account of the events, as well as testimony of a second officer that the statement he had taken from the victim revealed the same story as the victim had previously related to law enforcement officials, rendered lay opinions based upon the officers' own personal perceptions, which were helpful in determining the precise nature of the sexual offense perpetrated by defendant, and there was no error in the admission of these statements. State v. Rhinehart, 322 N.C. 53, 366 S.E.2d 429 (1988).

In prosecution for conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon, coconspirator's testimony concerning defendant's intent when he said he was going to "do it" met the requirements of this rule, and there was no error in allowing this statement. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988), holding, furthermore, that if there was any error, it was not prejudicial because there was ample other evidence to prove defendant's involvement in the conspiracy.

Testimony of the wife of a slander plaintiff as to the Japanese perception of lawsuits was properly admitted under this section where the suit involved slanderous statements made to Japanese businessmen and scientists and the trial court found her opinion was helpful to a clear understanding of her testimony. Raymond U v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, cert. denied, 323 N.C. 629, 374 S.E.2d 590 (1988).

Plaintiff demonstrated sufficient personal knowledge to testify regarding his opinion of the fair rental value of the property where he testified he was a real estate developer, that he had owned and developed other lake front property; furthermore, he testified as to the amount he paid for the property he owned and to the amount of revenue generated for defendants from rentals over the disputed property. Zagaroli v. Pollock, 94 N.C. App. 46, 379 S.E.2d 653, cert. denied, 325 N.C. 437, 384 S.E.2d 548 (1989).

In trial on charges of trafficking in marijuana, where customs agent testified that boat parked in front of beach cottage was type often used in drug smuggling, that the repeated travel by vehicle over the same roads indicated that it was involved in a smuggling operation, and that he could identify the smell of marijuana coming from the truck because he had many years of experience smelling marijuana, trial court did not err in overruling defendant's objection to these statements since opinions and inferences stated by agent were rationally based on his perceptions, and these statements were helpful to a clear understanding of testimony regarding circumstances related to the investigation which resulted in defendant's arrest. State v. Drewyore, 95 N.C. App. 283, 382 S.E.2d 825 (1989).

Lay witness' statement to the effect that victim had told social worker and policeman "very much the same thing" that she had previously told lay witness was clearly and rationally based on the witness' own perception and was also helpful to the determination of whether and to what extent defendant had sexually abused the victim. As such, it came within the requirements of this rule and was properly admitted. State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990).

Testimony of a murder witness as to what he believed the defendant meant when he warned the witness not to tell anyone about what he saw was admissible; it met the requirements of this rule in that it was both rationally based on his perception and it was helpful to the jury in explaining why the witness did not report the victim's death to law enforcement authorities. State v. McElroy, 326 N.C. 752, 392 S.E.2d 67 (1990).

Mother's testimony in rape prosecution that 10-year-old victim had never lied to her before about anything of this magnitude did not constitute improper lay opinion testimony. When read in context, the challenged testimony was helpful to the jury in understanding her testimony and its admission was proper. State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990), cert. denied, appeal dismissed, 328 N.C. 95, 402 S.E.2d 423 (1991).

Testimony of lay witness, a homeowner and member of homeowner's association, concerning location of a boundary was competent, even though it conflicted with testimony of an expert land surveyor. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

A police officer's testimony that, while he was driving "Johnny Gustud" to possible crime scenes, the defendant (who claimed to have multiple personalities and that the "Gustud" personality committed the crimes) "pretended" to be asleep and then woke up as the defendant, was admissible. This rule allows lay opinions when they are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of the fact in issue," and the officer's opinion that the defendant "pretended" to be asleep in the patrol car met these criteria. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied, 329 N.C. 504, 407 S.E.2d 550 (1991).

Where, in the course of her testimony, a physician repeated the victim's statements that the defendant had sexually abused her, defendant's objection that the doctor's testimony was improper because it was to the effect that defendant was the perpetrator was without merit. The testimony was derived from information obtained by the doctor in the course of the victim's treatment and evaluation and was admissible. Furthermore, the victim testified at trial and identified defendant as the perpetrator. Therefore, the doctor's testimony corroborates her testimony and was properly admitted on that ground. State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15, cert. denied, 329 N.C. 503, 407 S.E.2d 548 (1991).

In prosecution for first-degree sexual offense and taking indecent liberties with children, the trial court did not err in allowing the deputy to testify, over defendant's objection, that in his opinion defendant appeared to be between 29 and 30 years of age, where his opinion was rationally based on his perception of defendant, it was helpful to the jury in determining the age requirement of the crimes charged, and it was not necessary for the State to prove defendant's exact age in order to convict him of any of the crimes with which he was charged. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

In light of strong and unequivocal evidence of direct threats against a woman, made by the defendant while she was in his presence and he was armed with a firearm, there was no reasonable possibility that admitting the opinion testimony of a security guard, who testified that defendant "said something else to me that indicated to me that he was planning to shoot a woman," affected the result reached by the jury at trial. Therefore, any error in the admission of this testimony was harmless. State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (1993).

Where the detective expressed a lay opinion that he did not believe the witness's pretrial statement, and this opinion was rationally based on his own firsthand knowledge and observations, this opinion was helpful to explain his earlier testimony and was properly admissible under this rule. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Testimony by son and daughter of pedestrian struck by vehicle that plaintiff was in very poor emotional state, that plaintiff's leg was broken in three different places, that plaintiff looked very uncomfortable and that he was bleeding from his left ear which was the ear he had problems hearing out of were merely giving a factual account of what they observed. Thus, defendant's argument that the statements were opinion was without merit. Bowden v. Bell, 116 N.C. App. 64, 446 S.E.2d 816 (1994).

Where witness' testimony was rationally based on his perception, as the witness worked with defendant and routinely overheard defendant's conversations, testimony was admissible opinion testimony by a lay witness. State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

Lay testimony by a co-worker of murder victim was admissible to show the victim's state of mind, where the co-worker testified as to the victim's demeanor during the days prior to her being shot and killed by her ex-husband, including that she was "upset" and "would hold her stomach crying." State v. Childers, 131 N.C. App. 465, 508 S.E.2d 323 (1998).

The testimony of a trooper as to what happens to a vehicle tire when it is towed from an accident scene was not improperly admitted, in violation of this rule, to show the lanes each vehicle was in prior to the accident, which was the ultimate fact in issue. State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201, 2001 N.C. App. LEXIS 138 (2001).

Witness was permitted to testify that defendant by his actions apparently knew and recognized a person who entered the courtroom where defendant claimed that he did not know the person. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

There was no error in allowing lay testimony in a will contest in which undue influence was alleged that the witness could have swayed the testatrix in making decisions, had the witness so desired; the opinion was rationally based on the witness's perception of the testatrix over the course of many dealings with the testatrix, and was also helpful to a determination of a fact in issue: whether the testatrix was susceptible to influence in the time leading up to the execution of the will. In re Will of McDonald, 156 N.C. App. 220, 577 S.E.2d 131, 2003 N.C. App. LEXIS 126 (2003).

Non-expert testimony of nurse regarding the effects of a specific dosage of Valium was properly permitted under G.S. 8C-1, N.C. R. Evid. 701, because it was helpful in the determination of whether defendant was so impaired when he killed the victim that he could not have killed with premeditation and deliberation. State v. Smith, 357 N.C. 604, 588 S.E.2d 453, 2003 N.C. LEXIS 1415 (2003), cert. denied, — U.S. —, 124 S. Ct. 2915, 159 L. Ed. 2d 819 (2004).

Officer's testimony regarding defendant's pretrial statements to the police implicating a man as an accomplice in a felonious breaking and entering was properly admitted at trial where the testimony of the alleged accomplice's denial of involvement was admissible not as to his general credibility and character, but rather as an explanation for why he was not arrested. State v. Carmon, 169 N.C. App. 750, 611 S.E.2d 211, 2005 N.C. App. LEXIS 794 (2005).

In a trial for attempted murder, the trial court properly admitted testimony by the victim that it was defendant who shot him, as the victim had sufficient personal knowledge under G.S, 8C-1, N.C. R. Evid. 602, and the victim's opinion was rationally based on his perception of the shooting as required by G.S. 8C-1, N.C. R. Evid. 701. State v. Watkins, 169 N.C. App. 518, 610 S.E.2d 746, 2005 N.C. App. LEXIS 683 (2005), cert. denied, appeal dismissed, — N.C. —, 624 S.E.2d 632 (2005).

Detective's testimony regarding the manner in which sexually abused children usually testify constituted permissible lay witness testimony because it was not offered to bolster the victim's credibility. State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006), cert. denied, appeal dismissed, 361 N.C. 436, 649 S.E.2d 896 (2007).

Trial court did not commit plain error by admitting under G.S. 8C-1-602 a victim's testimony that defendant shot the victim even though the victim did not see defendant shoot the victim, since the victim's testimony was based on what the victim perceived as the shooting occurred, and the victim's brother testified that he also heard defendant's voice shortly after the shooting and that he had known defendant "since the day he was born"; the brother had sufficient personal knowledge to identify defendant and his opinion was rationally based on his perception of the shooting under G.S. 8C-1-701. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

In a suit between a lender and a broker who shared ownership of a corporation, where it was found that the lender breached fiduciary duties by depreciating the value of properties, it was not an abuse of discretion to admit the broker's lay testimony as to the value of the properties, because the broker had an extensive real estate background and specific knowledge of the properties. Bluebird Corp. v. Aubin, 188 N.C. App. 671, 657 S.E.2d 55, 2008 N.C. App. LEXIS 279 (2008).

Trial court did not abuse the court's discretion in allowing plaintiff's employer to testify concerning plaintiff's diminished earning capacity as the employer testified to working with plaintiff, both before and after plaintiff's injury; thus, the employer was familiar with the duties associated with plaintiff's position, as well as plaintiff's limitations with respect to the fulfillment of those duties. Based on this knowledge, the employer delivered opinions as to plaintiff's ability to perform plaintiff's job and plaintiff's earning capacity. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Testimony Held Inadmissible. — Testimony of police officer, testifying as a lay witness on redirect examination, that a "child of that age does not have the necessary information about sexuality to fantasize any of it" was so prejudicial as to warrant a new trial, where the State's case against the defendant was almost totally dependent on the credibility of the victim. State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987).

The trial court did not abuse its discretion by refusing to admit testimony where defendant made no showing that the proffered opinion testimony was rationally based on the perception of the witness or that it would be helpful to a determination of the issue of the distance from which the victim was shot. State v. Shuford, 337 N.C. 641, 447 S.E.2d 742 (1994).

A police officer's testimony was improper opinion, where he was asked if he believed the murder defendant's statement after his arrest concerning the murder of the mother of his child, because there was no indication that this testimony would help the jury to understand his testimony or to make their determination. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

A jail nurse was not qualified to testify as to whether a capital murder defendant appeared to be psychotic upon his admission to jail, where the nurse evaluated the defendant upon his admission to jail following a shooting spree at the business from which he was fired, but the nurse was not an expert witness. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Testimony about a defendant's motivation for confessing to a crime, where the opinion is based on a telephone conversation and a prior relationship with a defendant, is beyond the purview of G.S. 8C-1, N.C. R. Evid. 701. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Affidavit of licensed social worker and counselor who had counseled decedent for alcohol and substance abuse was not sufficient to raise a genuine issue of material fact and preclude summary judgment in a case where the claimant was trying to recover as a beneficiary under decedent's life insurance policy; the policy excluded recovery for an insured's ingestion of a drug, medicine, or sedative, except as prescribed by a physician, and the licensed social worker and counselor's opinions contained in the affidavit regarding decedent's ingestion of methadone were neither based on his personal knowledge nor proffered as expert opinions. Duncan v. Cuna Mut. Ins. Soc'y, 171 N.C. App. 403, 614 S.E.2d 592, 2005 N.C. App. LEXIS 1207 (2005).

Testimony offered by a detective, offering his opinion about the events depicted in two poor quality bank surveillance tapes, concluding that the video corroborated the victim's testimony that she was forced to withdraw money from an ATM against her will, was an inadmissible lay opinion testimony under G.S. 8C-1, N.C. R. Evid. 701 that invaded the province of the jury and should not have been admitted; however, the error was not prejudicial to defendant as the trial court's instruction to the jury that they were charged with evaluating the images on the videotape and were free to disagree with the detective's interpretation likely cured any impermissible reliance by the jury on the detective's statements. Further, the victim's own testimony as to what happened in the parking lot and at the bank, the knife recovered from the crime scene, and the victim's report of her rape and abduction constituted sufficient evidence to support the jury's decision, independent from the detective's testimony, and required a finding that the error was not prejudicial to defendant under G.S. 15A-1443(a). State v. Buie, — N.C. App. —, 671 S.E.2d 351, 2009 N.C. App. LEXIS 48 (2009).

Admission of Testimony Erroneous But Not Prejudicial. — In a termination of parental rights proceeding, the trial court erroneously, but not prejudicially, admitted a letter from respondent's psychiatrist, who was not tendered as an expert witness, based on a misstatement by counsel for petitioner. In re Brim, 139 N.C. App. 733, 535 S.E.2d 367, 2000 N.C. App. LEXIS 1028 (2000).

Where a police officer testified in part as an expert and in part as a layman, but there was no showing of his expertise concerning the original ownership of a television, and there was no indication that the officer was in a better position than was the jury to deduce the ownership of the television, the admission of the officer's testimony was error, but it was not prejudicial error, because there was no showing that a different result would have been reached if the testimony had not been admitted. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Applied in State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); State v. Shook, 327 N.C. 74, 393 S.E.2d 819 (1990); Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); State v. Hill, 105 N.C. App. 489, 414 S.E.2d 73 (1992); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (1993); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Dial, 122 N.C. App. 298, 470 S.E.2d 84 (1996); State v. Hart, 361 N.C. 309, 644 S.E.2d 201, 2007 N.C. LEXIS 410 (2007); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Cited in State v. Slone, 76 N.C. App. 628, 334 S.E.2d 78 (1985); Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986); State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); Welborn v. Roberts, 83 N.C. App. 340, 349 S.E.2d 886 (1986); Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C. App. 263, 350 S.E.2d 131 (1986); Phelps v. Duke Power Co., 86 N.C. App. 455, 358 S.E.2d 89 (1987); State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988); Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth., 88 N.C. App. 495, 364 S.E.2d 179 (1988); State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988); State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989); State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989); State v. Givens, 95 N.C. App. 72, 381 S.E.2d 869 (1989); State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989); State v. Davis, 97 N.C. App. 259, 388 S.E.2d 201 (1990); State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990); State v. Bunch, 104 N.C. App. 106, 408 S.E.2d 191 (1991); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991); State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992); State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Dukes, 110 N.C. App. 695, 431 S.E.2d 209 (1993); State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); State v. Mitchell, 342 N.C. 797, 467 S.E.2d 416 (1996); State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997); Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997); State v. Hurst, 127 N.C. App. 54, 487 S.E.2d 846 (1997); Tate v. Hayes, — N.C. App. —, 489 S.E.2d 418, 1997 N.C. App. LEXIS 854 (1997); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18, 2006 N.C. App. LEXIS 2504 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007); Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009).

Rule 702. Testimony by experts.

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
  a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
  b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:
  a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
  b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving. (1983, c. 701, s. 1; 1995, c. 309, s. 1; 2006-253, s. 6; 2007-493, s. 5.)

COMMENTARY

This rule is identical to Fed. R. Evid. 702, except that the words "or otherwise" which appear at the end of the federal rule after the word "opinion" have been deleted.

The rule is identical to G.S. 8-58.13, which should be repealed when Rule 702 becomes effective. The rule is consistent with North Carolina practice. *Brandis on North Carolina Evidence* § 134, at 520, n. 25 (1982).

Legal Periodicals. — For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?," see 21 Wake Forest L. Rev. 93 (1985).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For note, "Nurse Malpractice in North Carolina: The Standard of Care," see 65 N.C.L. Rev. 579 (1987).

For note, "Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas," see 1987 Duke L.J. 140 (1987).

For article, "The Syllogistic Structure of Scientific Testimony of Expert Testimony," see 67 N.C.L. Rev. 1 (1988).

For comment, "Admissibility of DNA Evidence: Perfecting the 'Search for Truth'," see 25 Wake Forest L. Rev. 591 (1990).

For article concerning the admissibility of DNA profiling, see 13 Campbell L. Rev. 209 (1991).

For article, "Expert Testimony Regarding the Speed of a Vehicle: The Status of North Carolina Law and the State of the Art," see 16 Campbell L. Rev. 191 (1994).

For article, "DNA Profiling in North Carolina," see 21 N.C. Cent. L.J. 300 (1995).

For survey, "State v. Daniels: Chief Justice Exum's Quantum Theory of Expert Psychiatric Testimony," see 73 N.C.L. Rev. 2326 (1995).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For comment, "Punitive Damages in Medical Malpractice: An Economic Evaluation," see 81 N.C.L. Rev. 2371 (2003).

For note, "Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina," see 83 N.C. L. Rev. 1613 (2005).

For article, "The Admissibility of Expert Testimony in North Carolina After Howerton: Reconciling the Ruling with the Rules of Evidence," see 28 Campbell L. Rev. 109 (2005).

For casenote, "Howerton v. Arai Helmet, Ltd.: Last Dance with the Daubert-Kumho Decisions: One Step Forward from Two Steps Back," see 28 N.C. Cent. L.J. 109 (2005).

CASE NOTES

I. General Consideration.
II. Qualification of Expert.
III. Expert Opinion Not Admissible.
IV. Expert Opinion Admissible.

I. GENERAL CONSIDERATION.

General Construction. — The statute was interpreted to apply as follows: Health care providers other than physicians were governed exclusively by subsection (b). Subsection (c) applied only to physicians who were "general practitioners," while subsection (b) applied only to physicians who were "specialists." Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000).

This rule does not require that claims against hospitals pertaining to administrative or nonclinical issues be certified under G.S. 1A-1, Rule 9(j) as medical malpractice actions since this rule is a rule of evidence, rather than substantive law. Estate of Waters v. Jarman, 144 N.C. App. 98, 547 S.E.2d 142, cert. denied, 354 N.C. 68, 553 S.E.2d 213 (2001).

Expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984); State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985); State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988); State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

This rule admits expert testimony when it will assist the jury in drawing certain inferences from facts, and when the expert is better qualified than the jury to draw such inferences. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

In order for one qualified as an expert to present an opinion based upon his specialized knowledge, his opinion must assist the trier of fact. State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987).

The test for admissibility of expert testimony is whether the jury can receive appreciable help from the expert witness. State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985); State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264, rev'd on other grounds, 322 N.C. 22, 366 S.E.2d 459 (1988).

The test for the admissibility of an opinion of either a lay or expert witness under this rule and G.S. 8C-1, Rule 701, respectively, is helpfulness to the trier of fact. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Section 8C-1, Rule 704 does not eliminate the helpfulness requirement set forth in this rule. Although an expert's opinion testimony is not objectionable merely because it embraces an ultimate issue, it must be of assistance to the trier of fact in order to be admissible. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

Who May Be Experts. — The rule permitting experts to testify to opinions they have formed based on information which is not itself admissible as substantive evidence is not limited to opinions of physicians and other medical experts. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

For witness' testimony to be admissible as expert testimony, the witness must be qualified by knowledge, skill, experience, training, or education. The expert only needs to be better qualified than the jury as to the subject at hand, with the testimony being "helpful" to the jury. Whether the witness qualifies as an expert is exclusively within the trial judge's discretion, and is not to be reversed on appeal absent a complete lack of evidence to support his ruling. State v. Davis, 106 N.C. App. 596, 418 S.E.2d 263 (1992), cert. denied, 333 N.C. 347, 426 S.E.2d 710 (1993).

Who May Be a Specialist. — A doctor who is either board certified in a specialty or who holds himself out to be a specialist or limits his practice to a specific field of medicine is properly deemed a "specialist" for purposes of this rule. Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000).

Rejection of Daubert test. — North Carolina is not, nor has it ever been, a Daubert jurisdiction, and the state supreme court expressly rejects the federal Daubert standard because it believes that on balance the North Carolina law which coalesced in Goode establishes a more workable framework for ruling on the admissibility of expert testimony than Daubert under G.S. 8C-1, N.C. R. Evid. 702. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Three-Step Inquiry for Evaluating Admissibility. — Goode sets forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? Howerton v. Arai Helmet, Ltd., 358 N.C.

440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Opinion Evidence Allowed in Certain Cases. — This rule is a rule of admission which allows opinion evidence in certain cases. If a witness, whether or not an expert, has knowledge of facts which would be helpful to a jury in reaching a decision, he may testify to such relevant facts. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Basis of Opinion. — While baseless speculation can never "assist" the jury under this rule and is therefore inadmissible, an expert need not reveal the basis of his or her opinion absent a specific request by opposing counsel under G.S. 8C-1, Rule 705. Cherry v. Harrell, 84 N.C. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Detective's testimony about his observations regarding the demeanor of the State's main witness, a co-perpetrator of the sex crimes that were charged against defendant, was lay opinion testimony because it was based on the detective's observations of defendant and was not expert testimony because the detective was not testifying to anything concerning specialized knowledge; while that testimony should not have been admitted because the detective vouched for the veracity of the witness and the detective's testimony was thus not helpful to the jury, the error in admitting the testimony was not plain error since defendant was impeached by other evidence apart from the detective's testimony. State v. Gobal, 186 N.C. App. 308, 651 S.E.2d 279, 2007 N.C. App. LEXIS 2199 (2007).

An opinion based upon reviews of evaluations of doctors who had interviewed defendant and personal discussions with doctors in whose care defendant had been placed were just as reliable as an opinion based on a hypothetical question. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

Personal Interview Not Required. — This rule does not require that an expert personally interview a defendant in order to express an opinion about that defendant's mental condition. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

Medical testimony did not have to be expressed in terms of reasonable probability or certainty, where the testimony objected to simply stated what the doctor did and did not find in examining and treating plaintiff. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798 (1989).

Horizontal Gaze Nystagmus (HGN) Test. — Horizontal Gaze Nystagmus (HGN) test is a scientific test, and therefore any testimony regarding the HGN test would be scientific testimony, which is subject to Fed. R. Evid. 702 and the standards established in *Daubert*; G.S. 8C-1-702(a)(1) also requires expert testimony on HGN tests. United States v. Van Hazel, 468 F. Supp. 2d 792, 2006 U.S. Dist. LEXIS 94757 (E.D.N.C. 2006).

"Educated Guess" by Expert. — Defendant's contention that physician admitted to speculating by stating that the figure was a relatively educated guess was without merit. The use of the word "guess" does not render an opinion inadmissible. The physician's choice of words as merely indicated that there was a margin of error (somewhere between ten and twenty percent) in his calculations. The existence of this margin of error also does not affect the admissibility of his testimony. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

Reliability of Expert's Scientific Technique. — While the scientific technique on which an expert bases a proffered opinion must be recognized as reliable, absolute certainty of result is not required. The technique must have achieved general acceptance in the relevant scientific community and provide scientific assurance of accuracy and reliability. State v. Catoe, 78 N.C. App. 167, 336 S.E.2d 691 (1985), cert. denied, 316 N.C. 380, 344 S.E.2d 1 (1986).

The expert's scientific technique on which he bases his opinion must be such that its accuracy and reliability has become established and recognized. However, the focus is on the reliability of the scientific method rather than its establishment and recognition. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Under Goode, to determine whether an expert's area of testimony is considered sufficiently reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable, but where a trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, it should generally focus on the following nonexclusive "indices of reliability": the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting the scientific hypotheses on faith, and independent research conducted by the expert. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Method of Proof. — Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the next level of inquiry is whether the witness testifying at trial is qualified as an expert to apply this method to the specific facts of the case. State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

There are two overriding reasons for excluding testimony which suggests whether legal conclusions should be drawn or whether legal standards are satisfied; the first is that such testimony invades not the province of the jury but the province of the court to determine the applicable law and to instruct the jury as to that law, and the second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

It is not error for trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

An expert may generally not testify that a certain legal standard has or has not been met. Pelzer v. UPS, Inc., 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. denied, 346 N.C. 549, 488 S.E.2d 808 (1997).

Attorney Testimony as to Legal Conclusions. — Allowing plaintiffs' expert, an attorney, to testify to his individual interpretation of North Carolina law was improper as it amounted to no more than a jury instruction. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Testimony Embracing Legal Conclusions Properly Excluded. — Fact that expert "found adult material" at several locations in the county did not provide a sufficient basis to support the admission of his expert testimony concerning whether the average adult in the community would find the materials which defendant was accused of selling to be patently offensive. His study was simply too unfocused and unspecific to provide him with a sufficient basis to give an expert opinion as to whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive. Thus, the trial court properly exercised its discretion by excluding his expert opinion testimony concerning whether the magazines in question were patently offensive to the average adult, applying contemporary community standards, on the ground that he was no better qualified than the jury to address the question and could not assist the jury. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

The trial court in a murder case did not err in refusing to admit testimony whereby defendant sought to have the experts tell the jury that certain legal standards had not been met. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Doctor's opinion that defendant could not have premeditated or deliberated the killings would have been inadmissible as a conclusion that a legal standard had not been met. State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988).

Doctor was improperly permitted to testify about the law of voluntary intoxication in North Carolina and its effect on defendant's insanity defense where he stated: "In North Carolina we still hold people responsible for whatever they do, if they are intoxicated"; doctor's testimony offered interpretation of the law implying that if defendant were voluntarily intoxicated, she was responsible for her actions even if her underlying mental disorder might otherwise render her legally insane. State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989).

Expert witness' answer on cross-examination that his opinion about the "improbability" of hair originating from a source other than defendant was based on nonscientific considerations, addressed the credibility of other witnesses and was an expression of opinion as to defendant's guilt and thus violated the Rules of Evidence. State v. Faircloth, 99 N.C. App. 685, 394 S.E.2d 198 (1990).

The treating doctor's opinion that the victim had been raped and kidnapped, although it went beyond the scope of permissible expert testimony, did not rise to the level of plain error because there was overwhelming evidence of defendant's guilt, and following the testimony, the trial court gave a limiting instruction reminding the jurors that the doctor's opinion was limited in certain areas and that they were the fact-finder. State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002), cert. denied, 358 N.C. 158, 593 S.E.2d 397 (2004).

Value of Professional Association. — The criteria set out in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, disc. rev. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), are factors for the court to consider in valuing the professional interest, and are not criteria for admissibility of the expert's opinion. McLean v. McLean, 88 N.C. App. 285, 363 S.E.2d 95 (1987), aff'd, 323 N.C. 543, 374 S.E.2d 376 (1988).

What Defendant Is Required to Show. — A defendant is required to make an ex parte threshold showing that the matter subject to expert testimony is likely to be a significant factor in the defense, show that an expert would assist him materially in the preparation of his defense, or show that the denial of expert assistance would deprive him of a fair trial. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Premeditation. — Where defendant's state of mind at time of killing was the central issue, and without the challenged testimony of the State's expert, the only testimony going to the mens rea of first degree murder was lay opinion testimony that defendant knew right from wrong, and the contradictory testimony of three experts called by defendant regarding defendant's ability to plan or to form specific intent, and where error in allowing State's expert testimony that defendant was capable of premeditating was compounded by the State's argument to the jury, defendant was entitled to a new trial on first degree murder charge. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Failure to Tender Qualified Expert. — Trial court did not abuse its discretion when it dismissed plaintiff's medical malpractice action with prejudice on the basis that she failed to comply with G.S. 1A-1, Rule 9(j) by tendering as a witness a general surgeon whom she could not have reasonably expected to qualify as an expert witness against defendant general practitioner under this rule. Allen v. Carolina Permanente Med. Group, P.A., 139 N.C. App. 342, 533 S.E.2d 812, 2000 N.C. App. LEXIS 903 (2000).

Absolute Right to Dismiss and Refilled Malpractice Case Despite Issue on Qualification of Expert. — Dismissal of an administratrix's second medical malpractice complaint filed after her earlier malpractice complaint was voluntarily dismissed was error because there was no evidence that the initial complaint's N.C. R. Civ. P. 9(j) certification was insufficient; the administratrix had an absolute right under N.C. R. Civ. P. 41(a)(1) to dismiss the original action and re-file her claim within one year, regardless of whether there had been a ruling on her G.S. 8C-1, N.C. R. Evid. 702(e) motion to qualify the witness she used for the certification of her original complaint as an expert. The fact that the second complaint relied on Rule 9(j)(1) instead of Rule 9(j)(2) did not give rise to an inference that the administratrix did not reasonably expect her expert for the first certification to qualify, and no basis existed for dismissal of the re-filed action pursuant to N.C. R. Civ. P. 12(b)(6). Ford v. McCain, — N.C. App. —, 666 S.E.2d 153, 2008 N.C. App. LEXIS 1657 (2008).

Applied in State v. Mayes, 86 N.C. App. 569, 359 S.E.2d 30 (1987); State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988); Tompkins v. Log Sys., 96 N.C. App. 333, 385 S.E.2d 545 (1989); State v. Everett, 98 N.C. App. 23, 390 S.E.2d 160 (1990); State v. Torres, 99 N.C. App. 364, 393 S.E.2d 535 (1990); State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990); State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991); Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991); Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); Griffith ex rel. Griffith v. McCall, 114 N.C. App. 190, 441 S.E.2d 570 (1994); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994); State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994); In re Carr, 116 N.C. App. 403, 448 S.E.2d 299 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); Trapp v. Maccioli, 129 N.C. App. 237, 497 S.E.2d 708 (1998); Davis v. City of Mebane, 132 N.C. App. 500, 512 S.E.2d 450 (1999); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000); State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002); Gregory v. Kilbride, 150 N.C. App. 601, 565 S.E.2d 685, 2002 N.C. App. LEXIS 685 (2002); Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009).

Cited in State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76; Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986); Welborn v. Roberts, 83 N.C. App. 340, 349 S.E.2d 886 (1986); In re Conditional Approval of Certificate of Need Application of Health Care & Retirement Corp. of Am., 88 N.C. App. 563, 364 S.E.2d 150 (1988); Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth., 88 N.C. App. 495, 364 S.E.2d 179 (1988); State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988); State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988); State v. Garvick, 98 N.C. App. 556, 392 S.E.2d 115 (1990); State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169 (1990); State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (1994); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994); Arrington v. Texfi Indus., 123 N.C. App. 476, 473 S.E.2d 403 (1996); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); Hylton v. Koontz, 138 N.C. App. 511, 530 S.E.2d 108 (2000); Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 146 N.C. App. 449, 553 S.E.2d 431, 2001 N.C. App. LEXIS 970 (2001); Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002); Nunn v.

Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002); Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003); Elliott v. Muehlbach, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005); Worthey v. York, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 37263 (W.D.N.C. Sept. 13, 2005); State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666, 2007 N.C. App. LEXIS 2085 (2007); Sturgill v. Ashe Mem'l Hosp., Inc., 186 N.C. App. 624, 652 S.E.2d 302, 2007 N.C. App. LEXIS 2256 (2007).

II. QUALIFICATION OF EXPERT.

Qualification of Expert Within Exclusive Province of Trial Judge. — The determination whether a witness has the requisite level of skill to qualify as an expert witness is ordinarily within the exclusive province of the trial judge, and a finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. State v. Parks, 96 N.C. 589, 386 S.E.2d 748 (1989).

Surgeon who was board certified in laparoscopic procedures, and was the director of the emergency room of a major university hospital, who examined and diagnosed patients who, after surgery, presented signs and symptoms similar to those of a decedent who died after having a laparoscopic cholecystectomy performed to remove her gall bladder, and who instructed residents in the emergency room regarding patients he treated, was qualified to testify as an expert in a medical malpractice action arising from the decedent's death. Sweatt v. Wong, 145 N.C. App. 33, 549 S.E.2d 222, 2001 N.C. App. LEXIS 574 (2001).

Question of Fact. — Whether a witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984).

Discretion of Judge. — The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

The decision as to whether scientific opinion evidence is sufficiently reliable and relevant remains largely within the discretion of the trial judge. State v. Catoe, 78 N.C. App. 167, 336 S.E.2d 691 (1985), cert. denied, 316 N.C. 380, 344 S.E.2d 1 (1986).

Ordinarily whether a witness qualifies as an expert is exclusively within the discretion of the trial judge and is not to be reversed on appeal absent a complete lack of evidence to support his ruling. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

The trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984); State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985); State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988).

A trial court is afforded wide latitude in applying this rule and will be reversed only for an abuse of discretion. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

The trial court's statement to the jury that "[the expert] will be allowed to testify as an expert in the field of DNA analysis if [the jury] finds her to be so qualified" was harmless error, if error at all, where the court, in effect, qualified her as an expert in the field of DNA analysis and permitted her to give expert testimony in this field. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Questions Concerning Weight of Expert's Conclusions Are for the Jury. — Once a trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674, 2004 N.C. LEXIS 667 (2004).

Once an expert passed G.S. 8C-1-702's threshold of admissibility, lingering questions or controversy concerning the quality of the expert's conclusions went to the weight of the testimony rather than its admissibility; an employee's contentions on appeal only challenged the methodology of an expert's opinion, which went to the weight of her testimony and not the admissibility, and the appellate court did not address such issues. Lane v. Am. Nat'l Can Co., 181 N.C. App. 527, 640 S.E.2d 732, 2007 N.C. App. LEXIS 246 (2007).

Trial court did not abuse its discretion by accepting a licensed general contractor and licensed home inspector in North Carolina, who was in the construction industry for approximately 30 years and was performing home inspections for nearly 10 years, as an expert on the subject of home inspections and whether a rental house met general standards of fitness and habitability. Pierce v. Reichard, 163 N.C. App. 294, 593 S.E.2d 787, 2004 N.C. App. LEXIS 382 (2004).

Trial Court Abused its Discretion. — Because the estate's expert witnesses were in a better position than the trier of fact to have an opinion on the subject of whether decedent would have suffered a stroke but for the doctor's failure to read an MRI, the trial court erred by granting the doctor's motion in limine to exclude the expert witnesses in the medical malpractice action. Hamilton v. Thomasville Med. Assocs., 187 N.C. App. 789, 654 S.E.2d 708, 2007 N.C. App. LEXIS 2565 (2007).

The Industrial Commission had the power to determine whether physician was qualified to testify as an expert in stating his opinion as to deceased employee's intoxication at 2:50 p.m. based on a blood alcohol test administered at 5:00 p.m. Torain v. Fordham Drug Co., 79 N.C. App. 572, 340 S.E.2d 111 (1986).

Qualifications of Expert. — It is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed or even engaged in a specific profession. State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984); Robinson v. Seaboard Sys. R.R., 87 N.C. App. 512, 361 S.E.2d 909 (1987), cert. denied, 321 N.C. 474, 364 S.E.2d 924 (1988).

To qualify, an expert need not have had experience in the very subject at issue; it is enough that through study or experience the expert is better qualified than the jury to render an opinion regarding the particular subject. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Witnesses who are experts in a field may offer opinion testimony regarding matters within the area of their expertise; if a witness is better qualified than the jury to form an opinion from certain facts, his opinion is admissible. Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

In the absence of a stipulation, witness whom a party is attempting to qualify as an expert must testify to his qualifications as set forth in this rule. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

An expert need not have had experience in the very subject at issue. It is enough that through study or experience the expert is better qualified than the fact-finder to render the opinion regarding the particular subject. In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994).

Doctor's lack of clinical experience should not have disqualified him from giving expert opinion testimony. His acknowledged expertise in the field of adolescent sex offenders and his study of articles on treatment of adult sexual offenders made him better qualified than the trial court to render an opinion on the length and efficacy of adult sexual offender therapy, and his testimony, therefore, would have been helpful to the trier of fact. In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994).

Neurologist could testify, as an expert witness for the patient about the relevant standard of care in a medical malpractice case because the witness, a board certified neurologist, specialized in the same specialty as one of the health care providers, who had a specialty in general consulting neurology. Billings v. Rosenstein, 174 N.C. App. 191, 619 S.E.2d 922, 2005 N.C. App. LEXIS 2293 (2005), cert. denied, — N.C. —, 630 S.E.2d 664 (2006).

Implicit Qualification as Expert. — Although plaintiff made no request at trial for a finding as to the qualification of defendant as an expert, where the court itself asked for the opinion of defendant, he was implicitly admitted as an expert. Cato Equip. Co. v. Matthews, 91 N.C. App. 546, 372 S.E.2d 872 (1988).

Trial court's overruling of defense counsel's objection to opinion testimony constituted an implicit finding that the witness was an expert. State v. Wise, 326 N.C. 421, 390 S.E.2d 142 (1990), cert. denied, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990).

Although State did not tender lieutenant in city fire department as an expert witness, the trial court implicitly found him to be an expert on arson, therefore, any error in permitting the witness to state opinions as an expert was harmless. State v. Greime, 97 N.C. App. 409, 388 S.E.2d 594 (1990).

Formal Ruling Held Unnecessary. — There was no need for the court to make a formal ruling that the witness was an expert where her qualifications had already been presented to the court. State v. Wise, 326 N.C. 421, 390 S.E.2d 142, cert. denied, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990).

Assuming arguendo that the trial court's failure to formally qualify the witness as an expert was error, it was harmless error in light of the evidence of her qualifications, the court's obvious conviction that the witness was an expert, and the fact that the witness' opinion testimony fit within the definition of expert testimony. State v. Wise, 326 N.C. 421, 390 S.E.2d 142, cert. denied, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990).

Failure to Lay Sufficient Foundation Showing Expert Had Sufficient Knowledge. — Trial court erred in allowing expert testimony that alleged victim was suffering from post-traumatic stress disorder, where the State failed to lay a sufficient foundation showing expert witness to have sufficient skill, knowledge, or experience in or related to the syndrome to qualify as an expert thereon. State

v. Goodwin, 320 N.C. 147, 357 S.E.2d 639 (1987).

Court may not rule that a witness is an expert on the basis that another court has found him to be an expert. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Licensed Clinical Psychologist. — The witness-doctor who had her masters in psychology, had a Ph.D., and was a licensed clinical psychologist who specialized in anxiety disorders (including PTSD), was well qualified to testify as an expert; her testimony was properly admitted as expert testimony. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Plaintiff's doctor did not have to qualify as a psychiatrist or psychologist to testify that he saw nothing in his examination and treatment of the plaintiff to indicate that she was malingering. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798 (1989).

Doctor in Medical Malpractice. — Doctor was properly qualified as an expert witness in a medical malpractice action pursuant to G.S. 8C-1, N.C. R. Evid. 702, as the doctor specialized in the same specialty as the defendant doctor, and during the year preceding 29 March 1997, the witness spent all of his professional time teaching at an accredited health professional school and the majority of it teaching in the specialty. Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003).

Expert could not reasonably be expected to qualify as an expert witness as required by G.S. 1A-1, N.C. R. Civ. P. 9(j), and did not qualify as an expert witness under G.S. 8C-1, N.C. R. Evid. 702(b) or (c) as: (1) the expert was a board certified obstetrician, (2) doctor one was a board certified emergency room physician and doctor two was a board certified trauma surgeon, (3) both doctors were acting within their capacities as specialists in treating a decedent as a trauma patient, (4) both doctor one and doctor two were properly deemed as specialists under Rule 702, and (5) the expert was not certified as either an emergency room physician or a trauma surgeon, nor did the expert practice in either of these areas. Knox v. Univ. Health Sys. of E. Carolina, Inc., 187 N.C. App. 279, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

Wife's proposed expert could not be accepted under G.S. 8C-1, N.C. R. Evid. 702(e), as there were no extraordinary circumstances to support the certification of the expert under Rule 702(e), nor did the wife argue such circumstances existed. Knox v. Univ. Health Sys. of E. Carolina, Inc., 187 N.C. App. 279, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, 188 N.C. App. 570, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

Exclusion of the estate's proffered expert in a medical negligence action was proper, because the proffered expert did not spend sufficient time, including the expert's surgery and teaching time, to meet the requirements of G.S. 8C-1, Rule 702(b). Cornett v. Watauga Surgical Group, P.A., — N.C. App. —, 669 S.E.2d 805, 2008 N.C. App. LEXIS 2231 (2008).

Emergency Room Nurses. — Three emergency room nurses were qualified to render their opinions as experts about the possibility that the victim accidentally swallowed the piece of plastic on which he choked to death; nurses are qualified to render expert opinions as to the cause of a physical injury even though they are not licensed to diagnose illnesses or prescribe treatment, and there is no basis for any preference of licensed physicians for such medical testimony. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

Forensic Pathologist. — Witness, who was properly qualified as a forensic pathologist to testify to the nature of the wounds inflicted on a homicide victim and to the cause of her death, was not qualified as an expert on the pattern that a knife blade makes when it is wiped on a shirt. This was a matter of common sense, best left to the jury. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Forensic Serologist. — Forensic serologist qualified as an expert, and his scientific testimony could assist the jury in determining whether defendant killed the victim; thus, he was competent to testify and allowing him to do so did not violate this rule. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), cert. denied, 516 U.S. 1079, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

Where there was testimony which established that the witness had particularized training and experience in forensic serology, the witness was properly accepted by the trial court as an expert in that area. State v. Hairston, 123 N.C. App. 753, 475 S.E.2d 242 (1996).

Police Officer. — Trial court properly found the length of a police officer's employment as a narcotics officer, as well as his knowledge of cocaine manufacturing, the division and packaging of the drug, and his extensive knowledge of illegal drug operations provided him with the requisite expertise to testify to a hypothetical question based on the facts of a case as an expert. State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713, 2002 N.C. App. LEXIS 853 (2002).

Although the trial court should have recognized a police lieutenant as an expert witness before it allowed him to offer his interpretation of evidence that was found at the scene of a double homicide, the record revealed that the court implicitly found that the lieutenant was an expert in crime scene investigation and admitted his testimony under G.S. 8C-1, N.C. R. Evid. 702(a), and the state supreme court refused to reverse defendant's convictions for first-degree murder because the lieutenant was not recognized formally as an expert witness. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Trial court did not abuse its discretion in allowing the investigating officer to testify as an expert under G.S. 8C-1-702(a) regarding the lividity of pooled blood found at the homicide crime scene and as to approximate time of death, as the State offered ample evidence, which included the officer's education, experience, and specialized training, that the officer was better qualified to give an opinion on the subject than the trier of fact; although the officer was not a medical expert, the applicable standard did not require an expert to be licensed or a specialist in the field in which the expert testified. State v. Steelmon, 177 N.C. App. 127, 627 S.E.2d 492, 2006 N.C. App. LEXIS 693 (2006).

Expert in Pediatric Gastroenterology. — Expert's certification in, and practice of, the subspecialty pediatric gastroenterology, did not preclude him under this section from being qualified to testify against defendant-pediatrician; the plaintiff's expert testified that he was "a distinguished professor of pediatrics in the Department of Pediatrics at the University of California" and his testimony as well as his curriculum vitae showed that he had been certified as a pediatrician since 1968. Edwards v. Wall, 142 N.C. App. 111, 542 S.E.2d 258 (2001).

Experts in Child Sexual Abuse Case. — The trial court did not err in qualifying a child sexual abuse counselor and a social worker as experts in child sexual abuse and admitting their testimony, where both witnesses testified to having received advanced degrees in psychology and counseling, to having had extensive experience in evaluating victims of child abuse, and to having testified on numerous prior occasions before the courts of this State as experts in the field of child sexual abuse. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

Individual who had counseled children suspected of being sexually abused for five years and had interviewed between 500 and 600 children in her capacity as a sexual abuse counselor, and who had a bachelor's degree in psychology, a master's degree in counseling, and had attended specialized training in the areas of sexual abuse counseling and investigation, was properly qualified by the court as an expert in counseling for sexually abused children. State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990), cert. denied, appeal dismissed, 328 N.C. 95, 402 S.E.2d 423 (1991).

Physician who had completed a pediatrics residency, had attended various educational workshops on child sexual abuse, and gave workshops and lectures on child sexual abuse throughout North Carolina, who had seen 300 children for evaluation of suspected sexual abuse, was properly qualified as an expert in the field of child sexual abuse. State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990), cert. denied, appeal dismissed, 328 N.C. 95, 402 S.E.2d 423 (1991).

Actuary. — An individual's educational qualifications and experience as a property and casualty actuary qualified him as an expert witness in a farm owner rate hearing, although he had never before testified in such a hearing. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 75 N.C. App. 201, 331 S.E.2d 124, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

Arson Expert. — Arson expert's testimony that the burning of victim's home was intentional was proper, where the agent had attended over 500 hours of arson investigation courses and numerous seminars organized by the International Association of Arson Investigators, was certified as a fire investigator by the North Carolina Fire and Rescue Commission, had taught classes on arson, and had participated in approximately 125 to 135 arson investigations. State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000), cert. denied, 531 U.S. 1117, 121 S. Ct. 868, 148 L. Ed. 2d 780 (2001).

Law Enforcement Officer As Expert. — Trial court did not abuse its discretion by allowing state trooper who (1) had formal training in investigating accidents, (2) had investigated between 2,000 and 2,500 accidents, and (3) had investigated defendant's accident, to testify as an expert witness in accident investigation and reconstruction. State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90, 2002 N.C. App. LEXIS 708 (2002), cert. denied, 356 N.C. 685, 578 S.E.2d 316 (2003).

State Bureau of Investigation special agent was properly qualified as an expert witness where the agent possessed sufficient knowledge, experience, and training in the field of bloodstain pattern interpretation and was in a better position to have an opinion about such evidence than was the jury. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Electrical Engineering and Fire Cause and Origin Investigation Expert. — Witness was properly permitted to testify as an expert in the fields of electrical engineering and fire cause and origin investigation given the witness's extensive educational background in electrical engineering and physics and the witness's 23 years of experience in the field. Red Hill Hosiery Mill, Inc. v. Magnetek, Inc., 159 N.C. App. 135, 582 S.E.2d 632, 2003 N.C. App. LEXIS 1441 (2003).

Qualification as Expert Upheld. — Decision to admit investigator's testimony concerning glass fragments found at the scene of the crime and in defendant's boot was upheld where the investigator had an extensive background in trace evidence, received a bachelor's degree in chemistry and biology, received internal training at two police departments, received external training at the FBI Academy at Quantico and Brunswick College, and had performed hundreds of tests for glass analysis during his career. State v. McVay, 167 N.C. App. 588, 606 S.E.2d 145, 2004 N.C. App. LEXIS 2388 (2004).

Nurse Engaged in Clinical Nursing. — In a medical malpractice case, a patient had forecast sufficient evidence that a nurse was qualified to testify under G.S. 8C-1, N.C. R. Evid. 702(b)(2). The nurse's deposition testimony that she worked in the clinical practice of nursing part of the time and that she served as a legal consultant part of the time did not necessarily contradict her affidavit that she devoted the majority of her time to clinical nursing; furthermore, defendants had not contradicted her statements that a registered nurse could be a "floor nurse" and that there was no "floor nursing" specialty. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

III. EXPERT OPINION NOT ADMISSIBLE.

Failure to Offer Showing as to Qualifications. — The trial court properly refused to admit testimony by officer about the trajectory of a bullet fired from defendant's pistol without some showing that the witness was qualified to testify, either as a lay witness or as an expert. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

An expert in accident reconstruction may in some situations be able to testify as to the circumstances of an accident from examination of the evidence; however, a police was not entitled to testify to such as the officer was never identified as an expert in accident reconstruction. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Defendant's expert was properly excluded under G.S. 8C-1, Rule 702 as there was no indication that the expert possessed any particular expertise on hard drives or the erasure of files. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

Expert Testimony Excluded Since Basis Was Speculation. — Where doctor's conclusions regarding defendant's mental condition on day of murder were purely speculation and conjecture and he indicated no comprehension of legal significance of specific intent, the doctor's proffered testimony was properly excluded since his testimony would not have assisted trier of fact to understand evidence or to determine fact in issue. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Expert's Failure to Make Independent Diagnosis. — In medical malpractice case, trial court did not err by refusing to allow expert testimony from a physician who did not make his own independent diagnosis or conduct independent testing to determine the cause of pain experienced after an injection. Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 618 S.E.2d 838, 2005 N.C. App. LEXIS 2040 (2005).

Expert No Better Qualified Than Jury. — Where doctor was asked to tell members of jury about abrasion over the urethra of victim, doctor's statement that sore area conceivably happened in intercourse that was performed at knife-point or under duress violated this rule; this expert was not any better qualified than jury to have opinion on subject whether intercourse was performed at knife-point or under duress. State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988), cert. denied, 328 N.C. 273, 400 S.E.2d 459 (1991).

In negligence action where van collided with garbage truck, trial court did not abuse its discretion in excluding meteorologist's testimony regarding visibility conditions in 1985 and 1987; the effect of the sun's glare on drivers is an effect to which any driver heading into the direction of the sun can attest and expert's credentials as a meteorologist made him no more qualified than any other driver to offer an opinion. Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

The trial court properly disallowed the plaintiff from using an economist as his expert witness to show the value of his loss of his own services; the jury was capable of rendering a decision on the value of a person's services to himself because such is a matter of common knowledge. Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001).

Trial court did not err in refusing to admit the testimony of doctor regarding the effect of long-term maximum-custody lockup on defendant's behavior and his ability to distinguish between appropriate and inappropriate fears, where the expert was in no better position than the jury to determine that, as the result of long-term imprisonment, certain legal standards had not been met, namely, that defendant did not premeditate and deliberate and that defendant was responding to a threat he genuinely perceived, and where such evidence would tend to confuse rather than help. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Bolstering Children's Testimonies with Evidence Based Solely on Their Own Disclosures. — The trial court's admittance of expert testimony that was not based on a specialized knowledge or expertise and did not assist the jury in understanding or determining a fact in issue was prejudicial and entitled the defendant to a new trial; without any physical evidence of sexual abuse, and based solely on disclosures made by the victims, the expert witnesses' testimonies were inadmissible under this rule. State v. Grover, 142 N.C. App. 411, 543 S.E.2d 179, 2001 N.C. App. LEXIS 149 (2001), aff'd, 354 N.C. 354, 553 S.E.2d 679 (2001).

Children's Symptoms of Post-Traumatic Stress Disorder. — Trial court erred in admitting an expert's testimony regarding the children's symptoms of post-traumatic stress disorder as no instruction was given that the testimony was to be considered for corroborative purposes, so it had to be assumed that the testimony was admitted to prove that the children had been sexually assaulted; however, the error was not plain error in light of the overwhelming evidence of defendant's guilt. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Chiropractor. — In personal injury action arising out of an automobile accident, chiropractor's testimony as to plaintiff's strain or sprain of a muscle was properly excluded, because such injury and treatment are beyond the field of chiropractic as defined by statute. Ellis v. Rouse, 86 N.C. App. 367, 357 S.E.2d 699 (1987).

Insurance Adjuster. — Where a home was flooded and the homeowner asserted breach of contract and unfair and deceptive trade practices against an insurer and an adjusting company, the testimony of the homeowner's expert was properly excluded because (1) the homeowner's attorney did not offer any case that directly stood for the proposition that insurance adjusters could testify as experts, and (2) the expert only offered legal conclusions. Burrell v. Sparkkles Reconstruction Co., 189 N.C. App. 104, 657 S.E.2d 712, 2008 N.C. App. LEXIS 422 (2008).

Memory Variables Affecting Identification. — For case in which exclusion of expert testimony of a professor of psychology whom defendant offered to provide expert evidence on memory variables affecting eyewitness identification, but who had not interviewed the victim, was upheld, see State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

Paternity of Victim's Child. — In a prosecution for first-degree rape of a female under the age of 13, with expert's testimony concerning the paternity index and evidence of defendant's access before it, jury was in as good a position as expert to determine whether defendant "probably" was father of victim's child. Therefore, expert's testimony that defendant "probably" was father of victim's child was of no assistance to the trier of fact and should have been excluded on that basis. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

Who Was Father in Paternity Action. — Genetics and paternity testing experts should not have been allowed to express their opinions that defendant was the children's father, because allowing an expert to express an opinion as to who is the father tramples upon the jury's domain. Brooks v. Hayes, 113 N.C. App. 168, 438 S.E.2d 420 (1993).

An Expert Is Not Needed to Explain Anatomical Dolls. — There is no need to have an expert evaluate the use of anatomical dolls or explain it to a jury; there is nothing technically complex about it. In fact, it is precisely because the use of the dolls can be readily understood by everyone involved, especially the child, that they are so often employed in the investigation of child abuse. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Opinion of Abuse by Defendant. — While doctor's opinion that children were sexually abused was clearly admissible under prior decisions, his opinion that the children were sexually abused by defendant was not. Nonetheless, admission of the evidence was not reversible error. State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

Where an expert, who was qualified as an expert in the field of pediatrics, testified that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim's vaginal opening, that testimony was not impermissible opinion testimony regarding the victim's credibility because the expert's previous testimony established the existence of physical evidence supporting a diagnosis of sexual abuse. State v. Streater, — N.C. App. —, 673 S.E.2d 365, 2009 N.C. App. LEXIS 211 (2009).

Credibility. — In a prosecution for taking indecent liberties with a child, testimony of two witnesses for the State, a pediatrician and a child psychologist, that in their opinion the child had testified truthfully, did not meet the requirements for expert testimony, as it concerned the credibility of a witness, a field in which jurors are supreme and require no assistance, rather than some fact involving scientific, technical or other specialized knowledge, and as character evidence the testimony violated the provisions of G.S. 8C-1, Rules 405(a) and 608. State v. Holloway, 82 N.C. App. 586, 347 S.E.2d 72 (1986).

Where a doctor admitted that abrasions found on an alleged sexual assault victim were neither diagnostic nor specific to sexual abuse, this was insufficient physical evidence to support the doctor's testimony of her diagnosis and opinion that the victim was probably sexually abused; since (1) there was not overwhelming evidence of defendant's guilt, (2) the only direct evidence was the victim's testimony corroborated by other witnesses, and (3) other evidence showed that the results of a rape kit were negative, the impermissible expert medical opinion evidence had a probable impact on the jury's result because it amounted to an improper opinion on the victim's credibility, and the admission of the expert opinion was plain error. State v. Couser, 163 N.C. App. 727, 594 S.E.2d 420, 2004 N.C. App. LEXIS 592 (2004).

Admission of a doctor's testimony that it was probable that the child was a victim of sexual abuse was erroneous because there was no physical indication of sexual activity and the doctor's opinion was based on an examination of the child, the child's medical history, and the existence of a sexually transmitted disease; the improperly admitted opinion on the child's credibility prejudiced defendant in the eyes of the jury. State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005).

It was plain error for a medical expert to bolster the credibility of the victim in violation of G.S. 8C-1, N.C. R. Evid. 702(a), so defendant did not have to preserve the claim for review pursuant to N.C.R. App. P. 10(b)(1); however, the error did not prejudice defendant as the State presented sufficient evidence from other sources to establish the victim's credibility. State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Trial court erred in admitting expert testimony that, inter alia, "these children suffered sexual abuse by (defendant)," as the opinion did not relate to a diagnosis derived from the expert's examination of the prosecuting witnesses in the course of treatment, making it improper opinion testimony concerning the children's credibility; however, the error was not plain error in light of the overwhelming evidence of defendant's guilt. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

As an expert's testimony that his findings were consistent with the history that he received from the victim of repeated anal penetration was an impermissible opinion regarding the victim's credibility, and the victim's testimony was the only direct evidence implicating defendant on the charge of first-degree sexual offense, the expert's testimony amounted to an improper opinion on the victim's credibility and it had a probable impact on the jury's result. State v. Streater, — N.C. App. —, 673 S.E.2d 365, 2009 N.C. App. LEXIS 211 (2009).

Defendant was entitled to a new trial on the charge of first-degree sexual offense because the trial court erred when it admitted a doctor's expert opinion that sexual abuse had in fact occurred when the doctor's testimony amounted to an improper opinion on the victim's credibility, and it had a probable impact on the jury's result; the victim's testimony was the only direct evidence implicating defendant on the charge of first-degree sexual offense, and while the doctor could give such testimony with regard to vaginal rape, where he found significant findings of physical evidence to support the charge history, he could not testify that it was defendant who repeatedly abused the victim where no such physical evidence existed. State v. Streater, — N.C. App. —, 678 S.E.2d 367, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

Tendency to Fabricate. — In prosecution for second degree rape and sexual offense, the trial court erred in permitting the prosecutor to pose a question to an expert in clinical psychology regarding whether the 13-year-old victim had a mental condition which would cause her to fabricate a story about the sexual assault. State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986).

Contradictory Testimony. — Where psychologist who examined and administered several tests to defendant concluded his testimony on voir dire by admitting that his opinion as to defendant's capacity to form the specific intent to kill would have been different had he been aware of defendant's confession to the police before making his assessment, it was clear that he doubted his own opinion; this expert opinion testimony, at best, was contradictory and equivocal and could not have been helpful to the trier of fact in making the determination of whether defendant specifically intended to kill the victim. State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995).

Specialists Disqualified from Testifying against General Practitioner. — All three of the plaintiff's witnesses were disqualified from testifying against the defendant, a general practitioner, pursuant to this rule, because they were specialists as that term is used in the statute. One was board certified in oncology; another, in emergency medicine and family practice; and the third held himself out as a specialist in emergency medicine. Consequently, the defendant's motion for a directed verdict was properly granted. Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000).

It was not error to exclude the testimony of a clinical psychologist as to the reactions of sexually abused children, when there was no evidence of the reaction of the child to the incident in the case at issue and the psychologist's testimony would not have been helpful to the jury in reaching a decision. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Medical Doctor on Child Abuse. — The opinion testimony of a doctor that the victim/child had been abused was inadmissible where: the doctor's "diagnosis" of the child's sexual abuse was based solely on a psychiatrist's interview—itself inadmissible—with the child; the child's body showed no signs of abuse—no scars, no enlarged vaginal opening, no missing or torn hymen, etc.—and the tests for sexually transmitted disease all came back negative; and the doctor's testimony most likely resulted in a different result than would have been reached otherwise. State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000).

Trial court erred by permitting a doctor to testify as to his opinion that defendant's stepdaughter had been sexually abused where the doctor's opinion was not supported by an adequate foundation, and its admission was prejudicial error. State v. Dixon, 150 N.C. App. 46, 563 S.E.2d 594, 2002 N.C. App. LEXIS 392 (2002), aff'd, 356 N.C. 428, 571 S.E.2d 584 (2002).

Medical Doctor on Child Abuse. — Even though the State failed to lay an adequate foundation for the admission of a pediatrician's statement of opinion under G.S. 8C-1, Rule 702, and the trial court's admission of the challenged portion of the testimony was error, it did not constitute plain error based upon other overwhelming evidence against defendant. State v. Stancil, 355 N.C. 266, 559 S.E.2d 788, 2002 N.C. LEXIS 182 (2002).

The failure to admit testimony challenging the undercover procedures used by an undercover agent in obtaining drugs from the defendant did not constitute an abuse of discretion, under this section, where the evidence was already sufficient to prove the drug charges under G.S. 90-95(a) and where the record already contained evidence that the agent used the drugs from the buys and the jury, therefore, had the ability, on its own, to assess the agent's credibility. State v. Mackey, 137 N.C. App. 734, 530 S.E.2d 306, aff'd, 352 N.C. 650, 535 S.E.2d 555 (2000).

Opinion on Actual Speed Based on Physical Evidence. — With respect to the actual speed of a vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene. Hicks v. Reavis, 78 N.C. App. 315, 337 S.E.2d 121 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

One who did not see a vehicle in motion will not be permitted to give an opinion as to its speed. Coley v. Garris, 87 N.C. App. 493, 361 S.E.2d 427 (1987).

Expert witness was not permitted to testify regarding the speed of the vehicles involved in an accident at the time of impact where the witness did not personally observe the vehicles at the time of the accident. Loy v. Martin, 156 N.C. App. 622, 577 S.E.2d 407, 2003 N.C. App. LEXIS 235 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 274 (2003).

Barefoot impression evidence, that is, evidence based on research into the uniqueness of bare feet found inside shoes at crime scenes, was not sufficiently scientifically reliable at the time of trial, but its admission, given the entire record, was harmless. State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001), review denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

Position of Body Before Shooting. — Trial court did not err in excluding the testimony of a witness as to how a body was positioned before it was shot because the trial court was not satisfied with the witness's expertise to testify in this area and did not believe that the witness's testimony would be helpful. State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001), cert. denied, 535 U.S. 934, 122 S. Ct. 1312, 152 L. Ed. 2d 221 (2002).

Practices And Procedures Used by Narcotics Officer. — The court rightfully refused the testimony of defendant's expert, a private detective and retired police officer of 30 years, where the jury was perfectly capable of judging the improper methods and procedures used by the undercover narcotics officer without the assistance of the expert; the testimony was irrelevant, had insufficient probative value on the facts to be proved, and violated the rule prohibiting expert testimony as to witness credibility, G.S. 8C-1, Rules 405(a) and 608, as read together. State v. Mackey, 352 N.C. 650, 535 S.E.2d 555, 2000 N.C. LEXIS 751 (2000).

Likely to Confuse Jury. — Expert testimony was properly excluded where it would have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force the officers used in attempting to apprehend defendant. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Trial court did not err in not permitting a psychologist to testify at trial as an expert witness as to eyewitness identifications since the court properly appraised the probative and prejudicial value of the evidence under G.S. 8C-1, Rule 403 and found that any probative value of the proffered testimony was outweighed by the risk of confusing the jury. State v. Cole, 147 N.C. App. 637, 556 S.E.2d 666, 2001 N.C. App. LEXIS 1257 (2001), appeal dismissed, cert. denied, 356 N.C. 169, 568 S.E.2d 619 (2002), cert. denied, 537 U.S. 1203, 123 S. Ct. 1275, 154 L. Ed. 2d 1045 (2003).

Trial court properly excluded mental health expert's testimony as to the likelihood of defendant's release from the hospital if the jury found defendant not guilty by reason of insanity after finding that the expert's testimony could confuse the issues of the case with the possible consequences, and the expert's testimony would not assist the jury in regard to any matter in issue or fact. State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007), review denied, appeal dismissed, 362 N.C. 366, 663 S.E.2d 431 (N.C. 2008).

Prejudicial, Unhelpful Testimony Excluded. — In case involving wife who helped her husband rape juvenile, trial court properly excluded testimony of both director of a nonprofit domestic violence corporation and defense psychologist because it was prejudicial and did little to appreciably help the jury. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

Daubert Test. — In action against helmet manufacturer to recover for injuries sustained in a motorcycle accident, expert testimony regarding causation was properly excluded under the Daubert test and where the record was replete with competent evidence supporting the challenged findings of the trial court. Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 581 S.E.2d 816, 2003 N.C. App. LEXIS 1193 (2003), cert. granted, 357 N.C. 459, 585 S.E.2d 757 (2003).

Surgeon Not Familiar With Local Standard of Care. — Trial court properly excluded expert testimony offered by a patient to support a malpractice claim because the patient's expert practiced orthopedic surgery in Virginia and was not familiar with the standard of care imposed on orthopedists who practiced in North Carolina. Smith v. Whitmer, 159 N.C. App. 192, 582 S.E.2d 669 (2003).

Patient did not comply with G.S. 1A-1-9(j) since expert patient identified had orthopedic surgery specialty, and not physical medicine and rehabilitation specialty that the doctor had; even if the expert was familiar with the standard of care, that familiarity did not satisfy G.S. 8C-1-702(b)(2)a. Smith v. Serro, 185 N.C. App. 524, 648 S.E.2d 566, 2007 N.C. App. LEXIS 1801 (2007).

Opinion on Actual Speed Based on Physical Evidence. — Because defendant's crime occurred before December 1, 2006, N.C. R. Evid. 702(i) did not apply, and Shaw rule barred expert opinion as to the speed of defendant's vehicle. State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

The trial court did not err in excluding an expert's testimony because (1) the notice of the expert witness was indeed late, (2) a property owner was notified by the Department of Transportation the day of jury selection, and (3) the expert's voir dire testimony revealed that his proffered method of proof was not sufficiently reliable. DOT v. Blevins, — N.C. App. —, 670 S.E.2d 621, 2009 N.C. App. LEXIS 40 (2009).

IV. EXPERT OPINION ADMISSIBLE.

Physician. — In prosecution for rape and taking indecent liberties with a minor, testimony of a stipulated expert physician and surgeon specializing in family medicine that a child's delay in reporting an incident of child sexual abuse was normal, based on his knowledge, skill, experience, training and education as a physician, was not error where the physician's testimony was used to corroborate the victim's credibility after the defendant's cross-examination attacked her credibility. State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987).

While the existence of other possible causes of the plaintiff's ruptured disk might have reduced the weight accorded to the physician's opinion, such other possibilities did not alone render inadmissible the physician's opinion that an automobile accident caused her injury. Cherry v. Harrell, 84 N.C. App. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Where the testimony of a duly licensed physician, board certified in family medicine with extensive experience in pediatrics, precisely explained the nature of a child's burns, how such burns are medically evaluated, and how they are treated, and he further testified that the number, location, and severity of the burns was inconsistent with a medical etiology of accidental causation, such testimony was clearly helpful to the court as a fact finder and was properly admitted. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

There was no error in admitting opinion of two doctors in an assault prosecution where one of the doctors treated the victim's wounds for at least 40 minutes and examined her over the course of several hours on the night she was attacked and the other doctor had been the victim's personal physician for four or five years and examined her the morning after the attack and continued to treat her for two and one-half months afterward. State v. Shubert, 102 N.C. App. 419, 402 S.E.2d 642 (1991).

Where doctor was allowed to testify about defendant's mental state at the time of the murders and gave his opinion that defendant did not form the specific intent to kill, but was not allowed to give his opinion that the defendant "snapped", defendant received a fair trial, free of prejudicial error. State v. Burgess, 345 N.C. 372, 480 S.E.2d 638 (1997).

Expert witness was properly allowed to give his opinion as to defendant's state of mind based on the fact that the victim was found lying prone on the floor; as a psychiatrist, the witness was trained to recognize links between behavior and a person's state of mind, therefore he had specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue, G.S. 8C-1, Rule 702(a), and his testimony was not improperly allowed. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Doctor was properly qualified as an expert witness in medical malpractice action involving shoulder dystocia in the delivery of a baby where the record showed that the witness and the doctor defending the action belonged to the American College of Obstetrics and Gynecology, the witness testified that he was a perinatologist and that all perinatologists were first obstetrician gynecologists, that perinatology, like obstetrics, included the performance in management of shoulder dystocia, and that even though he was considered a perinatologist, he continued to practice as an obstetrician gynecologist; accordingly, the witness was of the same or similar specialty as the doctor who delivered the baby such that he met the criteria for testifying as medical expert witness. Leatherwood v. Ehlinger, 151 N.C. App. 15, 564 S.E.2d 883 (2002), cert. denied, 357 N.C. 164, 580 S.E.2d 368 (2003).

The treating doctor's opinion regarding sexual assault was based on expertise in treating sexually abused patients, the victim's emotional state and physical appearance in the emergency room, and from what the victim had told the doctor during the course of treatment. State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002), cert. denied, 358 N.C. 158, 593 S.E.2d 397 (2004).

Expert medical witnesses were properly allowed to testify within their areas of expertise; G.S. 8C-1, N.C. R. Evid. 702(a)(1) permitted the admission of expert medical testimony to assist the trier of fact to understand the evidence or to determine a fact in issue, and the determination of the admissibility of expert testimony was within the sound discretion of the trial judge and would not be disturbed on appeal absent an abuse of discretion, which there was not. Floyd v. McGill, 156 N.C. App. 29, 575 S.E.2d 789, 2003 N.C. App. LEXIS 35 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 364 (2003).

When a physician testified, in a prosecution involving a sexual assault on a child, that her examination of the child was consistent with her interview of the child, this testimony was properly admitted because the physician did not testify that the allegations against the child's attacker were accurate. In re Butts, 157 N.C. App. 609, 582 S.E.2d 279, 2003 N.C. App. LEXIS 928 (2003), review improvidently allowed, appeal dismissed sub nom. In re T.R.B., 358 N.C. 370, 595 S.E.2d 146 (2004).

In a wrongful death action based on a medical specialist's medical malpractice, the trial court erred in failing to allow the specialist to cross-examine the medical expert for the decedent's estate as to whether the other treating doctor, a former codefendant, acted in accordance with the standard of care, because evidence of the former co-defendant's standard of care was relevant to show whether the specialist's conduct was the proximate cause of the injury, as G.S. 90-21.12 permits a physician, otherwise qualified under G.S. 8C-1, Rule 702, to testify regarding the applicable standard of care in a medical malpractice case. However, any error was harmless because there was other expert testimony admitted for both parties that contained the same substance, and it could not be said that a different outcome would have resulted. Boykin v. Kim, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

Trial court did not err in admitting the testimony of the employee's physicians as expert witnesses, as they were qualified by experience, training, and education with specialized scientific knowledge regarding the development of mesothelioma. Williams v. CSX Transp., Inc., 176 N.C. App. 330, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

Doctor's opinion testimony to a medical certainty that a nurse's accident at work probably aggravated her preexisting lymphedema was admissible because: (1) based on the doctor's experience in treating lymphedema, the doctor's expert opinion testimony was sufficiently reliable; and (2) the opinion testimony was not based solely on the notion of post hoc ergo propter hoc. Legette v. Scotland Mem'l Hosp., 181 N.C. App. 437, 640 S.E.2d 744, 2007 N.C. App. LEXIS 361 (2007), cert. denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 273 (2008).

Radiologist was without objection qualified under G.S. 8C-1, N.C. R. Evid. 702(a) as an expert in the field of medicine specializing in radiology, and was competent to offer the radiologist's expert opinion that a driver's trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered; under G.S. 8C-1, N.C. R. Evid. 704, the radiologist's expert opinion testimony was not rendered inadmissible on the basis that it embraced an ultimate issue to be determined by the jury—whether the injuries sustained by the driver were serious. State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009).

Trial court did not err in excluding expert testimony by a doctor who acknowledged in the doctor's deposition that the doctor had never performed the procedures at issue in the medical malpractice action. Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009).

Forensic Pathologist. — Court did not err by allowing a forensic pathologist to testify that the many bruises he found on the body of a deceased child were not consistent with normal childhood activity. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

Expert in pathology was permitted to testify as a victim's cause of death. State v. Johnson, 343 N.C. 489, 471 S.E.2d 409 (1996).

Although the state medical examiner who testified for the State in defendant's murder trial admitted uncertainty as to whether two of the victims had been shot twice, the medical examiner's testimony that the two victims at issue might have been shot twice based on the nature of their injuries was permissible opinion testimony under G.S. 8C-1, N.C. R. Evid. 702(a), 703 because the medical examiner was more qualified than the jury to formulate an opinion regarding the number of gunshot wounds suffered by the victims, and the testimony was based on the medical examiner's autopsies of the victims and the medical examiner's observations as an expert in forensic pathology; the fact that there was uncertainty about the number of gunshot wounds went to the weight of the evidence, rather than its admissibility. State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Opinion on Helpfulness of Autopsy Photographs. — Expert witness was properly permitted to testify that in the expert's opinion each of the autopsy photographs admitted into evidence depicted aspects of the victim's wounds, and each would be helpful to illustrate the victim's wounds to the jury, since such opinions were within the doctor's area of expertise and were relevant and appropriate to show the number and seversity of the wounds. State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

Assistant Medical Examiner. — In a prosecution for murder, the witness' position as Assistant Medical Examiner and his testimony regarding the number of other cases he had seen indicated sufficient expertise such that the trial court did not err in admitting his opinion of the cause of death. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Demonstration by Medical Examiner. — It was not error for the court to permit medical examiner to demonstrate with the use of the murder weapon, a .357 magnum, that he, a man approximately the size of the victim, could not shoot himself in the head with the gun from the necessary distance. State v. Benjamin, 83 N.C. App. 318, 349 S.E.2d 878 (1986).

In a prosecution for the rape of a mentally retarded victim, the trial court did not abuse its discretion in allowing a psychologist to answer a hypothetical question regarding how the victim would likely have reacted to a sexual advance. State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998), cert. denied, 352 N.C. 362, 544 S.E.2d 562 (2000).

Chiropractor. — In personal injury action arising out of an automobile accident, the trial court erred in excluding chiropractor's testimony concerning plaintiff's nerve strain or sprain, because such injury and treatment are within the field of chiropractic as defined by statute. Ellis v. Rouse, 86 N.C. App. 367, 357 S.E.2d 699 (1987).

Serologist. — Under the standard set forth in State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979), the tests forming the basis of serologist's testimony were sufficiently reliable to support the admission of her expert opinion based upon those tests. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Foundations for the testimony of expert witnesses who testified regarding spermatozoa, hair and DNA found on female minor's bed, clothes and body were sufficient. State v. Bowers, 135 N.C. App. 682, 522 S.E.2d 332, 1999 N.C. App. LEXIS 1236 (1999).

S.B.I. Lab Technician. — Trial court in a murder trial did not commit reversible error by permitting a State Bureau of Investigation laboratory technician to testify as to how a level of gunshot residue could have gotten on the victim's hands, and as to how the failure of the defendant's gunshot residue test to provide conclusive results could have been caused by the passage of 31/2 hours since the time of the shooting and by activity on the part of the defendant. State v. Benjamin, 83 N.C. App. 318, 349 S.E.2d 878 (1986).

S.B.I. agent was properly allowed to give her expert opinion as to why the seizure of defendant's police frequency book was important, testifying that finding a police frequency book and a radio scanner could indicate those acting illegally might have a "jump start" if they knew which police frequencies to monitor; that testimony was within the witness's expertise and was likely to assist the jury in inferring why such evidence was considered important and why it was seized during a search of defendant's residence for a methamphetamine laboratory. State v. Alderson, 173 N.C. App. 344, 618 S.E.2d 844, 2005 N.C. App. LEXIS 2033 (2005).

Ultrasound Technologist. — In case relating to indecent liberties with a child, where witness testified as to her qualifications as an ultrasound technologist, which included an undergraduate degree, completion of a medical science training program which specialized in ultrasound training, and six years of experience in the field, and her testimony assisted the jury in evaluating two facts in issue, namely, (a) whether intercourse occurred, and (b) the time at which the alleged offense was committed, court did not err in allowing the witness to testify as expert. State v. Fenn, 94 N.C. App. 127, 379 S.E.2d 715, cert. denied, 325 N.C. 548, 385 S.E.2d 504 (1989).

Nurse. — There was no abuse of discretion in the admission of expert testimony regarding nursing and the proper standard of care in a nursing home; both witnesses were amply qualified by training, experience, and knowledge to assist the jury in understanding the evidence with respect to nursing procedures and the applicable standard of care required of the elder care corporation, and the testimony did not have the potential to confuse or mislead the jury so as to outweigh its probative value. Estate of Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 565 S.E.2d 254, 2002 N.C. App. LEXIS 722 (2002), cert. denied, 356 N.C. 299, 570 S.E.2d 503 (2002).

Engineer. — Professional engineer's testimony as to the structure and appearance of a stairway on which plaintiff was injured was based on direct personal knowledge; therefore, this testimony was admissible so long as it was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Newton v. New Hanover County Bd. of Educ., 342 N.C. 554, 467 S.E.2d 58 (1996).

Self-Defense. — Pathologist who performed the autopsy on murder victim was clearly in a position to assist the jury in understanding the nature of the deceased's wound and in determining whether defendant, in fact, acted in self-defense when he shot the deceased, and therefore, he was properly allowed to testify to these matters in the form of an opinion, even though self-defense was an ultimate issue in the case. State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Testimony Based upon Diagnosis Made One Month After Accident. — In negligence action where plaintiff's van collided with defendant's garbage truck, trial court did not err in admitting medical testimony of doctor despite the fact fracture of plaintiff's thoracic vertebrae was diagnosed by doctor approximately one month after the accident; a medical expert is competent to testify as to the cause of suffering alleged by plaintiff and in this case, the doctor, qualified as an expert in the field of orthopedic surgery, testified that in his opinion, based on his evaluation of plaintiff's medical condition, X-rays, bone scan and plaintiff's medical history, the thoracic fracture, originally undiagnosed by doctors immediately after the accident, was caused by the collision in question. Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989).

Expert So Qualified May Testify Regarding Causation. — In medical malpractice case resulting from bilateral hernia operation in which the doctor mistakenly cut plaintiff's penis, the trial court did not violate this section when it allowed plaintiff's expert witness to testify regarding causation. Andrews v. Carr, 135 N.C. App. 463, 521 S.E.2d 269, 1999 N.C. App. LEXIS 1155 (1999).

"Psychological autopsy" on decedent, involving interviewing family members and reviewing records to determine the probable cause of death or the decedent's state of mind at the time of his death, was competent and properly admitted for the purpose of determining the mental state of the deceased at the time of his suicide in a workers' compensation proceeding wherein plaintiff alleged that decedent's suicide was caused by a dysthymic disorder (depression) caused by his employment as a police officer. Harvey v. Raleigh Police Dep't, 85 N.C. App. 540, 355 S.E.2d 147, cert. denied, 320 N.C. 631, 360 S.E.2d 86 (1987).

Psychologist's testimony that child victim responded to test questions in an "honest fashion ... admitting that she was in a fair amount of emotional distress" did not constitute an expert opinion as to her character or credibility, but was merely a statement of opinion by a trained professional, based upon personal knowledge and professional expertise, that the test results were reliable because the victim seemed to respond to the questions in an honest fashion. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Testimony Regarding the Compentency of Witnesses to Testify. — The testimony of a clinical social worker and licensed psychological associate/counselor was properly admitted as relevant to the issue of the competency of three children to testify. In re Faircloth, 137 N.C. App. 311, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Test Based on Phadebas Methodology. — The expert witness's testimony established the reliability of the "Phadebas methodology," and therefore was admissible in the defendant's trial for sexual offenses against a 12-year-old girl, where the methodology indicated the presence of saliva on the vaginal test swabs taken from the victim's sexual assault kit, and the testimony was offered by the state to support the victim's testimony that the defendant had put his mouth on her vagina. State v. Dennis, 129 N.C. App. 686, 500 S.E.2d 765 (1998).

Origin of Injuries. — In trial for sexual offense in the first degree, the trial judge did not err in permitting State's rebuttal witness, Chief Medical Examiner for the State, to testify that in his opinion scratch marks on child's back were not consistent with self-mutilation and in allowing pediatrician to offer her opinion that the injuries were neither accidental nor self-inflicted. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Expert Opinion on Credibility. — Although Rules 405 and 608, when read together, prohibit an expert witness from commenting on the credibility of another witness, this rule allows expert testimony where the expert's testimony goes to the reliability of a diagnosis and not to the credibility of a rape victim. State v. Marine, 135 N.C. App. 279, 520 S.E.2d 65 (1999).

Credibility of Children Who Report Abuse. — In a prosecution for rape and sexual offense committed against a mentally defective female, the trial court did not err in allowing a pediatrician to testify on the credibility of children in general who report sexual abuse. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Expert in Child Physical Abuse Case. — In murder trial alleging death by water intoxication, witness, qualified as an expert in pediatric critical care medicine, could relate the sensations that a six-year-old boy would feel after drinking a large quantity of water, which, under normal conditions, would have signaled him to stop drinking. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Where physicians testified they had experience with the medical conditions known as Battered-Child Syndrome and Shaken-Baby Syndrome, gave detailed explanations of the general nature of these conditions and how they are medically evaluated, and offered opinions as to whether the injuries were consistent with intentionally, as opposed to accidentally, inflicted injuries, the trial court did not abuse its discretion in allowing the testimony since it was within each physician's area of expertise, was helpful to the factfinder and did not embrace a legal term of art or conclusion of law. State v. McAbee, 120 N.C. App. 674, 463 S.E.2d 281 (1995).

Testimony from expert in pediatrics and child abuse regarding battered child syndrome was properly admitted. State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996), cert. denied, 520 U.S. 1106, 117 S. Ct. 1111, 137 L. Ed. 2d 312 (1997).

Expert medical testimony was admissible in a capital murder prosecution, where the testimony of four physicians concerning the severity of the injuries inflicted on the defendant's infant son was relevant and admissible as evidence of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel in that the evidence attempted to quantify and qualify the infant's injuries for the jury. State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998), cert. denied, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999).

In a prosecution for the murder of a child, it was proper, under G.S. 8C-1-702(a), for properly qualified experts to offer the opinion that the victim's death was not caused by an accidental injury, as: (1) both based their opinions on their years of experience as pathologists, during which they performed and consulted on numerous autopsies; and (2) the experts offered the basis of their opinions. State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Expert in Child Sexual Abuse Case. — An opinion as "to the age at which the children began to understand dates," by an expert in clinical social work particularly in the area of child sexual abuse, was within the realm of expertise of the witness and was of assistance to the jury; therefore, the trial court did not err by allowing the testimony. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

Court properly allowed the opinion testimony of expert/doctor where the record indicated that the doctor based her opinions on her own exam of the victim, extensive personal experience examining child sexual abuse victims, knowledge of child sexual abuse studies, and a colleague's notes from an interview with the victim. State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

The testimony of a licensed psychological associate was admissible, assuming it was tendered in her capacity as a child sex abuse expert, where her testimony was her opinion based on her specialized expert knowledge concerning what the child had demonstrated by manipulation of anatomically correct dolls, and it was helpful to the jury on the issue of whether the defendant had committed fellatio or anal intercourse on the child. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Expert opinion by a psychologist that the victim was sexually abused was admissible pursuant to this section where the expert who specialized in children and adolescents based her testimony on diagnosis made while treating the child on 45 occasions and not just on a repetition of the child's statements. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

Trial court properly permitted clinical social worker to express expert testimony in case of man accused of sexually abusing a boy since the social worker was properly qualified as an expert in the area of child sex abuse evaluations and interviewing, a proper foundation was laid, and the testimony was clearly instructive and helpful to the jury in understanding the evidence. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002).

Trial court did not err in permitting counselor who had talked with child sexual abuse victim to testify as an expert witness since the counselor's testimony that the child's behavior was consistent with a child who had been sexually abused was of the nature that would assist the jury in their ultimate determination of whether defendant sexually abused the child. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Opinion of a witness, qualified as an expert in pediatrics and the identification of child abuse based on thousands of examinations of abused children, linking an injury on the victim's face to contemporaneous sexual abuse, was properly admitted. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

At defendant's trial on charges of first degree statutory rape of a female child under 13 years old, statutory sexual offense of a female child under 13 years old, and taking indecent liberties with a child, trial court properly allowed expert testimony by pediatrician that the victim was sexually abused because the pediatrician's testimony was based on her own examination of the victim, and medical history she obtained from a child protective services investigator and the victim's mother. State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Admission of expert testimony by the psychologist for a sexual abuse victim was not plain error as based solely on the victim's statements where (1) the therapist was highly experienced in the field of child abuse; (2) conducted weekly hour-long sessions with the victim over approximately 10 months; (3) observed the child during therapy sessions; (4) noted the child's symptoms and manifestations during those sessions; and (5) was most likely aware of the child's account of the abuse to others. State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Pediatrician's testimony that a minor child had been sexually abused had sufficient foundation where the pediatrician had performed a medical examination on the child and taken a medical history. State v. Shepherd, 156 N.C. App. 69, 575 S.E.2d 776, 2003 N.C. App. LEXIS 31 (2003).

Opinion testimony of two expert witnesses was admissible because the trial court did not treat their testimony that a female child was highly likely to have been a victim of child sexual abuse as an endorsement of the female child's credibility in a child abuse and neglect case; further, even assuming the expert testimony was an impermissible endorsement of the female child's credibility, the father had not shown that the trial court had considered the testimony to bolster the female child's credibility. In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584, 2004 N.C. App. LEXIS 175 (2004), appeal dismissed, — N.C. —, 603 S.E.2d 884 (2004).

Testimony of the state's forensic pediatrician was admissible to rebut defense testimony as to the criteria used to determine if child abuse occurred, including what would be considered a normal caretaker behavior in such situations. State v. Faulkner, 180 N.C. App. 499, 638 S.E.2d 18, 2006 N.C. App. LEXIS 2504 (2006).

Trial court did not err in admitting a doctor's expert testimony that his physical findings were consistent with the victim's history because once the trial court accepted the doctor as an expert, controversy over his opinion went to the weight of his testimony, not its admissibility; the doctor testified that the victim's history of repeated vaginal penetration was consistent with his findings made during his examination of the victim's vaginal opening, and that testimony was not impermissible opinion testimony regarding the victim's credibility because the doctor's previous testimony established the existence of physical evidence supporting a diagnosis of sexual intercourse. State v. Streater, — N.C. App. —, 678 S.E.2d 367, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

Exhibition of Characteristics Consistent with Abuse. — Opinion of expert witness that mentally retarded adult exhibited behavioral characteristics consistent with sexual abuse was within the scope of permissible expert testimony, where it was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 66, 358 S.E.2d 67 (1987).

In trial for sexual offense in the first degree, it was not improper to allow both psychologist and pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state the opinion that the symptoms exhibited by the victim were consistent with sexual or physical abuse. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

In a prosecution in which defendant was convicted of taking indecent liberties with a minor, the testimony of social worker and pediatrician as to a child's continued cooperation with a person whom the child has accused of sexual abuse was specialized knowledge, helpful to the jury and well within the fields of expertise of the two witnesses, and as defendant had "opened the door" for this evidence by cross-examining child victim about going to barn alone with defendant after she admitted she was afraid of defendant and did not like to be alone with him, it was also admissible expert testimony that corroborated the testimony of the state's prosecuting witness. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

In prosecution in which defendant was convicted of taking indecent liberties with a minor, admission of testimony of psychologist who examined child at the request of DSS as to her anxiousness and anger during his examination of her and his professional expert opinion as to the relationship between her anxiousness and anger and the events which she described during the examination was not error. State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988).

Testimony of pediatrician that the physical trauma revealed by her examination of a child was consistent with the abuse which the child alleged had been inflicted upon her, did not comment on the truthfulness of the victim or the guilt or innocence of the defendant, and was properly admitted to assist the jury in understanding the results of the physical examination and their relevancy to the case being tried. State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988).

Allowing experts to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse is proper. State v. Love, 100 N.C. App. 226, 395 S.E.2d 429 (1990), cert. denied, appeal dismissed, 328 N.C. 95, 402 S.E.2d 423 (1991).

A doctor's testimony that "mothers of abused children usually do not believe the child, and that it was a good sign for the victim to have told her grandmother that defendant abused her," was proper under this rule, since a lay jury could be expected to be unfamiliar with the parental responses to allegations of abuse and the responses of abused children to those to whom they look for help. State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15, cert. denied, 329 N.C. 503, 407 S.E.2d 548 (1991).

Where physician's testimony was not that the victim was believable or that the defendant was guilty or innocent, but related to her expert knowledge of abused children in general and her personal examination of the victim, the testimony was admissible. State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15, cert. denied, 329 N.C. 503, 407 S.E.2d 548 (1991).

Court did not err in allowing a physician to testify in a trial for child abuse that a child would not drink enough water to result in the amount which the deceased child absorbed "voluntarily." The physician testified on cross-examination that "voluntarily" to him meant as the result of the thirst mechanism; and he testified at great length about the thirst mechanism, and the body's tendency to adjust water level to maintain the proper concentration of substances such as sodium. This evidence was well within the doctor's area of expertise and helpful to the jury. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

Witness's testimony regarding a "whooping" incident was properly admitted as the State's evidence tended to show that the victim began "wetting the bed" around the time of the alleged sexual abuse and the witness's testimony about the "whooping" incident therefore tended to establish defendant's intent to conceal the alleged sexual abuse. State v. Streater, — N.C. App. —, 673 S.E.2d 365, 2009 N.C. App. LEXIS 211 (2009).

Conversion Reaction in Rape Victims. — Expert testimony regarding post-traumatic stress disorder and conversion reaction in rape victims could be helpful to the jury in understanding the nature and causes of these disorders, as well as the post-assault behavior patterns of the victim. State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992).

Expert Testimony on Post-Traumatic Stress Disorder. — For case upholding admission of psychologist's testimony on post-traumatic stress disorder suffered by victim, see State v. Strickland, 96 N.C. App. 642, 387 S.E.2d 62 (1990).

If believed, expert testimony regarding post-traumatic stress disorder could be helpful to the jury in understanding the behavioral patterns of sexual assault victims. This court and courts of other jurisdictions have recognized the reliability of post traumatic stress disorder testimony in sexual assault cases. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Expert's testimony that stress from an incident may or may not have triggered plaintiff's outbreak of shingles was admissible and considered with other evidence, as expert testimony was not inadmissible for failure to state that the testimony was based upon a reasonable medical probability; although baseless speculation could never "assist" the jury, under G.S. 8C-1, N.C. R. Evid. 702, as long as the testimony was helpful to the jury and based sufficiently on information reasonably relied upon, under G.S. 8C-1, N.C. R. Evid. 703, the testimony was admissible. Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 575 S.E.2d 797, 2003 N.C. App. LEXIS 32 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Testimony on Meaning of Slang Terms. — Detective was properly permitted to testify regarding the definition of certain slang terminology used by defendant and defendant's brother in a taped phone conversation because the testimony was necessary to effectuate an understanding of the conversation; the judge's statement that the judge believed that the detective had "training and skills that will aid the jury in interpreting this stuff," and the fact that the judge allowed the detective to offer opinion testimony demonstrated that the judge concluded that the detective was qualified to offer expert opinions on the meaning of slang terms. State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628, 2007 N.C. App. LEXIS 1720 (2007).

Accident Reconstruction Expert. — Under the version of G.S. 8C-1-702 that was in effect prior to the adoption of 2006 N.C. Sess. Laws 253, § 33, a driver's reconstruction expert was properly allowed to testify as to the distance it would take a car similar to that driven by an owner's daughter to stop at various speeds as: (1) the expert never opined as to the speed that the daughter was traveling; (2) the expert used the expert's scientific expertise to perform an experiment that demonstrated stopping distances at various speeds; and (3) it was left up to the jury to determine the daughter's stopping distance. Hoffman v. Oakley, 184 N.C. App. 677, 647 S.E.2d 117, 2007 N.C. App. LEXIS 1628 (2007).

A Minor's Future Employment Opportunities. — The court properly allowed expert testimony pursuant to this section as to whether plaintiff, a minor injured in an automobile accident, would attend college and the effect of scarring on her future employability where the experts all testified based on their own personal evaluations of the minor, a review of her additional medical records, and their expertise and training. Fox-Kirk v. Hannon, 142 N.C. App. 267, 542 S.E.2d 346, 2001 N.C. App. LEXIS 92 (2001), review denied, 353 N.C. 725, 551 S.E.2d 437 (2001), review dismissed, 353 N.C. 725, 551 S.E.2d 437 (2001).

Testimony on Chronic Alcohol Abuse. — Expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue — whether the defendant had premeditated and deliberated; therefore, this expert opinion testimony was not rendered inadmissible on the basis that it embraced the issues of premeditation and deliberation and specific intent to kill, which are ultimate issues to be determined by the jury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Testimony of Expert Satisfied Helpfulness Test. — In a custody action, trial court did not err in admitting over objection the testimony of psychologist who stated that defendant was better able to meet the needs of the child and who stated her recommendations as to visitation; the testimony of psychologist was within her respective area of expertise and satisfied the helpfulness test for expert opinions under this rule, and the witness was unquestionably in a better position than the trial court to have an opinion on the subject about which she testified. Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

Where a defendant made a general objection to a police officer's testimony and not a specific objection to the officer's qualification as an expert, the admissibility of the officer's testimony was not preserved for review, and because the testimony was in the form of an opinion based on the officer's expertise and was likely to assist the jury, the testimony was not patently inadmissible and prejudicial. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Although the three experts who testified for plaintiffs were not qualified in neurosurgery, but in neurology and emergency medicine, their testimony that an earlier diagnosis would have led to a better outcome for the patient, who was ultimately diagnosed with a herniated disk accompanied by significant compression of the spinal cord, was competent because it was helpful for the jury in determining the proximate cause element of plaintiffs' negligence action. Weaver v. Sheppa, 186 N.C. App. 412, 651 S.E.2d 395, 2007 N.C. App. LEXIS 2206 (2007).

Bloodstain pattern interpretation is an appropriate area for expert testimony. State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

Bloodstain pattern interpretation is a specialized crime scene technique wherein a specially trained individual studies the blood and the types of stains at the scene of the crime, and then, based upon his knowledge of similar bloodstain characteristics and reproductions of the crime scene, he forms an opinion about what actually occurred at the crime scene. Experts rely upon specific categories of bloodstains which are defined by the way in which they are made. State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995).

Blood Spatter Testimony. — Admission of testimony by SBI agent regarding blood spatters, location of wound, and the location of body was properly admitted. State v. East, 345 N.C.

535, 481 S.E.2d 652 (1997), cert. denied, 522 U.S. 918, 118 S. Ct. 306, 139 L. Ed. 2d 236 (1997).

Ballistics Expert. — Defendant's conviction of first degree murder was affirmed, as the trial court properly admitted an expert's ballistic testimony pursuant to G.S. 8C-1, Rule 702, and defendant's claims concerning violation of the Daubert standard were irrelevant as North Carolina did not recognize the Daubert standard. State v. Anderson, 175 N.C. App. 444, 624 S.E.2d 393, 2006 N.C. App. LEXIS 191 (2006), cert. denied, — N.C. —, 632 S.E.2d 492 (2006).

Building Code Standards. — Whether or not building met the standards of the Building Code, though not determinative of the issue of negligence, had some probative value as to whether or not defendant failed to keep his store in a reasonably safe condition, and expert testimony on this issue could properly be introduced in a negligence action against store owner. Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

Expert on Cause of Fires. — In a civil action wherein plaintiff sought to recover proceeds of a fire insurance policy issued to plaintiffs by defendant, the trial court did not err in allowing a professor who had a doctorate in chemical engineering and had taught thermodynamics and heat transfer (the underlying sciences of fire and its propagation), had since 1946 done consulting work for various companies and individuals in forensics in connection with fires and explosions, had been called upon to do investigations with the purpose of giving an opinion as to the cause and origin of fires, and had been previously qualified as an expert to testify within these areas in the courts of this state to testify as an expert on the cause and origin of the fire. Wiles v. North Carolina Farm Bureau Mut. Ins. Co., 85 N.C. App. 162, 354 S.E.2d 248, cert. denied, 320 N.C. 517, 358 S.E.2d 533 (1987).

In a case where defendant was convicted of first degree arson, trial court did not err in admitting the opinion testimony of the State's expert witness that the fire was intentionally set; record showed the State's expert witness was a captain in the fire department who had served for nine years as a fire inspector and had received special training in fire investigation; furthermore, his testimony explained, in clear terms, the accepted method for eliminating accidental causes of fires and such testimony was clearly instructive to the jury. State v. English, 95 N.C. App. 611, 383 S.E.2d 436 (1989).

Expert in the field of incendiary fires had sufficient knowledge to form an opinion that the fire was intentionally set. State v. Hales, 344 N.C. 419, 474 S.E.2d 328 (1996).

Fire investigator, who had training and 40 years of experience with firefighting and who was an arson investigation instructor, was properly permitted as an expert witness to give his opinion that the fire to the defendant's house trailer was intentionally set by the use of an accelerant, and that it was impossible that the fire was accidentally set by a grease fire as the defendant claimed. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

Deputy fire marshal was properly allowed to express an opinion on the cause of a fire, under G.S. 702(a), as his experience, the nature of his job, and his personal investigation of the fire scene showed he was better qualified than the jury to form an opinion on the cause of the fire. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

Expert on Firearms Could Testify as to Wounds Inflicted. — Trial court properly permitted an expert witness in the field of firearm analysis and identification to testify from autopsy photographs of the victim that the wounds inflicted on the victim were consistent with the type of ammunition for which spent cartridges were found at the murder scene. State v. Holmes, 355 N.C. 719, 565 S.E.2d 154, 2002 N.C. LEXIS 549 (2002), cert. denied, 537 U.S. 1010, 123 S. Ct. 478, 154 L. Ed. 2d 412 (2002).

Opinion Based upon Preliminary Testing. — Though not a positive opinion that substance in cellophane package contained cocaine, analyst's opinion that the substance "could" contain cocaine was properly admissible in trial for trafficking, where the opinion was based upon a preliminary color test with a positive result. State v. White, 104 N.C. App. 165, 408 S.E.2d 871 (1991).

Officer Allowed to Testify as to How Marijuana Is Generally Packaged. — The trial court did not err in allowing officer to testify as to how marijuana was generally packaged since the officer was experienced in drug packaging and his opinion that the marijuana was packaged for private use did not invade the jury's province to pass upon the credibility of the witness or determination of guilt. State v. Chisholm, 90 N.C. App. 526, 369 S.E.2d 375 (1988).

Police Testimony Regarding Criminal Activity. — Narcotics detective's testimony concerning a "special focus" on hotels for drug interdiction purposes was admissible in defendants' cocaine trafficking and possession trial because the nature of the detective's job and experience made the detective better qualified than the jury to opine that area hotels and motels had been utilized in the distribution of narcotics. State v. Diaz, 155 N.C. App. 307, 575 S.E.2d 523 (2002), cert. denied, 357 N.C. 464,

586 S.E.2d 271 (2003), cert. denied, 357 N.C. 659, 590 S.E.2d 396 (2003).

Testimony Based on Blood-Alcohol Analyzer. — Court did not abuse its discretion in admitting Blood-Alcohol Analyzer as a reliable scientific method of proof under subsection (a) of this rule, nor should it have been excluded under G.S. 8C-1, Rule 403, since the probative value of its results were not substantially outweighed by the danger of unfair prejudice or jury confusion, and since both parties had opportunity to either attack or support its reliability. State v. Cardwell, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

Extrapolation of Blood Alcohol Concentration. — In prosecution in which the jury found defendant guilty of DWI and driving on the wrong side, testimony of expert witness that the average person displays a certain rate of decline in blood alcohol concentration (BAC) in the hours after the last consumption of alcohol, and that based on that average rate of decline defendant's BAC, which was .09 some two and one-half hours after the accident, would have been approximately 0.13 at the time of the accident, was not improper. State v. Catoe, 78 N.C. App. 167, 336 S.E.2d 691 (1985), cert. denied, 316 N.C. 380, 344 S.E.2d 1 (1986).

Admission of expert testimony by a research scientist and training specialist in forensic testing concerning average alcohol elimination rates was upheld, because it could have aided a finder of fact in determining whether defendant's breath alcohol level exceeded the statutory limit for driving while impaired purposes and was relevant. State v. Teate, 180 N.C. App. 601, 638 S.E.2d 29, 2006 N.C. App. LEXIS 2515 (2006).

Expert on Mitochondrial DNA Analysis. — Trial court properly admitted expert testimony concerning mitochondrial DNA analysis (mtDNA) evidence, despite defendant's assertion that mtDNA testing was not scientifically reliable and that its reasoning and methodology were not properly applied to the facts of the case. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999), cert. dismissed, 352 N.C. 669, 535 S.E.2d 33 (2000).

Special agent with the North Carolina State Bureau of Investigation, assigned to the forensic crime lab, could testify that (1) he conducted DNA analysis in using blood samples from defendant and blood samples and vaginal material from the victim and, (2) assuming a single semen donor, the DNA banding pattern was consistent with a mixture of the victim's and defendant's DNA profile. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Expert on Handwriting. — Trial court erred in refusing to permit a handwriting expert to render an expert opinion as to the validity of a signature on a contract, on the basis that handwriting analysis was not based in science and was not scientifically proven, as expert testimony may be deemed to be reliable notwithstanding the fact that it is not based in science. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002), cert. denied, 356 N.C. 695, 579 S.E.2d 102 (2003).

Expert Held in Better Position Than Jury to Interpret Evidence. — Where three witnesses testified that defendant crossed the center line and struck the Fiesta in the southbound lane, defendant and another witness testified that the accident occurred when the Fiesta slid into the northbound lane, and physical evidence was presented regarding damage to the vehicles, rotation and resting places of the vehicles, gouge marks in the pavement, and distribution of debris, the expert was in a better position than the jury to interpret this evidence and to draw conclusions from it based upon scientific principles. State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989).

While admittedly unfamiliar with the specific subject area of sale of law practices in the area, CPA's training and experience gave him knowledge sufficient to render him better qualified than the trier of fact to value an interest in a law practice; therefore, where the trier of fact made the determination that the witness' testimony would be helpful, no error or abuse of discretion was found. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

Trial court did not err in allowing testimony by doctor that sexual abuse of child was very likely because the doctor was in a better position than the jury to understand the significance of her medical findings. State v. Dick, 126 N.C. App. 312, 485 S.E.2d 88 (1997), cert. denied, 346 N.C. 551, 488 S.E.2d 813 (1997).

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 703.

Under the rule, facts or data upon which an expert bases an opinion may be derived from three possible sources. The first is the personal observation of the witness. The second source is presentation at trial by a hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts. The third source consists of presentation of data to the expert outside of court. See Comment, *Expert Medical Testimony: Differences Between the North Carolina Rules and the Federal Rules of Evidence* 12 W.F.L.R. 833, 837 (1976).

In *State* v. *Wade,* 296 N.C. 454 (1978), the Court stated that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." Although the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field" rather than that they be "inherently reliable," the thrust of *State* v. *Wade* is consistent with the rule. See W. Blakey, *Examination of Expert Witnesses in North Carolina,* 61 N.C.L.Rev. 1, 20-32 (1982).

The rule provides that the facts or data need not be admissible in evidence if of a type reasonably relied upon by experts in the particular field. In *State* v. *Wade* the Court stated that: "If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion." Thus an expert may testify as to the facts upon which his opinion is based, even though the facts would not be admissible as substantive evidence.

Legal Periodicals. — For article on the syllogistic structure of scientific testimony, see 67 N.C.L. Rev. 1 (1988).

For a practice-oriented discussion of impeachment of hearsay declarants by trial judges and attorneys, with observations on the extension of Rule 806 to Rule 703, see 13 Campbell L. Rev. 157 (1991).

For survey, "State v. Daniels: Chief Justice Exum's Quantum Theory of Expert Psychiatric Testimony," see 73 N.C.L. Rev. 2326 (1995).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

CASE NOTES

Constitutionality. — The admission into evidence of an expert opinion based upon information which is not itself admissible into evidence does not violate the U.S. Const., Amend. VI guarantee of the right of an accused to confront his accusers where the expert is available for cross-examination. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Applicability of "Inherently Reliable" Test Prior to Enactment of Rule. — Prior to the enactment of this rule, this court had adopted a policy that allowed experts to give their opinion when the information upon which they relied met an "inherently reliable" test. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

"Reasonably Relied Upon" Standard. — Several commentators have suggested that there is little difference in the "inherently reliable" standard adopted by the Supreme Court in State v. Wade, 296 N.C. 454, 251 S.Ed.2d 407 (1979) and the "reasonably relied upon" standard of this rule. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

The plaintiff's statements made to the physician for the purpose of treatment were adequate to support the physician's opinion as a statement "reasonably relied upon by experts in the particular field" under this rule. Cherry v. Harrell, 84 N.C. App. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Information Commonly Used and Accepted. — Where expert relied on statistical information commonly used and accepted in his field, such evidence was allowed by this rule. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

This rule is not confined in its application to medical and psychiatric expert testimony. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Foundation. — Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., 187 N.C. App. 694, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Expert need not testify from personal knowledge, as long as the basis for his or her opinion is available in the record or available upon demand. Thompson v. Lenoir Transf. Co., 72 N.C. App. 348, 324 S.E.2d 619 (1985); Liss of Carolina, Inc. v. South Hills Shopping Center, Inc., 85 N.C. App. 258, 354 S.E.2d 549 (1987).

In a murder prosecution, under this rule a psychiatrist could properly rely on the opinions and evaluations of other doctors when forming the basis for his opinion. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

Where the expert witness testified that he viewed the racetrack (although not while it was in use), reviewed aerial photos and topographical maps of the area, listened to recordings of the sound generated by the all terrain vehicles, and discussed the racetrack noise with several of the landowners in their nuisance case against their neighbors, the neighbors made no showing and presented no argument suggesting that this information was an inadequate basis under G.S. 8C-1, N.C. R. Evid. 703, for the expert's opinions; without such a showing, the appellate court not hold that the trial court erred in denying the neighbors' motion to strike the expert's testimony. Elliott v. Muehlbach, 173 N.C. App. 709, 620 S.E.2d 266, 2005 N.C. App. LEXIS 2226 (2005).

But May Give Opinion Based on Facts Not Otherwise Admissible. — Under this rule, an expert may give his opinion based on facts not otherwise admissible in evidence, provided that the information considered by the expert is of the type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Otherwise Inadmissible Hearsay Evidence May Be Allowed. — The well-established practice has been to admit evidence otherwise inadmissible as hearsay for the purpose of revealing the basis for expert opinion testimony. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Trial court did not err in admitting into evidence the crime laboratory reports upon which the expert, whether hearsay or not, permissibly based the expert opinion under G.S. 8C-1-703, as disclosure of the basis of the expert's opinion was essential to assessment of credibility and was not hearsay under G.S. 8C-1-801. State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

The substantive facts needed to support an expert's conclusion cannot be supplied by the opinion itself. Barbecue Inn, Inc. v. Carolina Power & Light Co., 88 N.C. App. 355, 363 S.E.2d 362 (1988).

The fact that an expert's opinion is not based on personal observation of the accident scene affects the weight to be accorded the testimony, not its admissibility. State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989).

Unless a party specifically objects to the qualification of the expert, a ruling permitting opinion testimony is tantamount to a finding by the trial court that the witness is qualified to state an opinion. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Duty of Trial Judge. — Although this rule and G.S. 8C-1, Rule 705 give plaintiff the right to vigorously cross examine defendant's expert regarding the underlying facts upon which he bases his opinion, it is the duty of the trial judge to exercise sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality. McClain v. Otis Elevator Co., 106 N.C. App. 45, 415 S.E.2d 78 (1992).

Court's Determination That Factual Basis of Opinion Was Insufficient. — Under this rule, the trial court could not properly exclude expert's testimony based on its own determination that the factual basis of the opinion was insufficient. Barbecue Inn, Inc. v. Carolina Power & Light Co., 88 N.C. App. 355, 363 S.E.2d 362 (1988).

Expert testimony that a particular cause "could have" or "possibly" produced a particular result is admissible. Barbecue Inn, Inc. v. Carolina Power & Light Co., 88 N.C. App. 355, 363 S.E.2d 362 (1988).

Contents of Psychiatric Report. — Admission into evidence of the contents of a report by a psychiatrist who did not testify at trial, when the substance of such report was revealed to the jury during the State's cross-examination of another psychiatrist, was proper, where the report was a part of the hospital records relied on by the psychiatrist who testified. State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985).

Out-of-Court Communication as Basis for Opinion. — This rule has been interpreted to permit an expert witness to rely on an out-of-court communication as a basis for an opinion and to relate the content of that communication to the jury. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Testimony Regarding Results of Experiments. — This rule allows experts to rely on the opinions of other experts or upon facts or data not itself admissible as the basis of their own expert opinions. When a witness testifies to results of experiments after giving an opinion which was based on such experiments, such testimony is not hearsay because it is not offered for the truth of the matter, but to show the basis of the opinion. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

Trial court did not err in admitting the testimony of an expert regarding the findings of another expert about what the nontestifying expert learned and reported in regard to ballistics tests performed on the weapon allegedly used to shoot the two victims in defendant's case; the expert's testimony was not offered for the truth of the matter asserted, but was offered top show the basis of his opinion, that he was relying on the nontestifying expert's report. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Testimony Regarding Experiment Properly Excluded. — Trial court properly sustained the State's objection to testimony by expert witness regarding an identification experiment where expert had not given an opinion specific enough to support admission of testimony regarding the experiment in question. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

An opinion based upon reviews of evaluations of doctors who had interviewed defendant and personal discussions with doctors in whose care defendant had been placed were just as reliable as an opinion based on a hypothetical question. State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (1994), cert. denied, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

Test Results as Basis for Opinion. — In order to be a proper basis for an expert opinion, test results of the analysis of residues said to indicate cocaine, if otherwise inadmissible, must be of a type reasonably relied upon by experts in the particular field. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Deposition summaries used by plaintiff's expert witness, although not admissible as substantive evidence, were admissible under this rule for the limited purpose of demonstrating to the jury facts the expert relied upon when forming his opinion. Wolfe v. Wilmington Shipyard, Inc., 135 N.C. App. 661, 522 S.E.2d 306, 1999 N.C. App. LEXIS 1243 (1999).

Architect. — The court erred in excluding an architect's opinion as to the cost of repair, especially in view of the fact that the trial took place before the court and not before a jury, where the facts upon which the architect intended to rely in answering the question were already in evidence through defendants' other technical witness. As such, personal knowledge was not a prerequisite for him to give an opinion. Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304, cert. denied, 312 N.C. 624, 323 S.E.2d 926 (1984).

County Medical Examiner. — In prosecution for rape and first-degree sexual offense involving four- and five-year-old victims, trial court did not err in allowing county child medical examiner to testify to his opinion as to the likelihood that the victims had engaged in sexual intercourse, which opinion was not based on personal examination of the victims but was based on his review of the examining doctor's medical reports and conversations with two other physicians regarding the implications of the presence of protozoa trichomonas in very young girls. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Flooding. — Where landowners' experts in an inverse condemnation case based on flooding allegedly caused by an unreliable dam used water flow rates from studies that had used different methodologies, their opinions as to flooding were conclusory, and defense experts gave uncontradicted testimony in opposition, the experts' testimony was unreliable and inadmissible. Davis v. City of Mebane, 132 N.C. App. 500, 512 S.E.2d 450 (1999).

Fingerprint Expert. — Where a fingerprint expert testified that his findings were verified by an out-of-court expert, the opinion of the out-of-court expert thus necessarily formed a part of the basis for the opinion to which the witness testified, and it clearly was reasonable for an expert in the field of fingerprint identification to rely upon such a procedure. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Medical testimony did not have to be expressed in terms of reasonable probability or certainty, where the testimony objected to simply stated what doctor did and did not find in examining and treating plaintiff. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988).

Opinion of Another Physician. — While one physician may not base his opinion solely on the statement of opinion of another physician, when a physician as an expert witness bases an opinion upon reliable information, including a consistent opinion of another physician, the second physician's opinion is admissible. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986) (decided under former § 8-58.14).

Although generally statements by one treating physician to another are inherently reliable, may be used as the basis for an expert opinion, and are admissible in evidence to show the basis for the expert opinion, when the trial judge determines on voir dire that the source of the physician's statement is in fact unreliable, he may exclude the statement as evidence for any purpose. If the opinion of the physician testifying as an expert is based solely on the unreliable statement, the physician should not be allowed to state the opinion. If, on the other hand, the opinion is based upon sufficient additional, reliable facts and data, the trial judge may allow the expert to state his opinion, notwithstanding his statement that he also relied in part upon unreliable information. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986) (decided under former § 8-58.14).

Where undisputed earlier testimony established that a certain individual was part of a medical group charged with evaluating mental health status and that mental health expert relied upon information from that individual in formulating her final diagnosis, this evidence should have been admitted for the purpose of showing the basis for the expert opinion testimony under this rule. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Police Officer. — Although the trial court should have recognized a police lieutenant as an expert witness before it allowed him to offer his interpretation of evidence that was found at the scene of a double homicide, the record revealed that the court implicitly found that the lieutenant was an expert in crime scene investigation and admitted his testimony under G.S. 8C-1, N.C. R. Evid. 702(a), and the state supreme court refused to reverse defendant's convictions for first-degree murder because the lieutenant was not recognized formally as an expert witness. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Waiver of Right to Challenge Qualifications on Appeal. — Where defendant did not object to the qualifications of the witness, but merely objected to the content of the testimony related to specific knowledge of the pellet gun involved in the case, defendant waived the right to challenge the witness's qualification on appeal. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Out-of-Court Expert. — A testifying expert can reasonably rely on the opinion of an out-of-court expert and can testify to the content of that opinion. This accords with case law prior to adoption of the Rules of Evidence. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Plaintiff's doctor did not have to qualify as a psychiatrist or psychologist to testify that he saw nothing in his examination and treatment of the plaintiff to indicate that she was malingering. Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 798 (1989).

Physician. — The physician's diagnosis and treatment of the plaintiff's injuries constituted a pre-trial personal perception upon which he was entitled to base his opinion pursuant to this rule. Cherry v. Harrell, 84 N.C. App. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Serologist. — Under the standard set forth in State v. Wade, 296 N.C. 454, 251 S.Ed.2d 407 (1979), the tests forming the basis of the serologist's testimony were sufficiently reliable to support the admission of her expert opinion based upon those tests. State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Admission of certain opinion testimony by a serologist was not error where the serologist's testimony that his opinion was based on statistics from the State Bureau of Investigation studies conducted between 1979 and 1983 and from scientific journals, both of which are relied on by other experts in his field, laid sufficient foundation to support admission of his expert opinion. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

DNA Analysis. — This rule permits an expert to give an opinion based on evidence not otherwise admissible at trial, provided the evidence is of the type reasonably relied upon by other experts in the field; forensic serologist based his opinion on the results of DNA analysis which is admissible in North Carolina. State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995), cert. denied, 516 U.S. 1079, 116 S. Ct. 789, 133 L. Ed. 2d 739 (1996).

Genetics Expert. — Trial court did not err by allowing special agent who was qualified as an expert in molecular genetics to testify that person who analyzed SBI database determined 500 samples to be a representative sample upon which the North Carolina population frequency database was developed, where the special agent was obviously familiar with the analysis of the SBI database and the results. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

Social Worker. — As an expert witness, a social worker is entitled, pursuant to this rule, to rely upon information received from a children's home official as a basis for her opinion. In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987).

Behavioral Characteristics Consistent with Abuse. — Opinion of expert witness that mentally retarded adult exhibited behavioral characteristics consistent with sexual abuse was within the scope of permissible expert testimony, where it was based upon his experience in treating sexually abused mentally retarded persons, his familiarity with research and literature in that field, and his personal examination of the victim. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, appeal dismissed and cert. denied, 320 N.C. 175, 358 S.E.2d 67 (1987).

Trial court did not abuse its discretion by allowing an expert witness who was called by the State during defendant's trial on charges of attempted first-degree rape and taking indecent liberties with a minor to testify about common characteristics and behaviors observed in children who experienced sexual abuse, even though the witness did not interview the victim or talk to her parents. State v. McCall, 162 N.C. App. 64, 589 S.E.2d 896, 2004 N.C. App. LEXIS 12 (2004).

Post-Traumatic Stress Disorder. — For case upholding admission of psychologist's testimony on post-traumatic stress disorder suffered by victim, see State v. Strickland, 96 N.C. App. 642, 387 S.E.2d 62 (1990).

Psychologist's Report. — Psychologist's report was admissible in a sentencing hearing after it was used to cross-examine another witness, where the report included comments from unidentified informants on various aspects of co-defendant's character and upbringing, including the relationship he had with his parents, his prior experience with police, his demeanor, and the influence his brother defendant had over him, all statements used routinely by psychologists to form an opinion. These statements were introduced, not for the truth of the matter asserted, but as nonhearsay evidence to support the psychologist's conclusions. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Admission of Expert Testimony Upheld. — Where plaintiff's expert witness testified regarding his opinion about what the projected net income of plaintiff's store would have been if it had remained in business, and at defendant's request, the witness disclosed the underlying information upon which he based his opinion, which information included records kept for accounting purposes by the expert witness and data supplied to him by plaintiff's management employees, the court did not err in allowing the witness to give his opinion to the loss of profits suffered by plaintiff as a result of defendant's breach of the lease contract. Liss of Carolina, Inc. v. South Hills Shopping Center, Inc., 85 N.C. App. 258, 354 S.E.2d 549 (1987).

Use of the word "guess" regarding his opinion did not render pathologist's testimony inadmissible. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Police captain's testimony indicating that a store had sold sexually explicit materials for several years prior to the time of indictment for dissemination of obscenity tended to show that the corporate defendant and the individual defendants, both of whom began working for the store before the indictment, were aware that the store was selling sexually explicit materials at the time of the alleged conspiracy. Consequently, the trial court properly allowed the testimony. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, cert. denied, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Trial court in a murder case did not err in allowing an expert to testify as to the presence and location of defendant's DNA on the victim's clothing; although the expert did not personally take the clothing samples, the expert had reviewed the investigator's report and had viewed the clothing. State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001).

Doctor's expert testimony with respect to the cause of the plaintiffs' daughter's injury, based on his training as an obstetrician gynecologist and his extensive experience with shoulder dystocia emergencies and brachial plexus injuries, was that birth simulated studies using manikin and cadaver models supported his conclusion that, if during delivery an obstetrician applies a downward level of traction involving excessive pressure, an injury to the C8-T1 area of the baby's brachial plexus could result; this testimony clearly demonstrated doctor's opinion that the daughter's injury was causally linked to the delivering physician's care, was based on more than mere speculation, and was sufficiently reliable to be submitted to the jury. Leatherwood v. Ehlinger, 151 N.C. App. 15, 564 S.E.2d 883 (2002), cert. denied, 357 N.C. 164, 580 S.E.2d 368 (2003).

Although the state medical examiner who testified for the State in defendant's murder trial admitted uncertainty as to whether two of the victims had been shot twice, the medical examiner's testimony that the two victims at issue might have been shot twice based on the nature of their injuries was permissible opinion testimony under G.S. 8C-1, N.C. R. Evid. 702(a), 703 because the medical examiner was more qualified than the jury to formulate an opinion regarding the number of gunshot wounds suffered by the victims, and the testimony was based on the medical examiner's autopsies of the victims and the medical examiner's observations as an expert in forensic pathology; the fact that there was uncertainty about the number of gunshot wounds went to the weight of the evidence, rather than its admissibility. State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657, 2002 N.C. App. LEXIS 965 (2002).

Expert's testimony that stress from an incident may or may not have triggered plaintiff's outbreak of shingles was admissible and considered with other evidence, as expert testimony was not inadmissible for failure to state that the testimony was based upon a reasonable medical probability; although baseless speculation could never "assist" the jury, under G.S. 8C-1, N.C. R. Evid. 702, as long as the testimony was helpful to the jury and based sufficiently on information reasonably relied upon, under G.S. 8C-1, N.C. R. Evid. 703, the testimony was admissible. Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 575 S.E.2d 797, 2003 N.C. App. LEXIS 32 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 271 (2003).

Applied in State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987); McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987); Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987); State v. Helms, 93 N.C. App. 394, 378 S.E.2d 237 (1989); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); Woodlief v. North Carolina State Bd. of Dental Exmrs., 104 N.C. App. 52, 407 S.E.2d 596 (1991); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001); Floyd v. McGill, 156 N.C. App. 29, 575 S.E.2d 789, 2003 N.C. App. LEXIS 35 (2003); Adams v. Metals USA, 168 N.C. App. 469, 608 S.E.2d 357, 2005 N.C. App. LEXIS 343 (2005).

Cited in State v. Hammond, 112 N.C. App. 454, 435 S.E.2d 798 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993); State v. Laws, 345 N.C. 585, 481 S.E.2d 641 (1997); Tate v. Hayes, — N.C. App. —, 489 S.E.2d 418, 1997 N.C. App. LEXIS 854 (1997); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000); Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 146 N.C. App. 449, 553 S.E.2d 431, 2001 N.C. App. LEXIS 970 (2001).

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 704.

The rule would abrogate the doctrine that excludes evidence in the form of an opinion if it purports to resolve the "ultimate issue" to be decided by the trier of fact.

In *State v. Wilkerson,* 295 N.C. 559 (1978), the Court held that admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on "whether the witness ... is in a better position to have an opinion ... than is the trier of fact." Professor Brandis states that: "It is hoped that a comparable reexamination of the rule as applied to lay testimony will be forthcoming. The rule has been condemned by thoughtful commentators, and judicial expressions of doubt are not wanting." *Brandis on North Carolina Evidence* § 126, at 480-81 (1982) (footnotes omitted).

The Advisory Committee's Note states:

"The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed. McCormick § 12."

Legal Periodicals. — For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

CASE NOTES

There are two overriding reasons for excluding testimony which suggests whether legal conclusions should be drawn or whether legal standards are sat-

isfied; the first is that such testimony invades not the province of the jury but the province of the court to determine the applicable law and to instruct the jury as to that law, and the second reason is that an expert is in no better position to conclude whether a legal standard has been satisfied or a legal conclusion should be drawn than is a jury which has been properly instructed on the standard or conclusion. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

This rule allows testimony on ultimate issues. Welborn v. Roberts, 83 N.C. App. 340, 349 S.E.2d 886 (1986).

Medical experts' opinions pursuant to this rule on ultimate issue in workers' compensation case that they could not say to a reasonable degree of medical certainty or probability that the employee's work-related leg injury caused the later onset of deep vein thrombosis failed to establish that the leg injury caused the deep vein thrombosis, thus, there was insufficient evidence to support the workers' compensation award for deep vein thrombosis. Holley v. ACTS, Inc., 357 N.C. 228, 581 S.E.2d 750, 2003 N.C. LEXIS 606 (2003).

Trial court properly admitted, under G.S. 8C-1, Rule 701, G.S. 8C-1, Rule 704, lay opinion testimony of various law enforcement officers that defendant "tried to kill" one of the responding officers because their testimony amounted to nothing more than shorthand statements of fact based on their knowledge and observations and did not implicate defendant's guilt, mental state, or intent. The officers' testimony was based on their perceptions after witnessing defendant shoot the officer, and was not objectionable merely because it embraced an ultimate issue to be decided by the trier of fact. State v. McVay, 174 N.C. App. 335, 620 S.E.2d 883, 2005 N.C. App. LEXIS 2402 (2005).

And Abrogates Doctrine Excluding Such Testimony. — This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact. Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

But Admission Must Be Helpful to Jury. — Section 8C-1, Rule 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission, the opinion must be helpful to the jury. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Expert opinion testimony is not rendered inadmissible on the basis that it embraces ultimate issues to be determined by the jury. State v. Boyd, 343 N.C. 699, 473 S.E.2d 327 (1996), cert. denied, 519 U.S. 1096, 117 S. Ct. 778, 136 L. Ed. 2d 722 (1997).

Radiologist was without objection qualified under G.S. 8C-1, N.C. R. Evid. 702(a) as an expert in the field of medicine specializing in radiology, and was competent to offer the radiologist's expert opinion that a driver's trauma was definitely very serious intracranial trauma with serious brain injury and serious orbital injury with all the bone damage that was suffered; under G.S. 8C-1, N.C. R. Evid. 704, the radiologist's expert opinion testimony was not rendered inadmissible on the basis that it embraced an ultimate issue to be determined by the jury—whether the injuries sustained by the driver were serious. State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009).

Expert testimony on the credibility of a witness is not admissible. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Expert Is Not Precluded from Testifying as to Mental Capacity. — This rule plainly provides that an expert witness is not precluded from testifying as to whether a defendant had the capacity to make and carry out plans, or was under the influence of mental or emotional disturbance, merely because such testimony relates to an ultimate issue to be decided by the trier of fact. State v. Shank, 367 N.C. 639, 367 S.E.2d 639 (1988), overruling State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), and State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), insofar as they are inconsistent.

But Court May Exclude Testimony Embracing a Conclusion Expert Is Not Qualified to Make. — It is not error for a trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

The trial court in a murder case did not err in refusing to admit testimony whereby defendant sought to have the experts tell the jury that certain legal standards had not been met. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Capacity to Premeditate. — Since first-degree murder requires premeditation and deliberation, opinion testimony tending to show that a defendant did not have the capacity to premeditate or deliberate is testimony that embraces an ultimate issue to be decided by the trier of fact. Under this rule, such testimony is not thereby rendered inadmissible. State v. Shank, 367 N.C. 639, 367 S.E.2d 639 (1988).

Because testimony tending to show that defendant did not have the capacity to premeditate or deliberate was relevant in determining the presence or absence of an element of the offense of murder with which he was charged, and this rule allows opinion testimony even though it relates to an ultimate issue, the trial court committed prejudicial error in not allowing the testimony. State v. Shank, 367 N.C. 639, 367 S.E.2d 639 (1988).

Where defendant in first degree murder case called expert who testified that defendant neither knew right from wrong nor was capable of forming specific intent to commit murder, and State called expert to rebut this testimony, trial court erred by admitting State's expert rebuttal evidence. State asked expert "Have you an opinion ... whether or not [defendant] was capable of premeditating murder ...," and expert replied "He was." This testimony was an impermissible opinion concerning whether a legal standard had been met, and, under the circumstances of the case, was not harmless. State v. Rose, 327 N.C. 599, 398 S.E.2d 314 (1990).

Expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue — whether the defendant had premeditated and deliberated; such expert opinion testimony was not rendered inadmissible on the basis that it embraced the issues of premeditation and deliberation and specific intent to kill, which are ultimate issued to be determined by the jury. State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993).

Opinion on Ultimate Issues in Defending Against Summary Judgment. — Nonexpert opinion on ultimate issues may not be relied on to defend against summary judgment. Whether expert opinion on ultimate issues so presented may be relied on is not clear. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

A medical expert's testimony is not limited to conditions he has personally observed. The correct limitation is that facts must be "within his knowledge." State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Legal Conclusions. — The rule that an expert may not testify that a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987), rev'd on other grounds, 321 N.C. 494, 364 S.E.2d 392 (1988).

An expert may generally not testify that a certain legal standard has or has not been met. Pelzer v. UPS, Inc., 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. denied, 346 N.C. 549, 488 S.E.2d 808 (1997).

The trial court correctly excluded portions of an expert witness's affidavit in which he opined that police officers in pursuit of a driver whom they suspected of being intoxicated and who, while fleeing, collided with and killed plaintiff's decedent acted "in a grossly negligent manner and showed a reckless disregard for the safety of others" in "violation of the City of Durham's pursuit policy." Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Constructive Possession in Drug Case. — Officer's testimony was not improper on the issue of constructive possession of drugs; the officer never testified that defendant was in constructive possession, but to the underlying facts of defendant's location in proximity to the drugs. State v. Hart, 179 N.C. App. 30, 633 S.E.2d 102, 2006 N.C. App. LEXIS 1675 (2006), affirmed in part, reversed in part on other grounds, and remanded, 361 N.C. 309, 644 S.E.2d 201 (2007).

Testimony of Attorney as to Legal Conclusions. — The trial court erred by allowing plaintiffs' expert witness, an attorney, to testify as to legal conclusions where the expert's testimony improperly invaded the trial court's province to determine the legal effect of a purchase money note and the guaranty executed in conjunction therewith, as well as the meaning of certain language in these documents. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Wound Consistent with Intent to Cause Death. — Forensic expert's testimony that one of victim's "gunshot wounds to the head was consistent with an intent to cause death" was admissible. State v. Teague, 134 N.C. App. 702, 518 S.E.2d 573 (1999).

Defendant's Capacity to Rape. — "Rape" is a legal term of art and accordingly witness' opinion testimony concerning whether defendant was "capable of rape" was properly excluded. State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), cert. denied, 335 N.C. 362, 441 S.E.2d 130 (1994).

"Gross negligence" clearly has legal significance and that characterization by expert witness should not have been permitted. Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204, rev'd on other grounds, 321 N.C. 494, 364 S.E.2d 392 (1988).

Death as "Homicide". — Where expert used the word "homicide" to explain the factual groundwork of the expert's function as a medical examiner and did not use the word as a legal term of art and where the expert explained how the expert determined that the victim's death was a homicide instead of death by natural causes, suicide, or accident, the expert's testimony conveyed a proper opinion for an expert in forensic pathology, and the trial court properly allowed it. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

This rule does not eliminate the helpful-

ness requirement set forth in § 8C-1, Rule 702. Although an expert's opinion testimony is not objectionable merely because it embraces an ultimate issue, it must be of assistance to the trier of fact in order to be admissible. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

Testimony that rape victim suffered from post-traumatic stress disorder is allowed to assist the jury in determining if the rape actually occurred, which expands the use of the testimony is allowed beyond purpose of rebutting defendant's contention that the prosecuting witness consented to intercourse. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

Paternity of Victim's Child. — In a prosecution for first-degree rape of a female under the age of 13, with expert's testimony concerning paternity index and evidence of defendant's access before it, jury was in as good a position as expert to determine whether defendant "probably" was father of victim's child. Therefore, expert's testimony that defendant "probably" was father of victim's child was of no assistance to the trier of fact and should have been excluded on that basis. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

"Intentional Injury" in Child Abuse Case. — In a homicide prosecution against the mother of a deceased child, the court did not err by allowing physician to testify that a child's condition and death were the result of an intentional injury where the child ingested seven to nine quarts of water over a two to three hour period. State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

In a prosecution for the murder of a child, it was proper, under G.S. 8C-1-704, for properly qualified experts to offer opinions on the ultimate issue that the victim's death was not caused by an accidental injury, as: (1) both based their opinions on their years of experience as pathologists, during which they performed and consulted on numerous autopsies; and (2) the experts offered the basis of their opinions. State v. Murphy, 172 N.C. App. 734, 616 S.E.2d 567, 2005 N.C. App. LEXIS 1786 (2005).

Existence of Partnership. — In case in which insurance company sought to prove that defendant was liable as a partner for premiums incurred by her ex-husband's business, the trial court did not commit prejudicial error in allowing non-expert witnesses to express their opinions regarding the existence of a partnership. G.R. Little Agency, Inc. v. Jennings, 88 N.C. App. 107, 362 S.E.2d 807 (1987).

Existence or Breach of Fiduciary Relationship. — An expert witness may give an opinion that under the circumstances one party has reposed special confidence in another party, or that one party should act in good faith toward another party, or that one party must act with due regard to the interests of another party. However, the witness may not opine that a fiduciary relationship exists or has been breached. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

An expert witness should not have been permitted to give his opinion that there was a fiduciary relationship between plaintiff and defendants, that the defendants breached their fiduciary duty, and that a member of defendant's board abused his discretion. HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 403 S.E.2d 483 (1991).

Child Abuse. — Expert's opinion as to whether a child had been abused was admissible where the opinion testimony was based upon the witness's overall examination of the victim and expert knowledge concerning the abuse of children, and not solely on the victim's statements. State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212, 2001 N.C. App. LEXIS 860 (2001).

Admission of Expert Testimony Upheld. — In prosecution for rape and first-degree sexual offense involving four and five year old victims, trial court did not err in allowing county child medical examiner to testify to his opinion as to the likelihood that the victims had engaged in sexual intercourse, which opinion was not based on personal examination of the victims but was based on his review of the examining doctor's medical reports and conversations with two other physicians regarding the implications of the presence of protozoa trichomonas in very young girls. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Examining physician's failure, in giving his opinion that a penis caused the trauma he observed during his examination of child victim, to qualify his response did not render this testimony as to an ultimate issue improper. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Fact that the opinion testimony of fireman as an expert as to the presence of a flammable liquid embraced an ultimate issue to be decided by the trier of fact did not make it objectionable. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

Trial court did not err in allowing the State's pathologist to testify that, in his opinion, the injuries suffered by the victim "were a proximate cause of her death" some 11 days later. State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986) (decided under former §§ 8-58.12 and 8-58.13).

Pathologist who performed the autopsy on murder victim was clearly in a position to assist the jury in understanding the nature of the deceased's wound and in determining whether defendant, in fact, acted in self-defense when he shot the deceased; therefore, he was properly allowed to testify to these matters in the form of an opinion, even though self-defense was an ultimate issue in the case. State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Testimony of lay persons and experts, in an action brought to settle a boundary dispute, that the boundary to the property was as they had described it was not objectionable merely because it related to an ultimate issue in the case. Welborn v. Roberts, 83 N.C. App. 340, 349 S.E.2d 886 (1986).

The physician's testimony in a personal injury suit involving an automobile accident was not inadmissible for failure to state it was based on "reasonable medical probability." Cherry v. Harrell, 84 N.C. App. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

In trial for sexual offense in the first degree, it was not improper to allow both psychologist and pediatrician to testify concerning the symptoms and characteristics of sexually abused children and to state the opinion that the symptoms exhibited by the victim were consistent with sexual or physical abuse. State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Where doctor gave opinion that defendant did not have specific intent to kill victim, trial court incorrectly ruled that doctor's testimony was inadmissible because it invaded the province of the jury since judge's concern that proffered testimony invaded the province of the jury had been vitiated by statute. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Where three witnesses testified that defendant crossed the center line and struck the victim's automobile in the southbound lane, defendant and another witness testified that the accident occurred when the victim's automobile slid into the northbound lane, and physical evidence was presented regarding damage to the vehicles, rotation and resting places of the vehicles, gouge marks in the pavement, and distribution of debris, the expert was in a better position than the jury to interpret this evidence and to draw conclusions from it based upon scientific principles. State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989).

If believed, expert testimony regarding post traumatic stress disorder could be helpful to the jury in understanding the behavioral patterns of sexual assault victims. This court and courts of other jurisdictions have recognized the reliability of post traumatic stress disorder testimony in sexual assault cases. State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990), vacated in part, 107 N.C. App. 710, 421 S.E.2d 812 (1992).

In an action wherein plaintiff sought a decree quieting title in a certain tract and determining that she had an unrestricted easement from the state road to that tract, the trial court erred in allowing an expert witness, an attorney, to give his opinion that, as a matter of law, plaintiff was entitled to an easement by implication. Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986).

In a personal injury case in which there was an allegation of excessive speed, where the court charged on excessive speed as an act of negligence, it was prejudicial error to admit the testimony of the highway patrolman as to his opinion of the speed of defendant's vehicle. Fowler v. Graves, 83 N.C. App. 403, 350 S.E.2d 155 (1986).

Where, in the course of her testimony, a physician repeated the victim's statements that the defendant had sexually abused her, defendant's objection that the doctor's testimony was improper (because it was to the effect that defendant was the perpetrator) was without merit. The testimony was derived from information obtained by the doctor in the course of the victim's treatment and evaluation and was admissible. Furthermore, the victim testified at trial and identified defendant as the perpetrator. Therefore, the doctor's testimony corroborated her testimony and was properly admitted on that ground. State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15, cert. denied, 329 N.C. 503, 407 S.E.2d 548 (1991).

Where surveyor was an expert in land survey and his testimony may have helped the jury understand conclusions which could be drawn from the survey maps, his testimony was properly admitted. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Doctor's use of the term "homicidal assault" was not a legal term of art, nor correlated to a criminal offense and the testimony related a proper opinion for an expert in the field of forensic pathology; thus, the trial court did not err in allowing the testimony. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996).

In a sexual assault case regarding a minor child, neither a pediatrician's recommendation that the child have no further contact with defendant nor her statement that the legal system relied on medical opinions constituted an opinion as to guilt. State v. Shepherd, 156 N.C. App. 69, 575 S.E.2d 776, 2003 N.C. App. LEXIS 31 (2003).

Admission of Opinion Evidence as to Defendant's Guilt Was Error. — Although G.S. 8C-1, N.C. R. Evid. 704 provides that testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, a trial court erred in allowing police officers to offer their opinions on whether defendant who was charged with cocaine trafficking was guilty. State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219, 2004 N.C. App. LEXIS 707 (2004).

Testimony of Lay Witness. — The state's objection to the questions posed by defense counsel on the ground that the questions went to an ultimate issue to be decided by the jury was not a proper basis for excluding the expected testimony by a police officer concerning whether he believed the defendant's comments concerning the murder of the mother of his child. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

Applied in Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985); Zagaroli v. Pollock, 94 N.C. App. 46, 379 S.E.2d 653 (1989); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993); State v. Fisher, 336 N.C. 684, 445 S.E.2d 866 (1994).

Cited in In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987); Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth., 88 N.C. App. 495, 364 S.E.2d 179 (1988); State v. Rose, 323 N.C. 455, 373 S.E.2d 426 (1988); State v. Marshall, 92 N.C. App. 398, 374 S.E.2d 874 (1988); State v. Silvers, 323 N.C. 646, 374 S.E.2d 858 (1989); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991); State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992); State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000); Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002); State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002).

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 705 in two respects.

Fed. R. Evid. 705 leaves it to the court, rather than opposing counsel, to determine whether to require prior disclosure of the underlying facts. Rule 705 is consistent with G.S. 8-58.14, which should be repealed after the rule is adopted.

The second difference is that the last sentence of this rule does not appear in the Fed. R. Evid. 705. This sentence is identical to G.S. 8-58.12 which should be repealed after this rule is adopted. Although hypothetical questions are no longer required, neither the rule nor G.S. 8-58.12 prohibits their voluntary use.

Prior to 1982, when the facts upon which an opinion was based were within the expert's own knowledge, the court had discretion to permit the expert to give his opinion first and leave the facts to be brought out by cross-examination. *Brandis on North Carolina Evidence* § 136 (1982). Facts not within the personal knowledge of the expert had to be incorporated into a hypothetical question and thus disclosed prior to the opinion. *Id.* The 1981 legislation eliminated the requirement of the hypothetical question and allowed the expert to give his opinion without prior disclosure of the underlying facts unless an adverse party requests otherwise. G.S. 8-58.14 [now repealed]. Upon the request of an adverse party, the judge must require the expert to disclose the underlying facts on direct examination or *voir dire* before stating the opinion. This rule continues that requirement.

The second sentence of Rule 705 gives the opposing side the right to require disclosure of the underlying facts or data on cross-examination. The cross-examiner is under no compulsion to bring out any facts or data except those unfavorable to the opinion. N.C. Civ. Pro. Rule 26(b)(4) provides for substantial discovery of the facts underlying the opinion prior to trial.

Under Rule 611, the court exercises control over the mode and order of interrogating witnesses and presenting evidence. The court may allow the opposing party to cross-examine concerning the factual basis of the opinion immediately after the opinion is given rather than at a later point in the trial.

Except where an adverse party requests it, this rule eliminates the requirement that the basis of an expert opinion must be stated. However, the requirement that there must be a basis for the expert opinion would not be abolished. See W. Blakey, *Examination of Expert Witnesses in North Carolina,* 61 N.C.L.Rev. 1, 9 (1982).

CASE NOTES

This rule is not the equivalent of a request for production of documents, which vehicle is available prior to trial. Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999).

Expert need not testify from personal knowledge, as long as the basis for his or her opinion is available in the record or available upon demand. Thompson v. Lenoir Transf. Co., 72 N.C. App. 348, 324 S.E.2d 619 (1985); Liss of Carolina, Inc. v. South Hills Shopping Center, Inc., 85 N.C. App. 258, 354 S.E.2d 549 (1987).

Whether an expert's opinion is elicited by hypothetical or direct questioning, the opinion need not be based solely on the expert's personal knowledge. Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

A medical expert's testimony is not limited to conditions he has personally observed. The correct limitation is that facts must be "within his knowledge." State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Legal Conclusions. — The rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

The probative value of defendant's convictions in 1986 were substantially outweighed by the danger of unfair prejudice when those convictions were introduced by the state solely to demonstrate the basis of the experts' opinions. State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

Although this rule allows a party to elicit evidence of the underlying facts of a witness' opinion, it does not restrict a party from asking otherwise proper questions. Therefore, where the district attorney asked the witness in this case whether it would affect his opinion that the defendant would adjust well to prison if he had heard the defendant had attempted to escape from prison in Virginia, it was well within the scope of proper cross-examination. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, 514 U.S. 1114, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995).

Requirement of Hypothetical Question Eliminated. — This rule eliminates the requirement that an expert's opinion testimony be in response to a hypothetical question. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

But Hypothetical Questions Are Still Permitted. — Although under the new Evidence Code hypothetical questions are not required, they are still permitted. Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 342 S.E.2d 582 (1986); Haponski v. Constructor's, Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987).

Counsel may form hypothetical question on any theory which can be deduced from the evidence and select as a predicate therefor such facts as the evidence reasonably tends to prove, leaving adversaries to protect themselves on cross-examination. Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 342 S.E.2d 582 (1986); Haponski v. Constructor's, Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987), rev'd in part, aff'd in part on rehearing, 83 N.C. App. 55, 348 S.E.2d 814, modified and aff'd, 320 N.C. 155, 357 S.E.2d 683 (1987).

Omission of a material fact from a hypothetical question does not necessarily render the question objectionable or the answer incompetent. Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 342 S.E.2d 582 (1986).

It is left to the cross-examiner to bring out facts that have been omitted from the hypothetical question and thereby determine if their inclusion would cause the expert to modify or reject his or her earlier opinion. Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 342 S.E.2d 582 (1986).

Duty of Trial Court. — Although G.S. 8C-1, Rule 703 and this rule give plaintiff the right to vigorously cross examine defendant's expert regarding the underlying facts upon which he bases his opinion, it is the duty of the trial judge to exercise sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality. McClain v. Otis Elevator Co., 106 N.C. App. 45, 415 S.E.2d 78 (1992).

Contents of Psychiatric Report. — Admission into evidence of the contents of a report by a psychiatrist who did not testify at trial, when the substance of such report was revealed to the jury during the State's cross-examination of another psychiatrist, was proper, where the report was a part of the hospital records relied on by the psychiatrist who testified. State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985).

Where a doctor testified on direct examination that he had obtained records from nine sources as part of his forensic psychological evaluation of defendant, it was proper for the prosecutor during cross examination to question the doctor regarding those records because they were used to formulate his opinion that defendant was suffering from bipolar disorder. State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996), cert. denied, 519 U.S. 894, 117 S. Ct.

237, 136 L. Ed. 2d 167 (1996).

Contents of Psychologist's Report. — Defendant was not prejudiced by the State's cross-examination of one expert using another expert psychologist's report during the sentencing phase of his murder trial, where other evidence was much more incriminating and the report actually supported his mitigating circumstances that he grew up in an unstable environment and that he had previous negative experiences with the police. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

In a death penalty case, while the North Carolina Rules of Evidence did not apply to the sentencing proceeding, G.S. 8C-1, N.C. R. Evid. 705 guided the supreme court's determination that the use of a psychologist's raw data in cross-examining him was not improper, as an expert could be required to disclose the underlying facts on which his opinion was based on cross-examination, under that Rule. State v. Miller, 357 N.C. 583, 588 S.E.2d 857, 2003 N.C. LEXIS 1410 (2003), cert. denied, — U.S. —, 124 S. Ct. 2914, 159 L. Ed. 2d 819 (2004).

Performance of Test by Another. — Nothing else appearing, the fact that expert witness did not perform mass spectography herself did not require exclusion of the evidence. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Request for Basis for Testimony. — A party who fails to request the specific basis for expert testimony at trial under this rule should have difficulty sustaining a hearsay objection on appeal. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

When testifying, the expert need not identify the basis of the opinion testimony beforehand, absent a specific request. State v. Gary, 78 N.C. App. 70, 337 S.E.2d 70 (1985); State v. Fletcher, 92 N.C. App. 50, 373 S.E.2d 681 (1988).

While baseless speculation can never "assist" the jury under G.S. 8C-1, Rule 702 and is therefore inadmissible, an expert need not reveal the basis of his or her opinion absent a specific request by opposing counsel under this rule. Cherry v. Harrell, 84 N.C. 598, 353 S.E.2d 433, cert. denied, 320 N.C. 167, 358 S.E.2d 49 (1987).

Only if an adverse party requests disclosure must the trial court require the expert to disclose the underlying facts of his opinion. State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992).

This rule did not require a defense expert in a medical malpractice trial to provide the raw data on which he based his opinion, where the plaintiff failed to seek the data through pretrial discovery measures or subpoenas, and the plaintiff's counsel was afforded ample opportunity to cross-examine the expert regarding the basis of his opinions. Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999).

Expert was not required to state the basis for the expert's opinion where defense counsel did not request the underlying basis for the opinion. Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009).

Opinion of Another Physician. — While one physician may not base his opinion solely on the statement of opinion of another physician, when a physician as an expert witness bases an opinion upon reliable information, including a consistent opinion of another physician, the second physician's opinion is admissible. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986) (decided under former § 8-58.14).

Although generally statements by one treating physician to another are inherently reliable, may be used as the basis for an expert opinion, and are admissible in evidence to show the basis for the expert opinion, when the trial judge determines on voir dire that the source of the physician's statement is in fact unreliable, he may exclude the statement as evidence for any purpose. If the opinion of the physician testifying as an expert is based solely on the unreliable statement, the physician should not be allowed to state the opinion. If, on the other hand, the opinion is based upon sufficient additional, reliable facts and data, the trial judge may allow the expert to state his opinion notwithstanding his statement that he also relied in part upon unreliable information. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986) (decided under former § 8-58.14).

Work of Other Expert. — Trial court did not err by allowing the State to cross-examine defense's expert witness on the work of a second expert. State v. White, 343 N.C. 378, 471 S.E.2d 593 (1996).

Court Not Obligated to Find Psychiatrist's Opinion Dispositive. — Merely because only one psychiatrist testified at hearing did not mean that the court was obligated to find his opinion dispositive, particularly when some of the underlying data he consulted and partially agreed with had reached a contrary conclusion. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Admission of Expert Testimony Upheld. — In prosecution for rape and first-degree sexual offense involving four and five year old victims, trial court did not err in allowing county child medical examiner to testify to his opinion as to the likelihood that the victims had engaged in sexual intercourse, which opinion was not based on personal examination of the victims but was based on his review of the examining doctor's medical reports and conversations with two other physicians regarding the implications of the presence of protozoa trichomonas in very young girls. State v. Smith,

315 N.C. 76, 337 S.E.2d 833 (1985).

Examining physician's failure, in giving his opinion that a male penis caused the trauma he observed during his examination of child victim, to qualify his response did not render this testimony as to an ultimate issue improper. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Where plaintiff's expert witness testified regarding his opinion about what the projected net income of plaintiff's store would have been if it had remained in business, and at defendant's request, the witness disclosed the underlying information upon which he based his opinion, which information included records kept for accounting purposes by the expert witness and data supplied to him by plaintiff's management employees, the court did not err in allowing the witness to given his opinions to the loss of profits suffered by plaintiff as a result of defendant's breach of the lease contract. Liss of Carolina, Inc. v. South Hills Shopping Center, Inc., 85 N.C. App. 258, 354 S.E.2d 549 (1987).

Cross-Examination Upheld. — The defendant on trial for nine murders was not prejudiced by the cross-examination of expert witnesses concerning two additional murders he had committed. State v. Wallace, 351 N.C. 481, 528 S.E.2d 326, 2000 N.C. LEXIS 350 (2000), cert. denied, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000).

Testimony Properly Excluded. — Fact that expert "found adult material" at several locations in the county did not provide a sufficient basis to support admission of his expert testimony concerning whether the average adult in the community would find the materials which defendant was accused of selling to be patently offensive. His study was simply too unfocused and unspecific to provide him with a sufficient basis to give an expert opinion as to whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive. Thus, the trial court properly exercised its discretion by excluding his expert opinion testimony concerning whether the magazines in question in this case were patently offensive to the average adult, applying contemporary community standards, on the ground that he was no better qualified than the jury to address the question and could not assist the jury. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

Trial court did not abuse its discretion by excluding defendant's statements to psychologist regarding his state of mind at the time of offense. State v. Ballard, 127 N.C. App. 316, 489 S.E.2d 454 (1997), rev'd on other grounds, 349 N.C. 286, 507 S.E.2d 38 (1998).

Because the State did not choose to explore the basis for defendant's expert's opinion at trial, the trial court was not obligated to allow the expert to testify as to certain conversations that he had with defendant that formed the basis for his opinion. State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

Testimony As to Final Conclusion. — Trial court properly allowed the expert to testify as to his final conclusion even though it may have touched on an ultimate issue in the case. Taylor v. Abernethy, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005), appeal dismissed, — N.C. —, 630 S.E.2d 454 (2006).

Denial of defendant's motion for pretrial voir dire of State's expert witnesses was not prejudicial, where defendant had opportunity to obtain evidence on direct and cross-examination. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677, 1999 N.C. App. LEXIS 803 (1999), cert. denied, appeal dismissed, 351 N.C. 117, 540 S.E.2d 745 (1999).

Failure to Object to Expert Witness. — Court rejected the defendant pharmacy's argument that G.S. 90-21.12 does not encompass a nationwide standard of care for pharmacists and that the plaintiff's witness's testimony concerning the standard of care applicable to the defendant pharmacist was erroneously based upon a nationwide standard, as not properly before it where defendant failed to move to strike the standard of care testimony by the witness which it challenged on appeal, while presenting on cross-examination essentially the same testimony to which it had objected, and where it failed to object to the tender of the witness as an expert in pharmacy or to request a voir dire hearing pursuant to this rule to explore the bases for his opinion. Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Timing of Voir Dire. — Because the Department of Transportation was permitted an opportunity to voir dire an expert prior to cross-examining him regarding the underlying facts or data supporting his opinion as to the market value of a property on the date of the taking, the trial court did not err in denying the DOT's request to voir dire the witness until after the witness had submitted his testimony on direct. DOT v. Blevins, — N.C. App. —, 670 S.E.2d 621, 2009 N.C. App. LEXIS 40 (2009).

Applied in Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992); State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000); Johnson v. Piggly Wiggly of Pinetops, Inc., 156 N.C. App. 42, 575 S.E.2d 797, 2003 N.C. App. LEXIS 32 (2003).

Cited in State v. Johnson, 105 N.C. App. 390, 413 S.E.2d 562; In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986); State v. Bright, 320 N.C. 491, 358 S.E.2d 498 (1987); Klassette ex rel. Klassette v. Mecklenburg County Area Mental Health, Mental Retardation & Substance Abuse Auth., 88 N.C. App. 495, 364 S.E.2d 179 (1988); State v. Brown, 101 N.C. App. 71, 398 S.E.2d 905 (1990); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991), cert. denied, 332 N.C. 348, 421 S.E.2d 158 (1992); State v. Bronson, 333 N.C. 67, 423 S.E.2d 772 (1992); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995); State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996); State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999); McCarver v. Lee, 221 F.3d 583, 2000 U.S. App. LEXIS 12222 (4th Cir. 2000); Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002).

Rule 706. Court appointed experts.

(a) *Appointment.* — The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* — Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* — In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* — Nothing in this rule limits the parties in calling expert witnesses of their own selection. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 706 except that "for the taking of property" has been inserted in subdivision (b) in lieu of "under the Fifth Amendment".

A trial judge has the discretion to call an expert witness. *State* v. *Horne,* 171 N.C. 787 (1916). This rule provides the procedure for calling such a witness.

Subdivision (b) provides the method of compensating experts called by the court but does not require an additional appropriation.

CASE NOTES

Valuation of Professional Practice. — In order to make a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. The court may appoint an additional expert witness under this rule, if needed. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

In an equitable distribution action, the trial court has the authority under this rule to appoint an expert witness to appraise the goodwill and other value of plaintiff's practice. Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985).

Apportionment of Cost Associated With Court-Ordered Evaluation. — Trial court did not err in making the father responsible for 40% of the cost associated with the court-ordered child centered evaluation, noting that the father delayed the evaluation by failing to attend appointments, coming unprepared, and refusing to provide documents in a timely manner. Smith v. Barbour, — N.C. App. —, 671 S.E.2d 578, 2009 N.C. App. LEXIS 109 (2009).

Failure to Question Source or Justification for Fees at Trial. — Party to equitable distribution action waived his right to contend that the trial court failed to make findings concerning (1) how much time appraiser spent in appraising the property; (2) appraiser skills; (3) appraiser's hourly rate for appraisals; (4) the reasonableness of his hourly rate in comparison with other appraisers; and (5) what appraiser did where attorney failed to question appraiser in any way with respect to source or justification for his appraisal fee. Swilling v. Swilling, 329 N.C. 219, 404 S.E.2d 837 (1991).

Fee Upheld. — Where the referee and the parties signed a consent order appointing an expert witness to appraise the business interest-owned by either or both of the parties and submitted a bill for services in the amount of $32,912, the trial court entered an order finding that the total fee requested was appropriate for the time involved and the types of evaluations which were completed. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d 39, cert. denied, 338 N.C. 669, 453 S.E.2d 181 (1994).

Report Not Conclusive. — Where a trial court appointed an "expert" instead of a "referee" as contemplated by the parties' settlement agreement, the expert's report was not conclusive, and the trial court erred in granting summary judgment based on the report. Porter v. Am. Credit Counselors Corp., 154 N.C. App. 292, 573 S.E.2d 176, 2002 N.C. App. LEXIS 1478 (2002), appeal dismissed, 357 N.C. 165, 579 S.E.2d 883 (2003).

Cited in Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993); Grasty v. Grasty, 125 N.C. App. 736, 482 S.E.2d 752 (1997); Offerman v. Offerman, 137 N.C. App. 289, 527 S.E.2d 684, 2000 N.C. App. LEXIS 328 (2000).

ARTICLE 8.

Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

The following definitions apply under this Article:

(a) Statement. — A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. — A "declarant" is a person who makes a statement.

(c) Hearsay. — "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Exception for Admissions by a Party-Opponent. — A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 801, except for subdivision (d) which is discussed below.

Subdivision (a) defines "statement" for purposes of the hearsay rule. The Advisory Committee's Note states:

"The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement'. Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. *** Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. *** Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c)."

Subdivision (a) differs from current North Carolina law by excluding from the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. Some North Carolina cases have barred evidence of conduct even though the conduct was nonassertive. In other cases, comparable evidence has been admitted, either as nonhearsay or without noticing its possible hearsay nature. *Brandis on North Carolina Evidence* § 142 (1982).

With respect to subdivision (a), the Advisory Committee's Note also states:

"When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact."

Subdivision (b), which defines declarant as a person who makes a statement, is consistent with North Carolina practice.

Subdivision (c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. The Advisory Committee's Note states:

"The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 id. § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *** The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying."

This definition of hearsay is consistent with the definitions used by North Carolina courts. See *Brandis on North Carolina Evidence* § 138 (1982). With respect to the definition of hearsay excluding "verbal acts" from the hearsay ban, see *Brandis,* § 141.

Subdivision (d)(1) of Fed. R. Evid. 801 departs markedly from the common law in North Carolina by excluding from the hearsay ban several statements that come within the common law definition of hearsay. Accordingly, the language of Fed. R. Evid. 801(d), which provides that in certain circumstances prior inconsistent statements, prior consistent statements, and out-of-court identifications are not hearsay, was deleted. See *Brandis on North Carolina Evidence* § 46 (prior inconsistent statements), §§ 51 and 52 (prior consistent statements); *State* v. *Neville,* 175 N.C. 751 (1918) (identification).

Subdivision (d)(2) of Fed. R. Evid. 801 excludes certain admissions of a party-opponent from the hearsay ban by stating that such statements are not hearsay. Subdivision (d) of Rule 801 achieves the same result in a manner consistent with current North Carolina practice by providing that such a statement may be admitted as an exception to the hearsay rule.

Subdivision (d) specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against the party.

With respect to category (A), a party's own statement is the classic example of an admission.

Category (A) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* §§ 167, 176 (1982).

With respect to category (B), the Advisory Committee's Note states:

"Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: 'X is a reliable person and knows what he is talking about.' See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that 'anything you say may be used against you'; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases."

Admission of a statement of which a party has adopted is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 179 (1982).

With respect to category (C), the Advisory Committee's Note states:

"No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statement to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159-161."

North Carolina courts currently admit statements when an agent is, in fact, authorized to speak for the principal. *Brandis on North Carolina Evidence* § 169, at 15 (1982). However, it is unclear whether such statements are admissible when the statement was made only to the principal. *Id.* at 17. The rule would clarify North Carolina law by encompassing statements by an agent to the principal or to a third party.

With respect to category (D), the Advisory Committee's Note states:

"The tradition has been to test the admissibility of statement by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment."

In *Hubbard* v. *R.R.,* 203 N.C. 675 (1932), the Court states:

"What an agent or employee says relative to an act presently being done by him within the scope of his agency or employment is admissible ... against the principal or employer, but what he says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer."

The North Carolina rule has been the subject of several dissenting opinions and has been criticized by Professor Brandis. See *Branch* v. *Dempsey,* 265 N.C. 733 (1965) (Sharp, J., dissenting); *Pearce* v. *Telephone Co.,* 299 N.C. 64 (1980) (Copeland, Carlton and Exum, J.J., dissenting); *Brandis on North Carolina Evidence* § 169 (1982). Rule 801(d)(D) would change North Carolina practice and make admissible any statements related to a matter within the scope of the agency or employment. The only additional requirement is that the statement be made during the existence of the relationship.

With respect to category (E), the Advisory Committee's Note states:

"The limitation upon the admissibility of statement of co-conspirators to those made 'during the course and in furtherance of the conspiracy' is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. *** The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitch* v. *United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); *Wong Sun* v. *United States,* 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)." Rule 801(d)(E) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 173 (1982).

Legal Periodicals. — For note, "State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases," see 64 N.C.L. Rev. 1352 (1986).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For article, "Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements To Convict," see 65 N.C.L. Rev. 1 (1986).

For article, "Not So 'Firmly Rooted': Exceptions to the Confrontation Clause," see 66 N.C.L. Rev. 1 (1987).

For note, "Admission of the Unthinkable: Hearsay Exceptions and Statements Made by Sexually Abused Children—State v. Smith," see 9 Campbell L. Rev. 437 (1987).

For note on the admissibility of a criminal defendant's hypnotically refreshed testimony, see 10 Campbell L. Rev. 311 (1988).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For note, "State v. Alston: North Carolina Continues to Broaden its Mind to Admissibility of a Victim's Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases," see 32 Wake Forest L. Rev. 1327 (1997).

For recent development, "The Defense Calls ... the Accuser? State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses," see 84 N.C. L. Rev. 2082 (2006).

CASE NOTES

Hearsay Defined. — An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted; if offered for any other purpose, the assertion is admissible. Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

Hearsay is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. If a statement is offered for any other purpose, it is admissible. Hall v. Coplon, 85 N.C. App. 505, 355 S.E.2d 195 (1987).

Testimony of a witness was hearsay under N.C. R. Evid. 801(c) because it consisted of statements, other than ones made by the declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. However, the testimony was admissible under an exception to the hearsay rule. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

The erroneous admission of hearsay is not always so prejudicial as to require a new trial. The defendant must still show that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

An act, such as a gesture, can be a statement for purposes of applying rules concerning hearsay. State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986).

A robbery report containing statements regarding the seizure, at a bus station, of defendant's luggage, which police suspected contained marijuana, was relevant evidence; the statements made to the investigating officer were vital to the identification of defendants as the suspects in the armed robbery and admissible for non-hearsay purposes. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Medical Records. — Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., 187 N.C. App. 694, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Composite Picture of Perpetrator Not a Statement. — A composite picture of a perpetrator prepared by police pursuant to the directions of a witness to a crime does not constitute a statement. Such a composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness' eyes rather than the witness' camera. No assertion or statement is involved. Therefore, a composite picture is not hearsay as defined by subsection (c) of this rule and Rule 802, and does not apply to bar the admission of a composite picture into evidence. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

Agency. — The admission of an un-redacted report, after a redacted report had already been offered in court, and comments made thereon by defendant's manager was proper and not violative of the rules prohibiting hearsay or opinion testimony where the manager of the defendant store was defendant's agent at the time he entered his comments on the incident report and the entry concerned a matter within the scope of his agency. Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000).

North Carolina Industrial Commission did not err when it allowed a professional football player's agent to testify regarding statements made by the team's scouting director, its position coach, and the assistant special teams coach because those individuals had authority to discuss the team's needs and a player's performance as their opinion would be considered in determining the team's final roster. Renfro v. Richardson Sports, Ltd. Partners, 172 N.C. App. 176, 616 S.E.2d 317, 2005 N.C. App. LEXIS 1435 (2005), cert. denied, 360 N.C. 535, 633 S.E.2d 821 (2006), cert. dismissed, 360 N.C. 535, 633 S.E.2d 821 (2006).

Adoption of Another's Statement as One's Own. — A person may expressly adopt another's statement as his own, or an adoptive admission may be implied from other conduct of a party which manifests circumstantially the party's assent to the truth of a statement made by another person. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Adoptive admissions fall generally into two categories — those implied from the affirmative act of a party, and those implied from silence or a failure to respond in circumstances that call for a response. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Defendant's affirmative, though silent, conduct indicating that declarant, who was indicted for the same crime, "had better hush" or "had better shut up," could reasonably be found by a jury to manifest the defendant's adoption or belief in the truth of the declarant's statements, thereby making them admissible under this rule. State v. Hunt, 325 N.C. 187, 381 S.E.2d 453 (1989).

Statements made by others on the videotape, e.g., "this is [defendant]'s big old gun" were inadmissible against him to prove possession of a firearm by a convicted felon because they were not adoptive admissions; the circumstances under which the videotaped third person statements were made were not circumstances where a denial by the defendant would naturally be expected. State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835, 2000 N.C. App. LEXIS 1243 (2000).

Trial court's giving a jury instruction on implied admission was not in error as the defendant's lack of denials to certain accusations by another person and the statement by the defendant to that person that the defendant was too smart to get caught contained both express and implied admissions by the defendant State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Mere possession of a written statement does not manifest an adoption of its contents. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Request for testing or other information does not automatically establish an adoption of statements contained within the response. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Statements Admissible to Explain Subsequent Conduct. — Statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Testimony in regard to threat against witness by defendant was not introduced for the truth of the statement, but explained why she did not report the offense in a more timely manner, and it was not hearsay. State v. Lamb, 342 N.C. 151, 463 S.E.2d 189 (1995).

Testimony that a witness' mother called to tell him that a man was at her house and that he went to her house was admissible for the limited purposes of showing what the witness did after the telephone conference with his mother, why he went to her house, and to corroborate another witness' testimony. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Testimony by defendant's former cellmate about cellmate's conversations with his attorney about a note the cellmate signed while sharing the cell with defendant was admissible for the limited purpose of explaining that the cellmate signed the note under coercive circumstances, which was why he testified for the State rather than the defendant. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C.

App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

The statements by witness outlining her daughter's problems with defendant and her request that someone meet her at the bus stop were introduced to explain why the mother asked the victim to meet her at the bus stop that afternoon and not for the truth of the matter asserted; their admission was, therefore, not in violation of this section. State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Admission of a detective's conversation with an inmate implicating defendant in two murders to explain the detective's subsequent conduct was inadmissible when it went beyond what was necessary to explain that conduct, and was relied on as substantive evidence of defendant's alleged crime. State v. Canady, 355 N.C. 242, 559 S.E.2d 762, 2002 N.C. LEXIS 176 (2002).

Testimony from surveillance team members about information one surveillance officer gave them about defendant's activities was properly admitted and was not hearsay; the trial court admonished the jury that the testimony was not being offered to establish the truth of the matters asserted, and the record showed that the evidence was admitted solely for the purpose of explaining each of the surveillance team members' actions when they arrived at the scene where defendant had been selling marijuana. State v. Young, 166 N.C. App. 401, 602 S.E.2d 374, 2004 N.C. App. LEXIS 1777 (2004), cert. denied, 359 N.C. 326, 611 S.E.2d 851 (2005).

In a drug case, a trial court did not err by allowing an officer to testify about a conversation with another person that led to defendant's arrest under G.S. 8C-1, N.C. R. Evid. 801(c) because (1) defendant opened the door during cross-examination and (2) the testimony was offered to explain subsequent conduct of the officers. State v. Cardenas, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

Trial court did not err in finding that police detective was the custodian or other qualified witness of pawn shop records for purposes of admissibility of his testimony regarding his review of those records, nor did it err in admitting the detective's testimony regarding said records, as his testimony regarding his review and his resulting actions was admissible to show the basis for those actions, explained his conduct, and was not hearsay. State v. Goblet, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Testimony regarding an officer's interaction with a detective and a third individual was non-hearsay since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim. State v. Alexander, 177 N.C. App. 281, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006), cert. denied, appeal dismissed, 361 N.C. 358, 644 S.E.2d 357 (2007).

Out-of-Court Statements to Impeach Party. — Trial court did not err in allowing the State to introduce out-of-court statements to impeach codefendant where the statements were not admitted for substantive purposes and would have been otherwise admissible because of the prior inconsistent statement exception to the hearsay rule. State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002).

Statements to Corroborate Child's Testimony. — Out-of-court statements offered for the sole purpose of corroborating six-year-old victim's testimony were not hearsay. State v. Gilbert, 96 N.C. App. 363, 385 S.E.2d 815 (1989).

Testimony by police juvenile investigator as to prior consistent statements made to him after a murder by a child who witnessed the murder was admissible since the officer's testimony corroborated the testimony of the child at trial. State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596, 2001 N.C. LEXIS 942 (2001).

Corroboration by Videotape. — Videotape was properly offered and accepted by the court as corroboration of the victim's testimony as the victim's statements were not offered to prove that defendant sexually assaulted the victim, but rather to show that the victim had made a similar, consistent statement to a counselor. State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994).

The date "1/10/97" appearing on the lower lefthand corner of a videotape depicting the defendant handling various weapons was inadmissible hearsay to prove that defendant was in possession of a weapon after the date of his prior felony conviction where the declarant was unknown since there was no testimony as to the identity of the operator of the camera and where the statement, that this video was filmed on 1/10/98, was offered for its truth, e.g., that defendant was in possession of a weapon on that date. State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835, 2000 N.C. App. LEXIS 1243 (2000).

Test on Admissions by Silence. — Regarding admissions by silence, whether the statement is oral or written, the critical inquiry is whether a reasonable person would have denied it under the circumstances. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Jury's Province to Draw Inferences from Silence. — A response which is not the equivalent of a denial may indicate acquiescence and be considered by the jury for what it is worth; where the evidence leaves the matter in doubt, it is the jury's province to determine whether the remarks were heard and understood, and to draw inferences from the person's silence. State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992).

Statements of a party to an action, spoken or written, have long been admissible against that party as an admission if relevant to the issues and not subject to some specific exclusionary statute or rule. This is still the case under the Rules of Evidence. Karp v. UNC, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

The exception, in subdivision (d)(A) of this rule is available only for statements made by parties to the lawsuit. State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

Out-of-Court Statements Forming Reputation of A Particular Place. — The trial court properly restricted defense counsel from referring to the premises where the defendant's alleged crimes took place as a "crack house," since such evidence was hearsay. State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

Admission by Party Opponent. — Where plaintiff slipped and fell in a grocery store, statements made by the store manager were admissible as an exception to the hearsay rule for admissions by a party opponent. Kremer v. Food Lion, Inc., 102 N.C. App. 291, 401 S.E.2d 837 (1991).

Defendant's confession that she killed her stepchild by smothering him by placing a plastic bag over his head was an admission by a party opponent and therefore admissible as substantive evidence of her guilt and to refute her defense of accident. State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995).

In murder prosecution, where defendant was allowed to go to a local funeral home to view her husband accompanied by a sheriff's deputy and a jail matron and both testified that defendant was "pretty hysterical and crying" and that while she stood over the victim's body, she stated twice: "Honey, why did you make me do it?," this statement was an admission which fell squarely within this rule. State v. Lambert, 341 N.C. 36, 460 S.E.2d 123 (1995).

The murder defendant's statement that he would have to "cap someone" if his employer did not stop garnishing his wages was admissible as an admission or statement of a party opponent. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

Trial court properly permitted testimony as to statements defendant made to fellow inmates while in jail that he had killed two women. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Sexual abuse victim's testimony that her abuser told her no one would believe her report of the abuse was admissible, under G.S. 8C-1, N.C. R. Evid. 801(d)(A), as an admission by a party-opponent, and was not hearsay, under G.S. 8C-1, N.C. R. Evid. 801(c). State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Under subdivision (d)(A) of this rule, the trial court did not error in admitting an officer's testimony that, at the hospital following the defendant's vehicle accident during a high-speed chase, the officer overheard the defendant tell the medical personnel that he had been drinking and driving as the statement was incriminating and constituted an admission by the defendant. State v. Smith, 157 N.C. App. 493, 581 S.E.2d 448, 2003 N.C. App. LEXIS 748 (2003).

Railroad was not entitled to military contractor immunity in a personal injury action filed by a brakeman who suffered a neck injury while sitting in a chair that did not meet the specification in the military contract, because telephone conversations between a railroad official and an agency official, while admissible pursuant to G.S. 8C-1, N.C. R. Evid. 803, did not establish that the government assented to the use of the substandard chairs, and because the trial court erroneously prohibited the brakeman's expert from testifying about a conversation with a government official concerning the chairs, since the denial of approval by the official could have been allowed as an admission of a party opponent, G.S. 8C-1, N.C. R. Evid. 801(d). Stilwell v. Gen. Ry. Servs., 167 N.C. App. 291, 605 S.E.2d 500, 2004 N.C. App. LEXIS 2179 (2004), cert. denied, 359 N.C. 326, 611 S.E.2d 852 (2005).

Defendant's statement that he would "be guilty" was admissible under G.S. 8C-1-801(d)(A) because it was defendant's own statement offered against his own interest. State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006).

Defendant's comments concerning statements he made to a coworker, to the extent they were hearsay, fell within the exception to the hearsay rule for admissions by a party opponent. State v. Collins, 335 N.C. 729, 440 S.E.2d 559 (1994).

An adverse witness, even the complaining witness in a criminal trial, is not a party to the action. State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

State of Mind Exception. — Statements made by the victim shortly before the victim's death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk" were admissible, under the state of mind exception to the hearsay rule. State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

Uncommunicated threats made by decedents against defendant were hearsay but were admissible as state of mind expressions of decedents. State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996).

Defendant's statements amount to party admissions and are therefore admissible under subdivision (d)(A) of this rule. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

That an admission of defendant was contained within a hearsay statement by another individual which was admissible as a prior inconsistent statement did not affect its admissibility because both statements were admissible. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Officers' testimony about the notes he took during an interview with defendant were not hearsay and were properly admitted into evidence; nor were they hearsay within hearsay. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Property Valuations as Admission of County. — Evidence of real property valuations made by the county for ad valorem tax purposes is admissible against the county in an eminent domain proceeding as an admission of a party opponent. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 479 (1988).

Admissions of Party's Attorney. — In North Carolina admissions of attorneys are binding upon their clients, and are generally conclusive. Karp v. UNC, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

Statements by defendant's attorney contained in an affidavit of the plaintiff's attorney were admissible against defendant under subsection (d) of this rule, since they concerned a matter within the scope of the context and scope of the attorney-client representation. Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc., 134 N.C. App. 468, 518 S.E.2d 28 (1999).

Defendant's answers to interrogatories, duly signed by defendant's attorney, were admissions of a party opponent, and as such should have been admitted into evidence. Karp v. UNC, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

When Acts and Declarations of Coconspirators Are Admissible. — The acts and declarations of conspirators are admissible against other members of the conspiracy, provided that the state establishes a prima facie case of the conspiracy independently of the declarations sought to be admitted. State v. Nichols, 375 N.C. 303, 365 S.E.2d 561 (1988); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989); State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

The hearsay statement by defendant's co-conspirator was admissible as an exception to the hearsay rule because it was made during the course and in furtherance of the conspiracy. State v. Williams, 345 N.C. 137, 478 S.E.2d 782 (1996).

State's Burden When Offering Statements of Alleged Co-conspirator. — When attempting to rely on the coconspirator exception to the hearsay rule, the State's burden is to produce evidence independent of the statements themselves sufficient to permit the jury to find the existence of an unlawful agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. State v. Cotton, 102 N.C. App. 93, 401 S.E.2d 376, cert. denied, 329 N.C. 501, 407 S.E.2d 543 (1991).

Statements made in reassurance that the transaction which is the subject of a conspiracy will indeed occur are made in furtherance of the conspiracy, and are admissible under subdivision (d)(E) of this rule. State v. Phillips, 88 N.C. App. 526, 364 S.E.2d 196 (1988), rev'd on other grounds, 325 N.C. 222, 381 S.E.2d 325 (1989).

Statements of coconspirators made prior to or subsequent to the conspiracy are not admissible under this exception. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Admission of statements of alleged coconspirator, as testified to by agent, made after the conspiracy shown by the evidence had long since ended, constituted prejudicial hearsay testimony and required a new trial. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985); State v. Collins, 81 N.C. App. 346, 344 S.E.2d 310 (1986).

Because there was no evidence that a conspiracy to rob a convenience store was in existence at the time statements in question were made, the trial court erred in admitting the hearsay statements as a statement by a coconspirator under G.S. 8C-1, Rule 801(d); however, the error was harmless pursuant to G.S. 15A-1443(b) because the remaining evidence that defendant took part in the robbery was overwhelming. State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

When Conspiracy Ends. — Ordinarily, a conspiracy ends with the attainment of its criminal objectives, but precisely when this occurs may vary from case to case. When a conspiracy ends for the purposes of subdivision (d)(E) of this rule is a question of fact for the trial court. State v. Gary, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

When a conspiracy ends is a question of fact. State v. Collins, 81 N.C. App. 346, 344 S.E.2d 310 (1986).

Evidence held sufficient to establish

prima facie the existence of a conspiracy to traffic in cocaine, so as to allow admission of statements of coconspirators. State v. Collins, 81 N.C. App. 346, 344 S.E.2d 310 (1986).

Admission of Acts or Declarations of Co-conspirator Before Conspiracy Is Established. — While a prima facie case of conspiracy must be made out before the close of the state's evidence, the courts often permit the state to offer the acts or declarations of a co-conspirator before the prima facie case of conspiracy is sufficiently established. State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

Ideally, the state should make prima facie showing before tendering co-conspirator's declarations; however, in its discretionary control of the presentation of evidence, the court may admit declarations subject to subsequent proof of the conspiracy. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988); State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Testimony by defendant's brother that father told him he would not give defendant a trailer unless he straightened up was not hearsay; testimony tended to show that victim intended to disinherit defendant and to show ill will between defendant and victim. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990), overruled in part.

While a prima facie showing of the existence of a conspiracy must be established independently of the statements sought to be admitted, the trial court may use such statements in establishing the times when the conspiracy was entered and terminated. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Defendant was not entitled to have his co-conspirators' incriminating statements sanitized pursuant to G.S. 15A-927(c)(1) where the statements were admissible against him under subdivision (d)(E) of this rule whether he was tried separately or jointly. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Co-conspirator's Statement Properly Admitted. — Statement made by co-conspirator to reassure undercover agent that drug trafficking transaction which was the subject of conspiracy would indeed occur, despite defendant's prolonged absence after she received advance payment, was admissible under this rule, even though defendant absconded with the money involved in the transaction and the crime of trafficking was never completed. State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986).

Where, based on defendant's admissions, a jury could find that defendant conspired with co-conspirator to commit armed robbery, the trial court did not err in admitting c-oconspirator's hearsay statements against defendant. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Evidence was sufficient, independent of out-of-court statements made by co-conspirators, to establish a prima facie case of conspiracy; therefore, the out-of-court statements were properly admitted in evidence. State v. Fink, 92 N.C. App. 523, 375 S.E.2d 303 (1989).

Evidence that an undercover officer arrived at cocaine seller's residence to make a purchase of cocaine and was told to come back in 30 minutes, and of defendant giving seller cocaine without any payment in return, and that the same cocaine was then sold to the undercover officer upon his return to the residence, was a prima facie showing of conspiracy sufficient to admit statements made by the seller under the co-conspirator exception to the hearsay rule. State v. Turner, 98 N.C. App. 442, 391 S.E.2d 524 (1990).

Out-of-court statements made by a conspirator in a prosecution for conspiracy to sell and deliver marijuana were not inadmissible hearsay where the actions of the defendant and co-conspirator observed by undercover officers were sufficient evidence to establish prima facie conspiracy. State v. Morris, 102 N.C. App. 541, 402 S.E.2d 845 (1991).

Where there was substantial evidence that the defendant had entered a conspiracy to kill her husband and that a co-conspirator's statements to another co-conspirator were in furtherance of and during the conspiracy, the trial court did not err by admitting testimony of the co-conspirator to whom the statements were made regarding those statements. State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992), cert. denied, 513 U.S. 1089, 115 S. Ct. 749, 130 L. Ed. 2d 649 (1995).

Statement by defendant regarding a murder that he had committed fit within the hearsay exception in Rule 804(b)(3) and within the exception for statements of a co-conspirator in subdivision (d)(E). State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Alleged hearsay was not admitted for its truth but admitted for impeachment; co-defendant's prior statements were admissible to attack the co-defendant's credibility and the jury was properly instructed that the statements were to be considered as impeaching evidence. State v. Featherson, 145 N.C. App. 134, 548 S.E.2d 828, 2001 N.C. App. LEXIS 569 (2001).

Statements made by defendant's brother were properly admitted under G.S. 8C-1, Rule

801(d)(E), as the statements of a co-conspirator because (1) the brother accompanied defendant to defendant's ex-girlfriend's home after she told defendant she did not want him to come there and after defendant threatened the victim; (2) after defendant barged into the girlfriend's home, the brother also entered the home; (3) the brother was present when defendant made his way to the girlfriend's bedroom, knocked open the bedroom door, saw the victim and went to the kitchen where he retrieved a steak knife; (4) the brother drove the car as he and defendant left the girlfriend's home after defendant threatened the victim; (5) the brother drove defendant back to the girlfriend's home a short time later, when defendant displayed a baseball bat and made threatening statements about the victim; (6) when defendant left the girlfriend's home a second time, the brother continued to drive, with defendant as his passenger; (7) when defendant and the brother talked with the victim's friend, defendant expressed his plans to get even with the victim and showed the friend the gun defendant was carrying. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Because of the limiting instruction that the trial court gave to the jury, co-defendant's confession could only be used against co-defendant and not against defendant; therefore defendant's contention that the prosecutor improperly used the statements of the co-defendant to corroborate a witness and thereby bolster the case against defendant was without merit. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Statement by Accessory. — Statement of defendant, convicted of being an accessory before the fact to murder committed by his girlfriend, to the effect that she was the one who brought up the discussions about killing the victims, constituted hearsay under subsection (a); however, this statement was admissible under subsection (d) as a party admission. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Claim Estimates By Insurer Properly Excluded as Evidence. — In personal injury action against plaintiff's UIM insurer, admitting claim estimates prepared by the insurer as admissions of a party opponent would unduly prejudice the defense and circumvent the policy of having the jury focus on the facts and not the existence of liability insurance. Braddy v. Nationwide Mut. Liab. Ins. Co., 122 N.C. App. 402, 470 S.E.2d 820 (1996).

Evidence Not Hearsay. — Testimony of plaintiff's father as to what his dead mother's gift intentions were with regard to money given to plaintiff and her husband to purchase a house was not hearsay, although it may have been objectionable on other grounds. Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

Defendant's name and address, written or printed on an envelope or its contents, was neither a written assertion nor conduct which was intended as an assertion, and therefore was not hearsay evidence. Moreover, while the sender's conduct in addressing and mailing the envelope undoubtedly implied that the sender believed that the addressee lived at that address, because no assertion was intended, the evidence was not hearsay and was admissible. State v. Peek, 89 N.C. App. 123, 365 S.E.2d 320 (1988).

Where testimony was not offered to prove that a woman insured victim's life so that she could have him killed, but to prove why the witness contacted the defendants to have the victim killed, the witness' testimony was not hearsay and was properly admitted. State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Murder victim's statement to her son that she did not want defendant to come to her house because he had failed to provide child support was not hearsay, because it was not offered to prove the truth of the matter asserted but to show victim's frustration and impatience with defendant. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

A witness' statement that his wife heard a rape victim say "Are you going to shoot me, too?" was relevant for the limited purpose of explaining why the witness called the sheriff a second time after he heard a commotion outside his house, and the statement was not inadmissible hearsay. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

Statement by murder defendant made in a letter to a witness while defendant was in jail was properly admitted even though the letter itself was not available for examination. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Statements which were offered not to prove the truth of any matter asserted therein, but rather to explain the subsequent conduct of the defendant and his accomplices in shooting detective and the context in which the murder occurred were not hearsay and were admissible. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

When evidence of a statement by someone other than the testifying witness is offered for a purpose other than to prove the truth of the matter asserted, the evidence is not hearsay. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

Testimony of a defendant's former co-employee was admissible where the defendant shot and killed his former supervisor and others after being fired, and the testimony concerning what was said at the defendant's termination conference a few days before the shooting was relevant to show motive. State v. Davis, 349 N.C. 1, 506 S.E.2d 455 (1998), cert. denied, 526 U.S. 1161, 119 S. Ct. 2053, 144 L. Ed. 2d 219 (1999).

Statements to a detective by the mother of a child sexually assaulted and murdered by her lover were admissible as prior consistent statements that corroborated and added weight to her trial testimony, where she said that her husband was afraid that her lover would harm the child, that she thought the defendant had harmed the child, that the defendant was angry because he believed the autopsy report was wrong, and that she and her lover tried to get their stories straight. State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998).

Witnesses' testimony that they told the victim prior to his murder that he could get a divorce and witness' testimony that the wife/defendant's desire for their daughter to get a job had caused strain in the marriage was not hearsay, since the statements were actually made by the persons testifying and were not offered to prove whether victim could get a divorce. State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999).

Testimony regarding whether the defendant had told her brother that the victim/her ex-husband actually forced her to have sex in order to visit her children was not offered to prove the truth of the matter asserted but was instead, introduced in an attempt to illustrate his state of mind regarding the victim and tended to show motive, and was, therefore, admissible under this section. State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Statement by co-conspirator to SBI agent indicating that defendant had told someone "all about it" was offered to support the witness's testimony at trial, not to prove the truth of the matter asserted and, therefore, not inadmissible hearsay. State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000), cert. denied, 531 U.S. 878, 121 S. Ct. 163, 148 L. Ed. 2d 110 (2000).

The jailer's and deputy sheriff's testimony that inmate said "hurry" or "leave" to defendant as she was departing did not constitute inadmissible hearsay because it was offered to prove that the directive was made, not to prove the truth of any matters asserted. State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94, 1999 N.C. App. LEXIS 1178 (1999).

Remarks made by defendant, accused of murdering her grandmother in a nursing home, to the police were admissible under this section as an admission of a party opponent. State v. Smith, 135 N.C. App. 649, 522 S.E.2d 321, 1999 N.C. App. LEXIS 1239 (1999).

Witness testimony regarding statements made by murder victim regarding the presence of drugs and money in the hotel room where she was staying with a drug dealer were admissible to show what the hearer did based on the victim's statements. State v. McCord, 140 N.C. App. 634, 538 S.E.2d 633, 2000 N.C. App. LEXIS 1266 (2000), review denied, 353 N.C. 392 (2001).

Inmate's statement to defendant who murdered another inmate about "that guy" being in the shower was offered to explain the subsequent conduct of defendant in walking toward the shower area and, therefore, was not hearsay; likewise, another inmate's testimony about $ 17.00 that victim owed to defendant did not constitute hearsay, but was relevant to establish a possible motive for the murder. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Testimony of insurance agent as to what victim asked him was admissible, as it was offered merely to establish that victim's husband had submitted her insurance application to him without her knowledge, not for the truth of the matters asserted. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

The trial court committed no error under this rule in allowing the jury to hear a small portion of an answering machine message, where the speaker's wife had testified earlier that she was not aware of any conversation between her husband and the plaintiff mother of a boy injured on defendant's amusement ride. Breedlove v. Aerotrim, U.S.A., Inc., 142 N.C. App. 447, 543 S.E.2d 213, 2001 N.C. App. LEXIS 147 (2001).

Minor child's medical history, which included statements to a pediatrician as to how the child had been sexually abused by defendant, was not hearsay because the statements were not offered for the truth of the matter asserted but to illustrate the type of information collected by the pediatrician in order to diagnose the child. State v. Shepherd, 156 N.C. App. 69, 575 S.E.2d 776, 2003 N.C. App. LEXIS 31 (2003).

Statements made by defendant's brother to friends of defendant's victim that (1) where defendant and the brother were from, anyone who pulled a knife or a gun on someone got "smoked," (2) that the brother was "through" but the friends would have to talk to defendant, and (3) that defendant and the brother should just assault the victim with a baseball bat, rather than kill him, were properly admissible because they were not hearsay as they were not admitted to prove the truth of the matter asserted. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Co-defendant's statements to the officer that defendant, who was expecting a large legal settlement, would pay a large sum for the officer to "forget" the drug offense, to which defendant replied in the affirmative, was not inadmissible hearsay, because the statements were "operative facts," or "verbal acts"excluded from the hearsay rule, and alternatively, the statements were adoptive admissions. State v. Weaver, 160 N.C. App. 61, 584 S.E.2d 345, 2003 N.C. App. LEXIS 1671 (2003).

Audiotape of a conversation defendant had with his wife and stepson, which the wife's relatives found 10 months after the wife and stepson were killed, was properly authenticated, and the state supreme court held that the trial court did not err when it admitted the tape for the limited purpose of showing defendant's malice, intent, and ill will towards the victims. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Trial court did not err in admitting into evidence the crime laboratory reports upon which the expert, whether hearsay or not, permissibly based the expert opinion under G.S. 8C-1-703, as disclosure of the basis of the expert's opinion was essential to assessment of credibility and was not hearsay under G.S. 8C-1-801. State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

With regard to a defendant's conviction for first-degree felony murder as to the death of his ex-girlfriend, the trial court did not err by admitting the testimony of a man who had been watching a movie with the victim at her home just prior to her death, which detailed why the man ran from the scene instead of confronting the defendant who broke into the victim's home, because the testimony was offered not for the truth of the matter asserted but for purposes of explaining why the man chose to run, to seek out the police, and not confront defendant single-handedly, which was admissible non-hearsay. State v. Byers, 175 N.C. App. 280, 623 S.E.2d 357, 2006 N.C. App. LEXIS 59 (2006), cert. denied, — N.C. —, 631 S.E.2d 135 (2006).

Trial court did not err in admitting into evidence two letters from decedent to the brother, as well as the envelopes which contained those letters; the letters and envelopes were not hearsay because they were not offered for the truth of the matter, but were offered to provide a sample of decedent's handwriting so that the jury could compare it to the signature on a contract at issue, and the letters were properly authenticated by a witness familiar with decedent's handwriting. Taylor v. Abernethy, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005), appeal dismissed, — N.C. —, 630 S.E.2d 454 (2006).

Football player was properly permitted to testify as to why he was released from another team where he offered personal knowledge as to why he was released and he stated that he could not "perform as needed on the field;" the statement did not meet the definition of hearsay because it occurred while the football player was testifying at a hearing. Swift v. Richardson Sports, Ltd., 173 N.C. App. 134, 620 S.E.2d 533, 2005 N.C. App. LEXIS 1898 (2005).

North Carolina Industrial Commission did not err under G.S. 8C-1, Rule 801(c) by allowing a former professional football player to testify about the reason for his termination from another professional team after his first professional team released the player because the player offered personal knowledge about why he was released and his testimony was not hearsay. Swift v. Richardson Sports, Inc., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 725 (Apr. 5, 2005).

Social worker's testimony in a termination of parental rights action regarding statements purported made by the father's drug counselor was not inadmissible hearsay but testimony as to terms of the father's case plan and the father's knowledge of those terms. In re S.N., 180 N.C. App. 169, 636 S.E.2d 316, 2006 N.C. App. LEXIS 2236 (2006).

Testimony regarding an informant's statements to a detective was not inadmissible hearsay because the testimony was not offered for its truth, but was offered to explain how the investigation unfolded, why defendants were under surveillance, and why the deputy followed defendants to the motel. State v. Wiggins, 185 N.C. App. 376, 648 S.E.2d 865, 2007 N.C. App. LEXIS 1804 (2007).

Detective's statements as to other businesses that had reported break-ins was not inadmissible hearsay as: (1) defendant's objection was overruled only as to what the detective did, and the evidence offered was both relevant, in that it explained the chain of events in the police investigation, and was not hearsay as it precluded the further admission of statements regarding the reported break-ins; (2) the statements were offered to explain the chain of events and were not offered for the truth of the matter asserted; and (3) the probative value of the statements was not substantially outweighed by their prejudicial effect as the detective's testimony did not directly accuse defendant of other crimes, and was not offered to prove defendant's conformity with character to commit wrongs, but was offered to explain the sequence of events. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Defendant's statement to an officer that a passenger told him to stop the car during a police chase was not offered for its truth, and thus was properly admitted in defendant's second-degree murder trial because it was not hearsay evidence under N.C. R. Evid. 801(c), and was introduced to demonstrate malice. State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Statements made in reference to testimony given during trial did not constitute hearsay. State v. Parker, 187 N.C. App. 131, 653 S.E.2d 6, 2007 N.C. App. LEXIS 2239 (2007).

There was no error in the admission of a witness's prior consistent statement, as it was not hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) where it was not offered for substantive purposes but instead, it was used by the State for corroborative purposes; moreover, the trial court properly gave a limiting instruction to the jury regarding use of the statement under G.S. 8C-1, N.C. R. Evid. 105. State v. Early, — N.C. App. —, 670 S.E.2d 594, 2009 N.C. App. LEXIS 49 (2009).

Officers' testimony recounting their interviews with three witnesses was not hearsay because it was offered as corroboration evidence and not substantive evidence. State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

Trial court did not err by admitting into evidence a DVD recording of defendant's police interview without redacting those questions posed to him by the detectives, which contained statements attributed to non-testifying third parties. The questions containing alleged statements of non-testifying individuals were admissible so that the jury could understand the circumstances in which defendant was caught in a lie, changed his story, and made significant admissions of fact, not to prove the truth of the matter asserted; thus, the questions were not hearsay under G.S. 8C-1, N.C. R. Evid. 801(c), and the protection afforded by the Confrontation Clause against testimonial statements was not at issue. State v. Miller, — N.C. App. —, 676 S.E.2d 546, 2009 N.C. App. LEXIS 805 (May 19, 2009).

Evidence Held Admissible. — In prosecution for kidnapping and robbery, it was not error for detective to testify to the actions of defendant's wife in turning over ring and bracelet taken from victim, on grounds that those actions constituted nonverbal statements, excludable as hearsay, where the testimony was only offered to show that detective obtained the jewelry from defendant's wife at defendant's apartment, and was not offered to prove the matter asserted by the wife's nonverbal conduct, i.e., that the items in her possession were the ones identified in the warrant as stolen from the victim. State v. Parker, 81 N.C. App. 443, 344 S.E.2d 330 (1986).

In a case involving negligence of defendant leading to theft of jewelry samples from car trunk, police investigative report was properly received for the limited purpose of showing that a report of the theft was made under this rule, and was also admissible as substantive evidence, as a present sense impression under G.S. 8C-1, Rule 803(1) and under the excited utterance exception in G.S. 8C-1, Rule 803(2). Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 82 N.C. App. 21, 345 S.E.2d 453 (1986).

Where affidavit and warrant were not introduced in order to prove the truth of the matters stated therein, but rather, to show that defendant had information, correct or incorrect, that victim was informing on him and his brother, it was not error for the trial judge to admit this evidence. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Where husband and wife stated in affidavit that they told insurer's agent that husband had been convicted of driving under the influence and was being treated for high blood pressure, statements were admissible since they were not offered to prove the truth of the matters contained in the statements but were offered to prove simply that defendant's agent had notice of these matters. Ward v. Durham Life Ins. Co., 325 N.C. 202, 381 S.E.2d 698 (1989).

Court did not abuse its discretion by allowing social workers to testify as to statements made to them by respondent's wife whereby she indicated respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior, as respondent's wife was a party to the action which was brought to determine whether her child was abused and neglected, and her statements to the social workers about her husband's conduct could only be reasonably considered as admissions by her that their child was subjected to conduct in her presence which could be found to be abusive and neglectful. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Testimony to the effect that nobody in defendant's presence had said anything to him about anybody having been shot did not fall within the definition of hearsay contained in this rule. This testimony was adduced for the purpose of showing that defendant was not told that anyone had been shot, and its truth depended only on the credibility of the testifying witness; it was relevant to show defendant's firsthand knowledge of the fact that an officer had been shot and thus was admissible to impeach defendant's credibility. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Statements of one person to another are not hearsay if the statement is made to explain the subsequent conduct of the person to whom the statement was made. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

Defendant's statements to victim concerning his crimes against another victim, if relevant, were admissible pursuant to subsection (d) and were relevant because they tended to show that the murder was especially heinous, atrocious, or cruel and tended to show the murder was part of a course of conduct. State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994), cert. denied, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994).

A police officer's testimony was admissible for corroborative, nonhearsay purposes, where the officer testified as to the statement the friend of the murder defendant gave to police officers, and the testimony was corroborative of the friend's own testimony and was explained to the jury as such. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Trial court did not commit reversible error by allowing the State to question a defense witness as to defendant's prior conviction for forcible robbery because evidence of defendant's prior conviction was admissible to attack defendant's credibility as a hearsay declarant; the defense witness's testimony assisted in establishing an alibi for defendant and was hearsay because it was offered for the truth of the matter asserted. State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776, 2002 N.C. App. LEXIS 1274 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 440 (2003).

Where a witness testified as to the events leading up to an surrounding the murders and an attempted murder, the trial court properly admitted portions of a 911-call to corroborate the witness's testimony. State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003), cert. denied, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003).

Defendant's statements concerning his age were properly admitted under the admissions by a party-opponent exception to the hearsay rule. State v. Clark, 161 N.C. App. 316, 588 S.E.2d 66, 2003 N.C. App. LEXIS 2047 (2003).

Trial court did not err in admitting two police officers to testify that they went to a residence to talk with defendant after arresting a person with crack cocaine in her hand who had just left the residence and who told them that she had just been visiting defendant, her cousin, at the residence; the evidence was not offered to prove that she had been visiting her cousin, which would be evidence offered for the truth of the matter asserted or hearsay, but was offered to explain the actions of the two police officers in going to the residence and talking to defendant, which resulted in defendant's arrest. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

No limiting instruction was required relating to defendant's statements to officers which established his motive for a robbery during which a store owner was killed, as defendant's statements were properly admitted as admissions of a party opponent. State v. al-Bayyinah, 359 N.C. 741, 616 S.E.2d 500, 2005 N.C. LEXIS 844 (2005), cert. denied, — U.S. —, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Officer's testimony about juvenile defendant's statements was properly admitted under G.S. 7B-2407 and G.S. 8C-1, N.C. R. Evid. 801(d); the officer interviewed defendant with his mother present, defendant was not in custody, and the juvenile rights warning was read to defendant and his mother, who both signed a statement indicating they understood the rights. In re J.J.D.L., 189 N.C. App. 777, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Evidence Held Inadmissible. — Where defendant's father, in response to a police inquiry, showed the police a drawer where a knife was supposedly kept, his conduct was a "statement" within the meaning of subsection (a) of this rule, and as the State offered the evidence to prove the existence of a knife and its use by the defendant as testified to by victim, the testimony was hearsay and inadmissible under G.S. 8C-1, Rule 802. State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986).

The testimony of two housing authority employees to the effect that defendant's supervisor had told them that deceased had been harassing defendant earlier on the day of the murder was hearsay and inadmissible. State v. Meeks, 320 N.C. 615, 360 S.E.2d 79 (1987).

Defendant's contention that the trial court erred in not allowing him to testify that witness in the car during the killing of a State Trooper said "You don't remember killing a State Trooper?" was without merit as defendant's testimony was hearsay and not within any of the exceptions to the rule prohibiting hearsay. See State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989).

Where a letter's anonymous author stated that defendant was not responsible for victim's death, but that her death had been the result of a "contract" being placed on her life because she had not paid declarant a $5.00 debt, the letter, as offered by defendant, contained inadmissible hearsay as it was offered by a person other than the declarant to prove the truth of the matter asserted — to wit, that it was not defendant but another who killed victim. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further reconsideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Witness's testimony concerning statement made to her that another person had been threatened by defendant was hearsay and was improperly admitted so that defendant was entitled to a new trial. State v. Allen, 127 N.C. App. 182, 488 S.E.2d 294 (1997).

A witness' affidavit was properly excluded as substantive evidence, where the witness testified at trial that she was not present at the time of the shooting, while her affidavit purportedly included the statement that she was present, but the affidavit was hearsay that fell within no established exception to the hearsay rule and was not inherently trustworthy. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

When an officer testified that defendant admitted that he and his wife used marijuana about every other day, that statement was hearsay as to defendant's wife, under G.S. 8C-1, N.C. R. Evid. 801(c), and could not be used as the basis for the trial court's finding that she was an unlawful user of controlled substances; thus, the trial court's order directing the destruction of her firearms, under G.S. 15-11.1(b1), based on this finding, was an abuse of discretion, because the wife was given no opportunity to contest the statement, nor was she represented by counsel at the time the testimony containing it was received. State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004).

Trial court erred in granting summary judgment to an employer because the statements in the affidavits made by three affiants to establish an employee's on-call pay rate, and in the exhibits submitted in support of their affidavits, were hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) and were inadmissible under G.S. 1A-1, N.C. R. Civ. P. 56(e) to prove the employee's on-call pay rate because only the employer's management team had knowledge of the employee's on call pay rate. However, there was no evidence that the affiants were members of the employer's management team or were otherwise involved in the establishment of the on-call pay rate for the employer; therefore, any knowledge the affiants had of the on-call pay rate was only through a statement made by another, namely the employer's management team. Gilreath v. N.C. HHS, 177 N.C. App. 499, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

Trial court properly sustained the State's hearsay objection to testimony elicited by defense counsel regarding a third-party statement to a police detective because while defendant argued the statement was only being used to establish a historical fact, defendant also argued that the statement would support his alibi defense, in which case, defendant would be offering the statement to prove the truth of the matter asserted. State v. Hairston, 190 N.C. App. 620, 661 S.E.2d 39, 2008 N.C. App. LEXIS 1015 (2008).

Evidence Not Prejudicially Admitted. — Defendant's conviction of murder was affirmed where, inter alia, the trial court did not err in allowing the admission of testimony over defendant's objection, where even if the admission of the testimony was an error, the error was not prejudicial. State v. Holliman, 155 N.C. App. 120, 573 S.E.2d 682, 2002 N.C. App. LEXIS 1591 (2002).

Evidence Not Prejudicially Excluded. — A statement made by the defendant to the arresting officer prior to the arrest was erroneously, but not prejudicially, excluded. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Admission of Non-Hearsay Raised No Confrontation Clause Concerns. — Admission of nonhearsay raises nc Confrontation Clause concerns; testimony regarding an officer's interaction with a detective and a third individual was non-hearsay, and raised no Confrontation Clause concerns, since it was not admitted to prove the truth of the matter asserted, but rather to show how the officer formed a reasonable suspicion that defendant was involved in the robbery at issue, which in turn justified including defendant's photo in a lineup shown to the robbery victim. State v. Alexander, 177 N.C. App. 281, 628 S.E.2d 434, 2006 N.C. App. LEXIS 843 (2006), cert. denied, appeal dismissed, 361 N.C. 358, 644 S.E.2d 357 (2007).

Applied in State v. Stafford, 77 N.C. App. 19, 334 S.E.2d 799 (1985); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); Black Horse Run Property Owners Ass'n v. Kaleel, 88 N.C. App. 83, 362 S.E.2d 619 (1987); State v. Knox, 95 N.C. App. 699, 383 S.E.2d 698 (1989); State v. Jones, 97 N.C. App. 189, 388 S.E.2d 213 (1990); State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136 (1990); State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990); State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993); State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); Melton v. Hodges, 114 N.C. App. 795, 443 S.E.2d 83 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995); State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Cox, 344 N.C. 184, 472 S.E.2d 760 (1996); State v. Coffey, 345 N.C. 389, 480 S.E.2d 664 (1997); State v. Bonnett, 348 N.C.

417, 502 S.E.2d 563 (1998); State v. Davis, 130 N.C. App. 675, 505 S.E.2d 138 (1998); State v. Moore, 131 N.C. App. 65, 505 S.E.2d 172 (1998); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000); State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858, 2000 N.C. App. LEXIS 986 (2000); State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116, 2002 N.C. App. LEXIS 1169 (2002); In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003); Maglione v. Aegis Family Health Ctrs., 168 N.C. App. 49, 607 S.E.2d 286 (2005); State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005); In re H.M., 182 N.C. App. 308, 641 S.E.2d 715, 2007 N.C. App. LEXIS 594 (2007); Burress v. Burress, — N.C. App. —, 672 S.E.2d 732, 2009 N.C. App. LEXIS 148 (2009).

Cited in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Stafford, 317 N.C. 568, 346 S.E.2d 463 (1986); State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434 (1986); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Riddle, 316 N.C. 152, 340 S.E.2d 75 (1986); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Brown, 81 N.C. App. 622, 344 S.E.2d 817 (1986); State v. Davis, 317 N.C. 315, 345 S.E.2d 176 (1986); Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); State v. Williams, 83 N.C. App. 527, 350 S.E.2d 914 (1986); Johnson v. Hunnicutt, 86 N.C. App. 405, 358 S.E.2d 74 (1987); State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987); State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987); State v. Bullock, 320 N.C. 780, 360 S.E.2d 689 (1987); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); State v. Harrell, 96 N.C. App. 426, 386 S.E.2d 103 (1989); State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990); State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); North Carolina State Bar v. Mulligan, 101 N.C. App. 524, 400 S.E.2d 123 (1991); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991); State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); Southern Ry. v. Biscoe Supply Co., 114 N.C. App. 474, 442 S.E.2d 127 (1994); State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996); State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996); Roberts v. Madison County Realtors Ass'n, 121 N.C. App. 233, 465 S.E.2d 328 (1996); State v. Jones, 342 N.C. 523, 467 S.E.2d 12 (1996); State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996); State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997); State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997); State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (1997); State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); State v. Riley, 128 N.C. App. 265, 495 S.E.2d 181 (1998); State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998); State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998); State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (1999); State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883, 1999 N.C. App. LEXIS 668 (1999); State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000); State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000); State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000); State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000); State v. Harris, 136 N.C. App. 611, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. Wardrett, 145 N.C. App. 409, 551 S.E.2d 214, 2001 N.C. App. LEXIS 651 (2001); State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002); State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002); State v. Frierson, 153 N.C. App. 242, 569 S.E.2d 687, 2002 N.C. App. LEXIS 1134 (2002); State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116, 2002 N.C. App. LEXIS 1169 (2002); State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002); State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003); State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003); State v. Meadows, 158 N.C. App. 390, 581 S.E.2d 472, 2003 N.C. App. LEXIS 1189 (2003); State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003); State v. Alston, 161 N.C. App. 367, 588 S.E.2d 530, 2003 N.C. App. LEXIS 2185 (2003); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005); In re M.J.G., 168 N.C. App. 638, 608 S.E.2d 813, 2005 N.C. App. LEXIS 435 (2005); In re M.G.T.-B., 177 N.C. App. 771, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006); State v. Sloan, 180 N.C. App. 527, 638 S.E.2d

36, 2006 N.C. App. LEXIS 2517 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); In re J.S., 182 N.C. App. 79, 641 S.E.2d 395, 2007 N.C. App. LEXIS 494 (2007); Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007); State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008); In re DRH, — N.C. App. —, 668 S.E.2d 919, 2008 N.C. App. LEXIS 2207 (2008); State v. Hodges, — N.C. App. —, 672 S.E.2d 724, 2009 N.C. App. LEXIS 153 (2009); In re J.V., — N.C. App. —, 679 S.E.2d 843, 2009 N.C. App. LEXIS 1137 (July 7, 2009).

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by statute or by these rules. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 802 except that the phrase "by statute or by these rules" is used in lieu of the phrase "by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Rule 802 provides for the standard exclusion of hearsay evidence; hearsay is simply inadmissible unless an exception is applicable. This is in accord with North Carolina practice. Unless an exception to the hearsay rule is provided in these rules, the courts are not free to create new hearsay exceptions by adjudication. Rules 803(24) and 804(b)(5) allow for the admission of evidence in particular cases, but not for more general policy formulation.

Legal Periodicals. — For note, "State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases," see 64 N.C.L. Rev. 1352 (1986).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For note, "Admission of the Unthinkable: Hearsay Exceptions and Statements Made by Sexually Abused Children—State v. Smith," see 9 Campbell L. Rev. 437 (1987).

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For note, "State v. Alston: North Carolina Continues to Broaden its Mind to Admissibility of a Victim's Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases," see 32 Wake Forest L. Rev. 1327 (1997).

For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

For recent development, "The Defense Calls ... the Accuser? State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses," see 84 N.C. L. Rev. 2082 (2006).

CASE NOTES

Hearsay Defined. — An assertion of one other than the presently testifying witness is hearsay and inadmissible if offered for the truth of the matter asserted; if offered for any other purpose, the assertion is admissible. Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

Exception to Hearsay Rule May Violate Constitutional Guarantees of the Right of Confrontation. — Even if an out-of-court statement properly falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes upon the defendant's constitutional right to confrontation. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), 511 U.S. 1008, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, 511 U.S. 1102, 114 S. Ct. 1875 (1994).

Where Relevant Hearsay Is Admissible. — Hearsay evidence, even if relevant, is inadmissible unless it is covered by statutory exception, or unless its exclusion deprives a defendant of a trial in accord with fundamental standards of due process. State v. Artis, 325

N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

When defense counsel, on cross-examination, asked a prosecution witness specific questions about a report the witness had written about a domestic violence incident defendant was involved in, and the witness's failure to record certain data, the trial court properly allowed the prosecution to re-direct the witness about the contents of the report, even though those contents were hearsay, because defendant's cross-examination "opened the door" to such testimony. State v. Mason, 159 N.C. App. 691, 583 S.E.2d 410, 2003 N.C. App. LEXIS 1524 (2003).

When defense counsel, on cross-examination, asked a prosecution witness why the police did not follow up on any other leads, the trial court properly allowed the prosecution, in an effort to rehabilitate the witness, to testify that other suspects were not pursued because two people identified defendant as being at the crime scene at the time of the shooting, even though the testimony related hearsay, because defendant's cross-examination "opened the door" to such testimony. State v. Mason, 159 N.C. App. 691, 583 S.E.2d 410, 2003 N.C. App. LEXIS 1524 (2003).

Trustworthiness of Evidence Falling Within Statutory Exception. — A showing that a hearsay statement is inherently trustworthy is established when the evidence falls within a statutory hearsay exception. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

The "except as otherwise provided ... by statute" exception under both this rule and Rule 1002 clearly covers written statements under G.S. 20-279.21(b)(3). Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 340 S.E.2d 127, cert. denied, 316 N.C. 731, 345 S.E.2d 387 (1986).

Hearsay Statements Not Rendered Competent Because They Corroborate Other Evidence. — Where hearsay statements were actually introduced as exhibits, where statements were before the jury as substantive evidence, and where all earlier apparent efforts to restrict their use to impeachment of witness or corroboration of the officer's testimony were mooted by their substantive use, statements should not have been used; since if testimony is not competent as substantive evidence, it is not rendered competent because it tends to corroborate some other witness. State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989).

Composite Picture of Perpetrator Not a Statement. — A composite picture of a perpetrator prepared by police pursuant to the directions of a witness to a crime does not constitute a statement. Such a composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness' eyes rather than the witness' camera. No assertion or statement is involved. Therefore, a composite picture is not hearsay as defined by this rule and Rule 801(c), and does not apply to bar the admission of a composite picture into evidence. State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992).

In a criminal prosecution, evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Trial court's admission of victim's testimony from a domestic violence protective order hearing did not violate his right to confront the witness against him, nor did it violate G.S. 8C-1, Rules 403, 404(b), and 803(3), where the hearsay statements constituted, and were admissible as, statements of declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Evidence Held Admissible. — Where a witness from the Department of Social Services testified that following an investigation into the alleged sexual abuse of a child the department "unsubstantiated" the charges, the testimony had characteristics of hearsay under this rule; however, its admission was not prejudicial since both plaintiff and defendant presented a considerable amount of conflicting evidence regarding the alleged sexual abuse. Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988).

In a murder trial, where a letter and testimony of the victim's grandmother were offered for the purpose of showing that defendant's motive for killing the victim was because she wished to discontinue their relationship, and cross-examination of defendant was designed to show defendant knew the contents of the letter prior to the homicide, the statements were relevant for the purposes for which they were admitted and their admission into evidence did not violate this rule. State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989).

Court did not abuse its discretion by allowing social workers to testify as to statements made to them by respondent's wife whereby she indicated respondent did not properly care for the children, excessively disciplined them, abused illegal drugs and alcohol in their presence, and was violent in his behavior, as respondent's wife was a party to the action which was brought to determine whether her child was abused and neglected and her statements to the social workers about her husband's conduct could only be reasonably considered as admissions by her that their child was subjected to conduct in her presence which could be found to be abusive and neglectful. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

The father's statement, relayed by the witness, explained why the deputies did not subsequently look for defendant at the father's house and was not offered to prove the truth of the matter asserted, but rather to explain the officers' actions, and was, therefore, not hearsay. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

The substance of witness's conversation with another detective was not inadmissible hearsay, because it was admitted for the purpose of explaining witness's subsequent conduct and not for the truth of the matter asserted. State v. Earhart, 134 N.C. App. 130, 516 S.E.2d 883, 1999 N.C. App. LEXIS 668 (1999), appeal dismissed, 351 N.C. 112, 540 S.E.2d 372 (1999).

Trial court did not violate this section by allowing prosecutor to cross-examine defendant about testimony provided by a witness for the State earlier in the trial; the prosecutor's reference to the testimony was not hearsay because he referred to it, not to prove the truth of the matter asserted, but to challenge defendant's credibility. State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858, 2000 N.C. App. LEXIS 986 (2000).

Necessity for expeditious procedure in foreclosure actions substantially outweighed any concerns about the efficacy of allowing a loan servicer's employee, who lived out of state, to testify by affidavit, and the trial court properly admitted her affidavit into evidence. In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003).

Trial court did not err in admitting two police officers to testify that they went to a residence to talk with defendant after arresting a person with crack cocaine in her hand who had just left the residence and who told them that she had just been visiting defendant, her cousin, at the residence; the evidence was not offered to prove that she had been visiting her cousin, which would be evidence offered for the truth of the matter asserted or hearsay, but was offered to explain the actions of the two police officers in going to the residence and talking to defendant, which resulted in defendant's arrest. State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (2004).

Trial court, with the exception of a child abuse investigator's testimony regarding the father's threat against the female child, did not err in admitting testimony from the child abuse investigator, another abuse investigator, a pediatrician, and a mental health professional regarding out-of-court statements made by the minor children to them in an abuse and neglect proceeding. In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584, 2004 N.C. App. LEXIS 175 (2004), appeal dismissed, — N.C. —, 603 S.E.2d 884 (2004).

Trial court did not err in finding that police detective was the custodian or other qualified witness of pawn shop records for purposes of admissibility of his testimony regarding his review of those records, nor did it err in admitting the detective's testimony regarding said records, as his testimony regarding his review and his resulting actions was admissible to show the basis for those actions, explained his conduct, and was not hearsay. State v. Goblet, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Admission of a detective's testimony about information given to another detective by a confidential informant did not violate defendant's Sixth Amendment rights because the statement was not testimonial, but was offered to explain the presence at a restaurant of the officers; a second detective's testimony was also not plain error as it was offered to explain detective's presence outside of defendant's apartment, rather than for the truth of the matter asserted and the testimony did not violate N.C. R. Evid. 802 because the statements were admissible to explain the presence of the detectives, rather than to prove that defendant sought to sell cocaine. State v. Leyva, 181 N.C. App. 491, 640 S.E.2d 394, 2007 N.C. App. LEXIS 362 (2007), cert. denied, appeal dismissed, 361 N.C. 573, 651 S.E.2d 370 (2007).

Hearsay testimony by a witness concerning statements made by the victim was not excluded by the hearsay rule under N.C. R. Evid. 803(1) because the victim's statements were her present sense impression of a choking incident. Furthermore, there was no rigid rule about how long was too long to be immediately thereafter. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., 187 N.C. App. 694,

654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Officer's testimony about juvenile defendant's statements was properly admitted under G.S. 7B-2407 and G.S. 8C-1, N.C. R. Evid. 801(d); the officer interviewed defendant with his mother present, defendant was not in custody, and the juvenile rights warning was read to defendant and his mother, who both signed a statement indicating they understood the rights. In re J.J.D.L., 189 N.C. App. 777, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Evidence Held Inadmissible. — Testimony of victim's neighbor to the effect that victim had told him that her son (the defendant) had hurt her and that she was afraid of him was hearsay and was not covered by any of the hearsay exceptions provided by G.S. 8C-1, Rules 803 or 804, and thus the trial court erred in admitting this statement. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

Where defendant's father, in response to a police inquiry, showed the police a drawer where a knife was supposedly kept, his conduct was a "statement" within the meaning of G.S. 8C-1, Rule 801(a), and as the State offered the evidence to prove the existence of a knife and its use by defendant as testified to by victim, the testimony was hearsay and inadmissible under this rule. State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986).

Defendant's contention that the trial court erred in not allowing him to testify that witness in the car during the killing of a State Trooper said "You don't remember killing a State Trooper?" was without merit as defendant's testimony was hearsay and not within any of the exceptions to the rule prohibiting hearsay. See State v. McQueen, 323 N.C. 675, 377 S.E.2d 38 (1989).

Where there was no express or implied statement of fact that a "sexual act" occurred, the testimony of witnesses concerning victim's prior statements to the contrary was inadmissible for any purpose. State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990).

Witness's testimony concerning statement made to her that another person had been threatened by defendant was hearsay and was improperly admitted so that defendant was entitled to a new trial. State v. Allen, 127 N.C. App. 182, 488 S.E.2d 294 (1997).

A witness' affidavit was properly excluded as substantive evidence, where the witness testified at trial that she was not present at the time of the shooting as the affidavit was hearsay that fell within no established exception to the hearsay rule and was not inherently trustworthy. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

Where the former wife sought to show that her ex-husband harassed her by interfering with her mail, evidence that the postmaster told the wife that the former husband went into the post office each day as the postmaster left for lunch was inadmissible hearsay, as the wife offered no basis for admission under an exception and there was no indication that the postmaster was unavailable. Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998).

Witness testimony with regard to statements made by respondent mother's aunt, who did not testify, concerning her treatment of her child constituted inadmissible hearsay under this rule and, on remand, should not be considered by the trial court. In re Dula, 143 N.C. App. 16, 544 S.E.2d 591, 2001 N.C. App. LEXIS 226 (2001), aff'd, 354 N.C. 356, 554 S.E.2d 336 (2001).

Because two witnesses' attempted testimony would have constituted an inappropriate use of the corroboration rule since their testimony did not relate to prior statements of a doctor, but rather to those of defendant, the witnesses' statements were appropriately excluded, and defendant's assignment of error was overruled as to those witnesses. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Applied in State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259 (1987); State v. Wilson, 338 N.C. 244, 449 S.E.2d 391 (1994); State v. Evans, 149 N.C. App. 767, 562 S.E.2d 102, 2002 N.C. App. LEXIS 310 (2002); State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002); State v. Alvarez, 168 N.C. App. 487, 608 S.E.2d 371, 2005 N.C. App. LEXIS 342 (2005); State v. Cardenas, 169 N.C. App. 404, 610 S.E.2d 240, 2005 N.C. App. LEXIS 681 (2005).

Cited in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985); State v. Stafford, 317 N.C. 568, 346 S.E.2d 463 (1986); Gallimore v. Daniels Constr. Co., 78 N.C. App. 747, 338 S.E.2d 317 (1986); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Hillard, 81 N.C. App. 104, 344 S.E.2d 54 (1986); State v. Davis, 317 N.C. 315, 345 S.E.2d 176 (1986); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987); State v. Baker, 320 N.C. 104, 357 S.E.2d 340 (1987); State v. Meeks, 320 N.C. 615, 360 S.E.2d 79 (1987); State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987); State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987); State v. Quick, 323 N.C. 675, 375 S.E.2d 156 (1989); Ward v. Durham Life Ins. Co., 325 N.C. 202, 381 S.E.2d 698 (1989); State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990); North Carolina State Bar v. Mulligan, 101 N.C. App. 524, 400 S.E.2d 123 (1991); State v. Patterson, 103 N.C. App.

195, 405 S.E.2d 200 (1991); State v. Petersilie, 334 N.C. 169, 432 S.E.2d 832 (1993); State v. Jones, 342 N.C. 523, 467 S.E.2d 12 (1996); State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996); Johnson v. Southern Indus. Constructors, Inc., 126 N.C. App. 103, 484 S.E.2d 574 (1997); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Riley, 128 N.C. App. 265, 495 S.E.2d 181 (1998); State v. Hines, 131 N.C. App. 457, 508 S.E.2d 310 (1998); State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000); State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000); State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000); State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002); State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002); State v. Love, 156 N.C. App. 309, 576 S.E.2d 709, 2003 N.C. App. LEXIS 114 (2003); State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003); State v. Meadows, 158 N.C. App. 390, 581 S.E.2d 472, 2003 N.C. App. LEXIS 1189 (2003); State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689, 2003 N.C. App. LEXIS 1443 (2003); State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003); State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004); State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004); State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006); State v. Sloan, 180 N.C. App. 527, 638 S.E.2d 36, 2006 N.C. App. LEXIS 2517 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008); In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. — A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. — A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions,

opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). — Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. — Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. — Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. — To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. — Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. — Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. — Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. — The record of a document purporting to establish or affect an interest in

property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. — A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. — Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. — Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. — To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. — Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation Concerning Boundaries or General History. — Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. — Reputation of a person's character among his associates or in the community.

(22) (Reserved).

(23) Judgment as to Personal, Family or General History, or Boundaries. — Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other Exceptions. — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 803, except as noted below. The Advisory Committee's Note states:

"The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revisions where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602."

As the Advisory Committee's Note indicates, the exceptions are phrased in terms of nonapplication of the hearsay rule. Evidence that is otherwise inadmissible may be stricken from a writing.

Exception (1) concerns present sense impressions and Exception (2) concerns excited utterances. The Advisory Committee's Note states:

"In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. (Citation omitted.)

The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

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With respect to the *time element,* Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor.'"

North Carolina courts have recognized a hearsay exception for spontaneous utterances that is substantially the same as Exception (2). See *Brandis on North Carolina Evidence* § 164 (1982). Exception (2) would clarify discordant rulings in this area, particularly as to the element of time. *Id.* at 650. Exception (1) would be a new exception to the hearsay rule in North Carolina. *Id.* at 653.

Exception (3) concerns statements of the declarant's then existing mental, emotional or physical condition. The Advisory Committee's Note states:

"The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."

Exception (3) is similar to the corresponding North Carolina exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 161 (1982). However, the North Carolina exception differs from Exception (3) in that in North Carolina declarations that are made in a criminal case after the commission of the crime are generally not included within the exception for fear that admissibility would permit the defendant to create evidence for himself. *Id.* at 636.

In North Carolina, when the issue is one of undue influence or fraud with respect to the execution of a will, the declarations of a testator are admitted only as corroborative evidence and are not alone sufficient to establish the previous conduct of another person by means of which the alleged fraud was perpetrated or the undue influence exerted. *Brandis on North Carolina Evidence* § 163, at 647-48. Exception (3) would change this result and permit such declarations to be admitted as substantive proof.

Exception (4) concerns statements made for purposes of medical diagnosis and treatment. The Advisory Committee's Note states:

"Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful.*** The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend.*** Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Under current North Carolina practice, statements of past condition made by a patient to a treating physician or psychiatrist, when relevant to diagnosis or treatment and therefore inherently reliable, are admissible to show the basis for the expert's opinion. *Brandis on North Carolina Evidence* § 161, at 635 (1982). In some instances, a statement to a nontreating physician is currently admissible. *State* v. *Franks,* 300 N.C. 1 (1980). Professor Brandis states that when qualifying as basis for the expert's opinion statements of past condition "should be (though, as yet, they are not) admissible as substantive evidence as an exception to the hearsay rule." *Brandis, supra,* at 636.

Exception (5) concerns past recollection recorded, which is currently admissible in North Carolina. See *Brandis on North Carolina Evidence* § 33 (1982).

The phrase "or adopted by a witness" was added by Congress to make it clear that statements adopted by a witness would come within the rule. The language chosen by Congress may be read to suggest that the statement does not qualify for admission unless the witness made the recordation himself or actually adopted the recordation of another. The exception should be construed so as not to require that the recordation of another be actually adopted by the witness. Thus the statement may be one that was made by the witness, one that was adopted by the witness, or one that was made by the witness and recorded by another. This construction would be in accord with North Carolina practice which permits use of the recorded statement if the witness is able to testify that he saw it at a time when the facts were fresh in his memory, and that it actually represented his recollection at the time. See *Brandis, supra,* at 127.

To prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined, the last sentence of Exception (5) provides that the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. Current North Carolina practice apparently permits the writing itself, or a reading thereof by the authenticating witness, to be admitted. *Brandis, supra,* at 126, n. 75.

Exception (6) concerns records of regularly conducted activity. The exception is derived from the traditional business records exception. The exception is limited to business records, but business is defined to include the records of institutions and associations like schools, churches and hospitals. This appears to be a slight expansion of the current North Carolina business records exception. See *Brandis, supra,* § 155.

The exception is consistent with North Carolina practice in that the person making the record is not required to have personal knowledge of the transactions entered. See *Brandis, supra,* § 155, at 617. However, it must be shown that the record was actually based (or it was the regular practice of the activity to base the record) upon a person with knowledge acting pursuant to a regularly conducted activity.

The exception specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries. See *State* v. *DeGregory,* 285 N.C. 122 (1977).

In addition, the Advisory Committee's Note states that:

"Problems of the motivation of the informant have been a source of difficulty and disagreement.

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The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'"

Apparently, there are no North Carolina cases on this point.

The rule is in accord with North Carolina practice in that it includes computer storage. *Brandis, supra,* § 155, at 619.

Exception (7) concerns the absence of an entry in the records of regularly conducted activity. As the Advisory Committee's Note states: "Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence." This is existing North Carolina law. See *Brandis on North Carolina Evidence* § 155 (1982).

Exception (8) differs from Fed. R. Evid. 803(8) in that the word "State" is used in lieu of the word "government".

Part (A) of the exception is for records, reports, statements or data compilations setting forth the activities of the public office or agency. Part (A) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 153 (1982).

Part (B) covers matters observed pursuant to duty imposed by law when there is also a duty to report. Part (B) is in general accord with North Carolina practice. *Id.* In criminal cases, Part (B) does not cover matters observed by police officers and other law enforcement personnel. Note that the right to confrontation may exclude evidence in criminal cases even if the matter is not one observed by law enforcement personnel.

Part (C) covers factual findings resulting from an investigation made pursuant to legal authority. The term "factual findings" is not intended to preclude the introduction of evaluative reports containing conclusions or opinions. Apparently North Carolina courts currently exclude statements in reports that only amount to an expression of opinion. *Id.* at 609.

The Advisory Committee's Note states:

"Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation ...; (2) the special skill or experience of the official ...; (3) whether a hearing was held and the level at which conducted; (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109 ... (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case."

The phrase "unless the sources of information or other circumstances indicate lack of trustworthiness" applies to all three parts of the exception.

Public records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6).

Exception (9) excludes from the hearsay ban records of vital statistics and is similar to G.S. 130-49 [now repealed] and G.S. 130-66 [now repealed].

One purpose of the exception is to admit a death certificate to prove that a death occurred. G.S. 130-66 [now repealed] also provides that a death certificate is prima facie evidence of the cause of death. However, in *State* v. *Watson,* 281 N.C. 221 (1972), the Court held that the admission of the "hearsay and conclusory statement" of the cause of death in the victim's death certificate violated the right to confrontation. Exception (9) is not intended to permit the use of statements of the cause of death in a death certificate against a defendant in a criminal case.

Exception (10) concerns the absence of a public record or entry. The Advisory Committee's Note states:

"The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception (7). ***

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, *e.g., People* v. *Love,* 310 Ill. 558, 142 N.E. 204 (1923), certificate of secretary of state admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded."

Exception (10) is similar to G.S. 1A-1, Civ. Pro. Rules 44(b) and 44(c). See also *Brandis on North Carolina Evidence* § 153, at 610 (1982).

Exception (11) concerns records of religious organizations. The Advisory Committee's Note states:

"Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception (6) would be applicable. However, both the business record doctrine and Exception (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge,* 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the information be in the course of the activity."

Currently in North Carolina records of activities of religious organizations are admissible to the extent of the business records exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 155 (1982).

Exception (12) concerns marriage, baptismal, and similar certificates. The Advisory Committee's Note states:

"The principle of proof by certification is recognized as to public officials in Exceptions

(8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears."

Under current North Carolina practice, these items are admissible only to the extent they are part of a public record.

Exception (13) concerns family records.

The North Carolina exception for family records is more restrictive in that statements of family history and pedigree are admissible only if the declarant (1) is unavailable; (2) made the statement before the beginning of the controversy; and (3) bore a relationship to the family such that he was likely to have known the truth. *Brandis on North Carolina Evidence* § 149 (1982).

Exception (14) concerns records of documents affecting an interest in property. The Advisory Committee's Note states:

"The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651."

Exception (14) is consistent with North Carolina practice. See G.S. 47-20 through 47-20.4; G.S. 47-14; and G.S. 47-17.

Exception (15) concerns statements in documents affecting an interest in property. The Advisory Committee's Note states:

"Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one."

The extent to which recitals of fact in a deed or other dispositive documents are admissible in North Carolina is not entirely certain. *Brandis on North Carolina Evidence* § 152 (1982). Adoption to Exception (15) would somewhat expand admissibility and clarify North Carolina law in this area.

Exception (16) concerns statements in ancient documents. The Advisory Committee's Note states:

"Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id* § 1573, p. 429, referring to recitals in ancient deeds as a 'limited' hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy."

North Carolina courts currently recognize as exceptions to the hearsay rule recitals in deeds more than 30 years old. "The North Carolina cases have involved deeds, but it may be assumed that the rule extends here, as it does elsewhere, to other dispositive instruments such as wills and powers of attorney." *Brandis on North Carolina Evidence* § 152, at 604 (1982). Exception (16) would expand the North Carolina exception to include statements in many types of documents more than 20 years old.

Exception (17) concerns market reports and commercial publications. The Advisory Committee's Note states:

"Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate."

North Carolina courts have admitted into evidence a variety of published compilations used or relied on by the public or particular professions. See *Brandis on North Carolina Evidence* § 165 (1982).

Exception (18) concerns learned treatises. The Advisory Committee's Note states:

"The writers have generally favored the admissibility of learned treatises …, but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. *** Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *** The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

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The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness.*** Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise."

Exception (18) is substantially the same as G.S. 8-40.1 [now repealed]. Although [former] G.S. 8-40.1 was modeled after Exception (18), there has been some doubt whether the statements, once received, are substantive evidence or are merely for impeachment or corroboration. *Brandis on North Carolina Evidence* § 136, at 543 (1982). It is intended that Exception (18) authorize admission of such statements as substantive evidence.

The last sentence of [former] G.S. 8-40.1 differs from Exception (18) by providing that the statements may not be received as exhibits "unless agreed to by counsel for the parties." The quoted language was viewed as superfluous since evidence excluded by this rule and other rules may be admitted upon stipulation by counsel for the parties.

Exception (19) concerns matters of personal and family history. The advisory Committee's Note states:

"Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. *** As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *** All seem to be susceptible to being the subject of well founded repute. The 'world' in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated."

Under current North Carolina law only reputation among family members is admissible concerning matters of family history and pedigree, except for marriage which may be proved by both family and community reputation. *Brandis on North Carolina Evidence* § 149, at 599 (1982). Exception (19) would permit proof by reputation among family and associates, or in the community.

Exception (20) concerns reputation as to land boundaries or general history. The Advisory Committee's Note states:

"The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered."

Exception (20) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 150 (1982).

Exception (21) concerns reputation as to character. The Advisory Committee's Note states:

"Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a)."

Exception (21) is consistent with North Carolina practice.

Exception (22) is reserved for future codification. Fed. R. Evid. 803(22) concerns use of a judgment of previous conviction to prove a fact essential to sustain the judgment. Under current North Carolina practice, the judgment or finding of a court generally cannot be used in another case as evidence of the fact found, except where the principle of *res judicata* is involved. *Brandis on North Carolina Evidence* § 143 (1982). By not adopting a hearsay exception for judgments of previous conviction, it is intended that North Carolina practice with respect to previous convictions remain the same.

Exception (23) concerns a judgment as proof of matters of personal, family or general history, or boundaries. The Advisory Committee's Note states:

"A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *** The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character."

A judgment admitted under this exception is some evidence of the matter essential to the judgment, but is not a binding determination of the matter for purposes of the current proceeding.

Generally, a judgment cannot be used under current North Carolina practice to prove a fact essential to the judgment, except where the principle of *res judicata* is involved. *Brandis on North Carolina Evidence* § 143 (1982).

Exception (24) differs from Fed. R. Evid. 803(24) in that the last sentence of the federal rule does not require written notice. Also, Exception (24) requires the notice to be given sufficiently in advance of offering the statement while Fed. R. Evid. 803(24) requires the notice to be given sufficiently in advance of the trial or hearing.

This exception makes admissible a hearsay statement not specifically covered by any of the previous twenty-three exceptions if the statement has equivalent circumstantial guarantees of trustworthiness and the court makes the determinations required by the rule. This exception does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions.

Writing for the majority in *State* v. *Vestal,* 278 N.C. 561, 589 (1971), Justice Lake stated that:

"No branch of the law should be less firmly bound to a past century than the rules of evidence. The purpose of the rules of evidence is to assist the jury to arrive at the truth. Exceptions to the hearsay rule, evolved by the experience and wisdom of our predecessors for that purpose, should not be transformed by us into rigid molds precluding all testimony not capable of being squeezed neatly into one of them."

North Carolina courts have admitted hearsay evidence in many instances on the ground that the evidence was part of the "*res gestae* ". The *res gestae* formula has been frequently resorted to in cases that would seem to be more appropriately governed by independent hearsay rules. See *Brandis on North Carolina Evidence* § 158 (1982). The phrase *res gestae* "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology." *U.S.* v. *Matot,* 146 F.2d 197 (2d. Cir. 1944) (Learned Hand). Although evidence previously governed by the *res gestae* formula may now fall within the specific hearsay exceptions or the catch-all in Exception 24, the *res gestae* formula should not be relied on by the courts.

Legal Periodicals. — For note on the future of character impeachment in North Carolina, in light of State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984), see 63 N.C.L. Rev. 535 (1985).

For note, "State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child

Sexual Abuse Cases," see 64 N.C.L. Rev. 1352 (1986).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For article, "Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements To Convict," see 65 N.C.L. Rev. 1 (1986).

For article, "Not So 'Firmly Rooted': Exceptions to the Confrontation Clause," see 66 N.C.L. Rev. 1 (1987).

For note, "Admission of the Unthinkable: Hearsay Exceptions and Statements Made by Sexually Abused Children—State v. Smith," see 9 Campbell L. Rev. 437 (1987).

For article, "Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment," see 67 N.C.L. Rev. 257 (1989).

For note, "Criminal Procedure — Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation — Coy v. Iowa," see 11 Campbell L. Rev. 381 (1989).

For note, "Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-'Firmly Rooted' Exception," see 14 Campbell L. Rev. 347 (1993).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For note, "State v. Alston: North Carolina Continues to Broaden its Mind to Admissibility of a Victim's Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases," see 32 Wake Forest L. Rev. 1327 (1997).

For article, "Recent Developments: State v. Hinnant: Limiting the Medical Treatment Hearsay Exception in Child Sexual Abuse Cases," see 79 N.C.L. Rev. 1089 (2001).

For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

For recent development, "The Defense Calls ... the Accuser? State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses," see 84 N.C. L. Rev. 2082 (2006).

CASE NOTES

I. General Consideration.
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I. GENERAL CONSIDERATION.

Constitutional Restrictions on Use of Hearsay. — A prosecutor is prohibited by U.S. Const., Amend. VI and N.C. Const., Art. I, § 23 from introducing any hearsay evidence in a criminal trial unless two requirements are met. The prosecution must show both the necessity for using the hearsay testimony and the inherent trustworthiness of the original declaration. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), aff'd, 900 F.2d 705 (4th Cir.), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

This rule is virtually identical to the federal rule. Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828 (1986).

North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tribunal. This practice remains the same under the new evidence code. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986), holding, however, that under the circumstances, the admission of testimony about the actions of licensing board did not constitute reversible error.

Evidence Must Be Relevant. — While this rule delineates instances in which evidence will not be excluded simply because such evidence is hearsay, it does not annul the requirement of

G.S. 8C-1, Rule 402 that the evidence be relevant. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Corroborating Testimony. — Hospital nurse's testimony as to what a rape victim told her the day after the rape occurred was practically identical to victim's testimony, and was admissible for the nonhearsay purpose of corroborating victim's testimony. State v. Locklear, 320 N.C. 754, 360 S.E.2d 682 (1987).

Although the State did not specify the purpose for which it offered the testimony of the victim's mother about the victim's out-of-court statement, and defendant did not request a limiting instruction, the trial court, in its final instructions to the jury, informed the jury that evidence of any out-of-court statement was to be received for corroborative purposes only. State v. Ford, 136 N.C. App. 634, 525 S.E.2d 218, 2000 N.C. App. LEXIS 111 (2000).

Section 20-139.1(e1), pertaining to use of a chemical analyst's affidavit in general district court, has effectively created a statutory exception to the hearsay rule. Section 20-139.1(e1) reflects a rationale which complies fully with historically recognized legitimate reasons for exceptions to the general rule against hearsay evidence. State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984).

Every writing sought to be admitted must be properly authenticated, and must satisfy the requirements of the "best evidence rule," G.S. 8C-1, Rule 1002, or one of its exceptions, set forth in G.S. 8C-1, Rule 1003, et seq. Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by this rule and G.S. 8C-1, Rule 804. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

The mere admission of incompetent hearsay evidence over proper objection does not require reversal. Rather, the party objecting must also show that the incompetent evidence caused some prejudice. Where the court sits as finder of fact, that party must show that the court relied on the incompetent evidence in making its findings. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Even assuming the State presented no evidence to support admission of hearsay statements under either the present sense impression or excited utterance exceptions, and the admission of the hearsay statements was an abuse of discretion, there was no prejudicial error under G.S. 15A-1442(4)(c) as other evidence established that defendant was armed while on a bus. A witness testified that the witness saw an imprint of a gun in defendant's pocket while on the bus. State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008), appeal dismissed, cert. denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

Defendant waived his right to appellate review of the admissibility of hearsay evidence under section (3) of this Rule, where he only argued erroneous admission under G.S. 8C-1, Rule 804(b)(5). State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Defendant waived the issue as to whether the doctor's testimony that the victim told the doctor that defendant kicked the victim was admissible under G.S. 8C-1, N.C. R. Evid. 803(4); similar evidence was previously admitted without objection. State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772, 2002 N.C. App. LEXIS 1272 (2002).

Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value. Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828 (1986).

No Hearsay Involved in Use of Dolls in Child's Testimony. — Allowing a child to use anatomical dolls to illustrate her testimony was not tendered pursuant to subdivision (24) of this rule, which allows certain hearsay testimony, because no hearsay was involved in the child's testimony. The use of anatomical dolls is not inherently open to suggestiveness by the examiner, if the witness is "other than an expert." State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Applied in Morrison v. Stallworth, 73 N.C. App. 196, 326 S.E.2d 387 (1985); State v. Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985); In re Helms, 77 N.C. App. 617, 335 S.E.2d 917 (1985); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); Whisenhunt v. Zammit, 86 N.C. App. 425, 358 S.E.2d 114 (1987); State v. Bright, 320 N.C. 491, 358 S.E.2d 498 (1987); State v. Ball, 324 N.C. 233, 377 S.E.2d 70 (1989); State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989); State v. Knox, 95 N.C. App. 699, 383 S.E.2d 698 (1989); State v. Payne, 327 N.C. 194, 394 S.E.2d 158 (1990); In re Krauss, 102 N.C. App. 112, 401 S.E.2d 123 (1991); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580 (1992); State v. Stutts, 105 N.C. App. 557, 414 S.E.2d 61 (1992); In re Gallinato, 106 N.C. App. 376, 416 S.E.2d 601 (1992); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992); State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993); State v. Shoemaker, 334 N.C. 252, 432 S.E.2d 314 (1993); State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657

(1993); State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993); State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996); State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997); State v. Corpening, 129 N.C. App. 60, 497 S.E.2d 303 (1998); State v. Hipps, 348 N.C. 377, 501 S.E.2d 625 (1998); State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998); State v. Marecek, 130 N.C. App. 303, 502 S.E.2d 634 (1998); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); Sitton v. Cole, 135 N.C. App. 625, 521 S.E.2d 739, 1999 N.C. App. LEXIS 1186 (1999); In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000); State v. Galloway, 145 N.C. App. 555, 551 S.E.2d 525, 2001 N.C. App. LEXIS 744 (2001); In re Rhyne, 154 N.C. App. 477, 571 S.E.2d 879, 2002 N.C. App. LEXIS 1454 (2002); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Cummings, 361 N.C. 438, 648 S.E.2d 788, 2007 N.C. LEXIS 815 (2007).

Cited in Murray v. Associated Insurers, Inc., 114 N.C. App. 506, 442 S.E.2d 370; State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316; State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); Fowler v. Graves, 83 N.C. App. 403, 350 S.E.2d 155 (1986); State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987); State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332 (1987); Phillips & Jordan Inv. Corp. v. Ashblue Co., 86 N.C. App. 186, 357 S.E.2d 1 (1987); State v. Austin, 320 N.C. 276, 357 S.E.2d 641 (1987); State v. Moore, 87 N.C. App. 156, 360 S.E.2d 293 (1987); In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987); State v. Diaz, 88 N.C. App. 699, 365 S.E.2d 7 (1988); State v. Agudelo, 89 N.C. App. 640, 366 S.E.2d 921 (1988); State v. McNeill, 90 N.C. App. 257, 368 S.E.2d 206 (1988); In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990); State v. Noble, 326 N.C. 581, 391 S.E.2d 168 (1990); Gregory v. North Carolina, 900 F.2d 705 (4th Cir. 1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); State v. Whitted, 99 N.C. App. 502, 393 S.E.2d 590 (1990); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); Ferguson v. Williams, 101 N.C. App. 265, 399 S.E.2d 389 (1991); Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992); Smith v. North Carolina Dep't of Natural Resources & Community Dev., 112 N.C. App. 739, 436 S.E.2d 878 (1993); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); State v. Oxendine, 112 N.C. App. 731, 436 S.E.2d 906 (1993); State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994); State v. Roten, 115 N.C. App. 118, 443 S.E.2d 794 (1994); State v. Robertson, 115 N.C. App. 249, 444 S.E.2d 643 (1994); State v. Pope, 122 N.C. App. 89, 468 S.E.2d 552 (1996); State v. Hester, 343 N.C. 266, 470 S.E.2d 25 (1996); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996); State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996); State v. Crawford, 344 N.C. 65, 472 S.E.2d 920 (1996); State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (1996); State v. Woody, 124 N.C. App. 296, 477 S.E.2d 462 (1996); State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); State v. East, 345 N.C. 535, 481 S.E.2d 652 (1997); State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997); State v. Macon, 346 N.C. 109, 484 S.E.2d 538 (1997); State v. Jackson, 126 N.C. App. 129, 484 S.E.2d 405 (1997); State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997); State v. Allen, 127 N.C. App. 182, 488 S.E.2d 294 (1997); State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997); State v. Gary, 348 N.C. 510, 501 S.E.2d 57 (1998); State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998); State v. Small, 131 N.C. App. 488, 508 S.E.2d 799 (1998); State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94, 1999 N.C. App. LEXIS 1178 (1999); Hylton v. Koontz, 138 N.C. App. 511, 530 S.E.2d 108, 2000 N.C. App. LEXIS 787 (2000); State v. Pugh, 138 N.C. App. 60, 530 S.E.2d 328, 2000 N.C. App. LEXIS 551 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. Allen, 353 N.C. 511, 546 S.E.2d 372, 2001 N.C. LEXIS 528 (2001); State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001); State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002); Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002); State v. Frierson, 153 N.C. App. 242, 569 S.E.2d 687, 2002 N.C. App. LEXIS 1134 (2002); State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003); State v. Walters, 357 N.C. 68, 588 S.E.2d 344, 2003 N.C. LEXIS 570 (2003); State v. Sutton, 169 N.C. App. 90, 609 S.E.2d 270, 2005 N.C. App. LEXIS 534 (2005); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); In re M.G.T.-B., 177 N.C. App. 771, 629 S.E.2d 916, 2006 N.C. App. LEXIS 1182 (2006); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007).

II. PRESENT SENSE IMPRESSION.

The underlying theory of the present sense exception to the hearsay rule is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation.

State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988).

The basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation. State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997).

In order to constitute a present sense impression, a statement must have been made while the declarant was perceiving the event or condition, or immediately thereafter. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Explanation of Event. — Detective's testimony concerning statement made by captain in identification bureau while destroying rape kit involved "explaining an event," i.e., the destruction of the evidence, and because the event and the statement occurred simultaneously and the statement was in explanation, such testimony was admissible under the present sense exception to the hearsay rule. State v. Reid, 322 N.C. 309, 367 S.E.2d 672 (1988).

Calls to 911 that reported that decedent's tractor trailer appeared to have struck tire debris in the road and had run off the roadway and that the caller's husband checked the driver and that he was breathing were admissible as present sense impression under the hearsay exception set forth in G.S. 8C-1-803(1). Wooten v. Newcon Transp., Inc., 178 N.C. App. 698, 632 S.E.2d 525, 2006 N.C. App. LEXIS 1670 (2006).

There is no rigid rule about how long is too long to be considered "immediately thereafter" regarding the present sense impression exception. State v. Clark, 128 N.C. App. 722, 496 S.E.2d 604 (1998).

Murder victim's statements to a relative made the same day as the defendant returned stolen items to the murder victim and threatened the murder victim, but made after a police officer had stayed with the murder victim all afternoon did not qualify as being made immediately after the event and were therefore not admissible under the present sense impression hearsay exception. State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793, 2002 N.C. App. LEXIS 867 (2002).

Nine days later cannot be considered "immediately thereafter" and thus a statement made at that time was not a present sense impression. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Testimony Made Several Hours After Shooting Incident. — Witness's testimony to the state bureau of investigation special agent was not admissible under the present sense impression exception to the hearsay rule because the witness's statement to the agent was made several hours after the shooting incident. State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

Where eyewitness went to notify police immediately after abduction, the officer was on the scene in 10 minutes, and eyewitness then gave him a statement about the event, under the facts his statement was not too remote to be admissible under subdivision (1) of this rule. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986).

Police Report. — In a case involving negligence of defendant leading to theft of jewelry samples from car trunk, police investigative report was properly received for the limited purpose of showing that a report of the theft was made under G.S. 8C-1, Rule 801, and was also admissible as substantive evidence under this rule as a present sense impression and an excited utterance. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 82 N.C. App. 21, 345 S.E.2d 453 (1986).

Statements by Shooting Victim. — Statements made by the victim immediately after the shooting to which three witnesses were allowed to testify, were excited utterances and not excluded by the hearsay rule. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

Testimony Held Admissible. — Testimony of mother of murder victim regarding a conversation when victim came over to her mother's house crying and saying that defendant had kicked her out of his house was properly allowed into evidence as a present sense impression by the declarant under subdivision (1) of this rule. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where witness saw defendant with a gun in her daughter's yard and attempted to warn her, the daughter's statement to her mother that defendant was looking for the victim was admissible as a present-sense impression. State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (1996).

Witness's statement regarding defendant's actions, made after the witness drove a half a mile, was admissible as a present sense impression as the time afforded to the witness in that travel was not likely to have afforded the witness an opportunity to deliberately misrepresent defendant's condition. State v. Morgan, 359 N.C. 131, 604 S.E.2d 886, 2004 N.C. LEXIS 1199 (2004).

Witness's testimony regarding a telephone conversation the witness had with the victim prior to the murder qualified as a present sense impression because the victim was speaking with the witness immediately before defendant and a woman, who was allegedly acting in concert with defendant, approached the victim's house, only about two hours after the woman had talked to the victim for the first time. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

Hearsay testimony by a witness concerning statements made by the victim was not excluded by the hearsay rule under N.C. R. Evid. 803(1) because the victim's statements were her present sense impression of a choking incident. Furthermore, there was no rigid rule about how long was too long to be immediately thereafter. State v. Petrick, 186 N.C. App. 597, 652 S.E.2d 688, 2007 N.C. App. LEXIS 2267 (2007), appeal dismissed, review denied, 362 N.C. 242, 660 S.E.2d 540 (2008).

Held Inadmissible, But Harmless. — Although a victim's statement was not properly admissible under the present sense impression exception to the hearsay rule, pursuant to G.S. 8C-1, N.C. R. Evid. 803(1), where it was made approximately seven hours after she was shot by defendant's co-conspirators and after the victim had undergone general anesthesia and surgery, and there were no requisite findings made by the trial court to allow it to be admitted under G.S. 8C-1, N.C.R. Evid. 804(b)(5), the admission was deemed harmless error; it was noted that the same information contained in the victim's written statement had been properly introduced into evidence by other witnesses and through other means. State v. Wiggins, 159 N.C. App. 252, 584 S.E.2d 303, 2003 N.C. App. LEXIS 1502 (2003), cert. denied, 541 U.S. 910, 124 S. Ct. 1617, 158 L. Ed. 2d 256 (2004).

III. EXCITED UTTERANCES.

Continuation of Former Practice. — Subdivision (2) of this rule, relating to excited utterances, is merely a continuation of the longstanding rule in this State that exclamations of a bystander concerning a startling or unusual event, made spontaneously and without time for reflection or fabrication, are admissible. State v. Simpson, 77 N.C. App. 586, 335 S.E.2d 526 (1985), cert. denied, 315 N.C. 595, 341 S.E.2d 36 (1986).

The "excited utterance" exception of subdivision (2) of this rule is a codification of the common-law exception, spontaneous utterance. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

Statements made while the declarant was under stress caused by a startling event were admissible as an exception to the hearsay rule. State v. Littlejohn, 340 N.C. 750, 459 S.E.2d 629 (1995).

But Not Every Statement Made Under Stress Is Similarly Admissible. — Where defendant was under the stress of a startling event when he made his exculpatory statement, but 25 minutes had elapsed between the fight and the statement, giving him sufficient time to have fabricated a story, admission of the statement as an excited utterance was properly denied. State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516, 2001 N.C. App. LEXIS 727 (2001).

Statement Admissible as Excited Utterance. — Testimony of a witness as to a statement made by a declarant relating to a startling event and made while the declarant was under the stress of that event is not excludable under the hearsay rule. State v. Sneed, 327 N.C. 266, 393 S.E.2d 531 (1990).

Testimony of witness on voir dire that victim told him that defendant attempted to kill her and that victim wanted to move in with witness provided a plausible reason and factual basis for the victim's fear of defendant, which was relevant to show the nature of the victim's relationship with defendant and the impact of the defendant's behavior on the victim's state of mind prior to the murder. State v. Glenn, 333 N.C. 296, 425 S.E.2d 688 (1993).

Statements made only 20 minutes after the shootings and relating to the startling events at issue were properly admitted pursuant to G.S. 8C-1, N.C. R. Evid. 803(2). State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Statement made by defendant's girlfriend, "We gots to be more careful," was admissible as an excited utterance exception to the hearsay rule where it as made in reaction to the startling event of arriving home late in the evening, being seized in the front yard, and being led handcuffed into her own residence; an eyewitness testified that she the girlfriend made the statement she was upset and shaking, and immediately after making it, she burst into tears. State v. Boyd, 177 N.C. App. 165, 628 S.E.2d 796, 2006 N.C. App. LEXIS 854 (2006).

In an action in which defendants appealed from a judgment of the Wayne County Court that convicted defendants of first degree murder, the trial court did not err in its admission of a witness's hearsay testimony as to an individual's statement, "You should have shot the expletive in the head" because the testimony was properly admitted under the "excited utterance" exception to the hearsay rule. State v. Sloan, 180 N.C. App. 527, 638 S.E.2d 36, 2006 N.C. App. LEXIS 2517 (2006), appeal dismissed, cert. denied, 361 N.C. 367, 644 S.E.2d 560 (2007), aff'd, 650 S.E. 2d 594, 2007 N.C. LEXIS 1011 (2007).

Statements a decedent made to a witness were admissible as an excited utterance under G.S. 8C-1, N.C. R. Evid. 803(2) because they were made sufficiently close to the event and were made while the decedent was upset and had not had time to reflect; the witness consistently described the decedent as being scared, upset, and excited, and in light of the decedent's statement that defendant pulled a gun on him, it was reasonable that the decedent was still upset when he spoke to the witness. State v.

Applewhite, 190 N.C. App. 132, 660 S.E.2d 240, 2008 N.C. App. LEXIS 822 (2008).

The rationale for the admissibility of an excited utterance is its trustworthiness. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

The reason for allowing the excited utterances exception is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances. State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

In order to fall within the hearsay exception of subdivision (2) of this rule, there must be (1) a sufficiently startling experience suspending reflective thought, and (2) a spontaneous reaction, not one resulting from reflection or fabrication. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

For a statement to qualify as an excited utterance, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

For a statement to be admitted as an excited utterance there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection of fabrication. State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997).

Showing of Unavailability Not Necessary. — Although a defendant's son, who had witnessed his father's assault on his mother, was not shown to be unavailable to testify at trial, a trial court did not err by admitting the son's hearsay evidence as an excited utterance under G.S. 8C-1, N.C. R. Evid. 803(2) without any showing that the son was unavailable and without making the findings required by G.S. 8C-1, N.C. R. Evid. 804(b)(5) for a determination of the applicability of the residual exception to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 803(24). State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002).

Statements to Police. — Statement, heard by officer arriving at murder scene, that defendant shot the victim fit squarely within the excited utterance exception to the hearsay rule and was properly admitted. State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997).

The victim's oral statement to a police officer when he first arrived at her neighbor's house and found her in the back yard, regarding being pursued, beaten and terrorized by defendant, was admissible as an excited utterance. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Statement Made in 911 Call. — Child's statements in the 911 call were clearly probative as to whether defendant had shot the victim; the child was in the next room when he heard the shot and the surrounding circumstances established that defendant had been inside when the shooting occurred. State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151, 2002 N.C. App. LEXIS 768 (2002).

Admission of the 911 event report was proper under the business records exception to the hearsay rule. State v. Hewson, 182 N.C. App. 196, 642 S.E.2d 459, 2007 N.C. App. LEXIS 581 (2007).

Statement Made to Police over One Hour After Crime. — Where defendant made exculpatory statement to a police officer over an hour after the crime was discovered, the trial court could properly conclude that he had time to manufacture the statement and did not make it spontaneously. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

A nine-day interval between the event and the statement precludes the statement from being a spontaneous reaction, not one resulting from reflection or fabrication, so as to be admissible as an excited utterance. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Statements Made by Children. — When considering the spontaneity of statements made by young children, there is more flexibility concerning the length of time between the startling event and the statements because the stress and spontaneity upon which the exception is based are often present for longer periods of time in young children than in adults. State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (1998).

Statements Made to a Neighbor. — A statement made by defendant's daughter was admissible as an excited utterance even though made in response to questions from a neighbor, where the statement was made several hours after the nine-year-old girl's mother was found dead, and she told the neighbor that her parents had been fighting and she had heard her mother telling the father to "stop." State v. Boczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (1998).

Child Victim's Statements to Grandmother. — Trial court did not err in ruling that three and a half year old victim's statements to her grandmother regarding rape by her father fit into an exception to the hearsay rule. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), aff'd, 900 F.2d 705 (4th Cir.), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

In prosecution for rape of four and five year old victims, grandmother's testimony regarding her conversations with the victims, including the identification of the defendant as the assailant, resulting in their being examined, diagnosed, and treated at hospital, was properly admitted as substantive evidence pursuant to subdivision (4) of this rule, and as an excited utterance under subdivision (2). State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Statement to her grandmother by a two-and-a-half year old child that her mother was dead was an excited utterance and was admissible as an exception to the hearsay rule. State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994), cert. denied, 514 U.S. 1114, 115 S. Ct. 1971, 131 L. Ed. 2d 860 (1995).

Statement By Murder Victim. — The murder victim's statements to her brother-in-law that the defendant had held a gun to her head and threatened to kill her were admissible in the defendant's murder trial under the excited utterance exception, where the victim called the brother-in-law immediately after the incident, while she was upset and had not had time to reflect. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 103, 145 L. Ed. 2d 87 (1999).

Statement of Onlooker to Witness Pursuing Thief. — Trial court did not err in allowing witness, in relating her pursuit of thief, to testify that when she lost sight of the man she was pursuing, a nearby woman yelled at her, asked what she was doing, and said that the man had gone into the parking lot, as assuming that the statement was arguably hearsay, it was admissible as a present sense impression or an excited utterance. State v. Markham, 80 N.C. App. 322, 341 S.E.2d 777 (1986).

Statement made by a person standing near the spot where victim was shot, immediately after defendant shot the victim and bent over her with the gun still in his hand, was clearly a statement relating to the startling attack and shooting while the declarant was under the stress of excitement caused by the event; as such, it was an excited utterance within the meaning of subdivision (2) of this rule and was admissible into evidence, notwithstanding its hearsay character. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

Statement by Witness to Shooting. — Testimony by witness that codefendant stated "I didn't believe you would shoot him" fits squarely within the excited utterance exception to the hearsay rule. State v. Braxton, 344 N.C. 702, 477 S.E.2d 172 (1996).

Statements by Defendant. — Where defendant saw his brother fall to the floor, bleeding, after being hit over the head with a chair by shooting victim, the defendants statements regarding victim were admissible as excited utterances. State v. Riley, 128 N.C. App. 265, 495 S.E.2d 181 (1998).

Statement to Aunt an Hour After Event. — The trial court properly excluded aunt's testimony on the grounds that it was inadmissible hearsay where defendant first talked to his aunt on the telephone after the shooting from his grandmother's house to tell her where he was and that he was on his way home and defendant did not mention the shooting on the phone but waited until after he had ridden home, an hour after the shooting, to tell her what had happened. State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994).

Mother's Accusatory Statements. — In prosecution for manufacturing marijuana, the jury was entitled to consider the defendant's mother's excited utterances in the form of accusatory statements, made when she learned that defendant was being arrested, and his responses thereto. State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986).

Statements by Assault Victim. — Statements by defendant's daughter were properly admitted under the excited utterance exception where she described her father's attack on her to a neighbor, to whom she ran for help, and to a police officer and both testified that she was very upset, out of breath, and that her face was bruised and swollen. State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998).

Statements by Rape Victim to Officer. — Statement made by victim, an 89-year-old woman who had been raped approximately 10 minutes before, to detective was properly submitted at defendant's trial for rape and burglary, where victim died prior to trial from unrelated causes. State v. Murphy, 321 N.C. 72, 361 S.E.2d 745 (1987).

Statements made by a mentally retarded rape victim, who was visibly shaken, that she had been raped less than 30 minutes earlier were properly determined to be excited utterances. State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998), cert. denied, 352 N.C. 362, 544 S.E.2d 562 (2000).

Statement made by four-year-old victim to her mother, in the presence of her father, within 10 hours after leaving defendant's custody, without hesitation and without prompting by her parents, was a spontaneous reaction to a startling experience, and the trial court properly admitted father's testimony as to victim's statements under the hearsay exception for excited utterances. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Child Victim of Sexual Assault. — Because testimony indicated that statements by a child, allegedly the victim of a sexual assault, were (1) spontaneous and not in response to any questioning on the part of the adult to whom they were made, (2) related to the alleged sexual assault, a "startling event," particularly to a young child, and (3) were made only three days after such assault, the testimony was properly admitted pursuant to subdivision (2) of this rule. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), 511 U.S. 1008, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, 511 U.S. 1102, 114 S. Ct. 1875 (1994).

In prosecution on two counts of first degree sexual offense (by anal and genital penetration) and one count of taking indecent liberties with a minor child, five year old victim's conversation with classmates on school playground was of such a nature as to have been properly admitted under the excited utterance exception to the hearsay rule; in the circumstances of this case, the passage of four or five days did not detract from the "spontaneity" of victim's response. State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995).

A child sexual abuse victim's statements to her mother and to a police officer were admissible under the excited utterance and existing mental, emotional, and physical condition exceptions to the hearsay rule. State v. Hinnant, 131 N.C. App. 591, 508 S.E.2d 537 (1998).

In a sexual abuse prosecution, testimony that a child immediately told a neighbor and her grandmother that defendant did something to her that made her feel uncomfortable was admissible as an excited utterance, under G.S. 8C-1, N.C. R. Evid. 803(2). State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Statement After Escape from Burning House. — The out-of-court statement of an excited victim, made as much as 15 minutes after escaping from a burning house, falls within the excited utterance exception to the hearsay rule. State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987), appeal dismissed and cert. denied, 364 S.E.2d 661 (1988).

Statement by Passenger of Car. — Where defendant's car nearly sideswiped driver's car, driver's statement "he has a gun" offered by passenger was a spontaneous reaction that occurred while declarant was under the stress of this startling experience without the opportunity to reflect on what he was seeing or to fabricate his statement before speaking, and was properly admitted as an excited utterance exception to the hearsay rule. State v. Gainey, 343 N.C. 79, 468 S.E.2d 227 (1996).

Statement by Driver of Car. — Trial court properly sustained the State's objection to the admission of defendant's statement as an excited utterance pursuant to G.S. 8C-1, N.C. R. Evid. 803(2) where the record was clear that a sufficient amount of time had lapsed between the time defendant crashed a vehicle in a high speed chase and the time defendant made a statement to a police officer that a passenger forced defendant to drive to have provided defendant with an opportunity to fabricate a statement. State v. Riley, 154 N.C. App. 692, 572 S.E.2d 857, 2002 N.C. App. LEXIS 1531 (2002).

Police Report. — In a case involving negligence of defendant leading to theft of jewelry samples from car trunk, police investigative report was properly received for the limited purpose of showing that a report of the theft was made under G.S. 8C-1, Rule 801, and was also admissible as substantive evidence under this rule as a present sense impression and an excited utterance. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 82 N.C. App. 21, 345 S.E.2d 453 (1986).

Statements Held Not Excited Utterances. — In prosecution on two counts of first degree sexual offense (by anal and genital penetration) and one count of taking indecent liberties with a minor child the statements of out-of-court declarants, classmates of five year old victim, to their mothers — the second level of hearsay contained in the testimony of the mothers — did not fall within the "excited utterance" exception to the hearsay rule; admission of those statements into evidence as "excited utterances" was improper. State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995).

Statement by defendant that he had not shot anyone did not meet the excited utterance exception as girlfriend's questioning comment to defendant that she heard he had shot someone was not a sufficiently startling event, and defendant's response could not be considered spontaneous coming five hours after the event. State v. Jackson, 340 N.C. 301, 457 S.E.2d 862 (1995).

Witness's testimony to the state bureau of investigation special agent was not admissible under the excited utterance exception to the hearsay rule because the statements, made several hours after the shooting, were not the product of a spontaneous reaction. State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

IV. MENTAL, EMOTIONAL OR PHYSICAL CONDITION.

Where Evidence Showing Victim's State of Mind Is Admissible. — Evidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case. State v. Meekins, 326 N.C. 689, 392 S.E.2d 346 (1990), cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), 511 U.S. 1008, 114 S. Ct. 1378, 128 L. Ed. 2d 54 (1994).

Petitioner's habeas petition was properly denied because North Carolina's determination that G.S. 8C-1, N.C. R. Evid. 803(3) was a Sixth Amendment-compliant, firmly-rooted, state-of-mind hearsay exception, was not contrary to United States Supreme Court precedent. Hayes v. York, 311 F.3d 321, 2002 U.S. App. LEXIS 23956 (4th Cir. 2002), cert. denied, 538 U.S.

979, 123 S. Ct. 1803, 155 L. Ed. 2d 669 (2003).

Rape victim's state of mind in hospital trauma room was relevant to the issue of whether sexual intercourse was committed by force and against her will. Her statements that she was afraid of the defendant were therefore admissible. State v. Locklear, 320 N.C. 754, 360 S.E.2d 682 (1987).

Statement of Intent to Engage in Future Act. — Subdivision (3) of this rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988); State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

A cellmate's testimony that he had overheard his cellmate plan to frame defendant for a double murder was admissible to show the cellmate's present intent to commit a future act. State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (1999).

This rule allows the admission of a hearsay statement of a then-existing intent to engage in a future act; therefore, witness's testimony as to other individual's declaration that he wanted to go rob service station was admissible as evidence of that individual's then-existing intent to engage in a future act. State v. Sneed, 327 N.C. 266, 393 S.E.2d 531 (1990).

Subdivision (3) of this rule does not contain a requirement that the declarant's statement must be closely related in time to the future act intended. A review of the cases interpreting subdivision (3) of this rule does not reveal that any such requirement has been read into the statute. State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992).

An inmate's statement to another inmate that he was going to approach defendant about straightening out victim's debt was admissible, under this rule, as evidence of his then-existing intent to engage in a future act. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Victim's statement to the victim's sister regarding the victim's intention to meet defendant was admissible under G.S. 8C-1-803(3) because the statement tended to show the victim's plan or intent to engage in a future act. State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Failure of the trial court to admit or exclude evidence tending to show a declarant's state of mind will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached if the error had not been committed. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Testimony Offered to Prove Fact Remembered. — The proffered hearsay statement of a child pertained to a memory of the previous day's events and was offered solely for the purpose of proving such events, thus, it was properly excluded by subdivision (3) of this rule. In re Hayden, 96 N.C. App. 77, 384 S.E.2d 558 (1989).

Statement of Belief to Prove Fact Believed. — Defendant could not introduce into evidence a statement allegedly made by murder victim whereby victim stated to her mother that she was going to get killed if "the people" ever caught up with her, as the statement, if uttered, did not constitute a then existing state of mind, emotion, sensation or physical condition, but was plainly a statement of belief to prove the fact believed. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of State v. Simmons, 51 N.C. 21 (1858).

Statements That Merely Recite Facts. — Testimony that victim said he knew the defendant had stabbed someone seventeen times was inadmissible under this section, because the witness did not testify as to an actual statement of emotion by the victim but rather as to her opinion that he acted frightened. State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000).

Statement Made Several Days After Incident Not Admissible. — Statements by the victim to his wife and daughter, made sever days after the robbery, did not reflect the victim's then-existing state of mind during the robbery and thus, were not admissible under G.S. 8C-1, N.C. R. Evid. 803(3). State v. Blackstock, 165 N.C. App. 50, 598 S.E.2d 412, 2004 N.C. App. LEXIS 1168 (2004), cert. denied, — N.C. —, 610 S.E.2d 208 (2005), appeal dismissed, cert. denied, — N.C. —, 610 S.E.2d 208 (2005).

Statement of Intent to Disinherit. — Testimony by defendant's brother that victim told him he would not give defendant a trailer unless he straightened up, was admissible under the state of mind exception since victim's state of mind regarding his intention to disinherit defendant was relevant to the issue of defendant's motive. State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990) in light of 291 N.C. 253, 230 S.E.2d 390 (1976).

Telephone Message. — The trial court did not commit reversible error in its admission into evidence of a telephone message written by victim's next-door neighbor, to victim's roommate, even though the court admitted the statement under the residual hearsay exception found in subdivision (24) of this rule when the court should have admitted it under subdivision (3) as a statement of intent to engage in a future act. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Statements in victim's diary were not statements of her state of mind but were merely a recitation of facts which described various events; thus, the diary entry was not admissible under the state-of-mind hearsay exception. State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994).

Statement murder victim made to witnesses was admissible as relevant state of mind testimony tending to explain and refute defendant's claims of self-defense and accident. State v. Crawford, 344 N.C. 65, 472 S.E.2d 920 (1996).

A murder victim's statements were admissible in the husband's murder trial under the state of mind exception, where the victim made statements to witnesses that the defendant had threatened to kill her, that he had threatened to make her the next Nicole Simpson, and that he urinated on the kitchen floor and used the victim's hair to wipe it up, because the statements shed light on the victim's state of mind, her emotions, and her physical condition. State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998), aff'd, 350 N.C. 79, 511 S.E.2d 302 (1999).

The murder victim's statements to witnesses about his marital and financial difficulties were admissible under the state of mind exception during his wife's murder prosecution, since the statements were not a mere recitation of facts but rebutted the wife's contention that she and the victim had a loving and compassionate relationship. State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999).

Evidence as to the murder victim's hearsay statements about her fear of the defendant was admissible under the state of mind hearsay exception. State v. Childers, 131 N.C. App. 465, 508 S.E.2d 323 (1998).

Victim's prior statements were properly admitted to show her state of mind before she was murdered. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

A murder victim's statements, made shortly before his death, in which he expressed fear that the defendant was going to kill him were admissible under the state of mind exception to the hearsay rule to show the status of the victim's relationship to the defendant prior to the killing, that defendant had a motive for the killing, and that the killing was a deliberate premeditated act rather than a spontaneous act done in self-defense; the probative value of such testimony outweighed any potential prejudice to defendant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

The victim's tearful statements to others that her husband was having an affair, that she might not return alive from their vacation, and don't let him get away with this were admissible to show the victim's state of mind. State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237, 2002 N.C. App. LEXIS 967 (2002).

Murder victim's hearsay statements to her boyfriend that habeas petitioner inflicted physical injuries upon her were not admissible since when the statements were made, the victim was in a position with respect to her boyfriend in which some people might naturally have wished to minimize their relationship with another suitor (petitioner) or, at least, believe their own interests might be better served by creating an image of the other person and of the relationship different from reality. Walker v. Jackson, 226 F. Supp. 2d 759, 2002 U.S. Dist. LEXIS 19413 (M.D.N.C. 2002).

Testimony fell under the state of mind hearsay exception in G.S.8C-1, N.C. R. Evid. 803(3), where the murder victim stated that she was afraid to go home because of defendant and she was scared because she thought that defendant was going to kill her. State v. Earwood, 155 N.C. App. 698, 574 S.E.2d 707, 2003 N.C. App. LEXIS 20 (2003).

Victim's statements to his friends that he had a confrontation with defendant and was afraid of defendant were properly admitted under G.S. 8C-1, N.C. R. Evid. 803(3), as they showed the victim's then-existing state of mind, and the statements were not mere recitations, devoid of emotion. State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Admission of a hearsay statement from the murder victim at trial was not erroneous since the statement served to support the victim's assertion that it was "spooky" at home alone during the day and tended to show her state of mind at the time of the conversation with her mother. State v. Smith, 357 N.C. 604, 588 S.E.2d 453, 2003 N.C. LEXIS 1415 (2003), cert. denied, — U.S. —, 124 S. Ct. 2915, 159 L. Ed. 2d 819 (2004).

Victim's recorded statement bearing directly on his relationship with the defendant at about the time she was alleged to have killed him, which tended to show that he was afraid of the defendant, to disapprove the normal, loving relationship that the defendant contended existed between the two, and to refute any likelihood that he would have slept with the defendant with a loaded and cocked semi-automatic pistol under his pillow, and which corroborated at least one motive for the murder, i.e., the defendant's borrowing money, without the victim's knowledge, which she could not repay, was admissible under subdivision (3) of this rule as evidence tending to show the victim's state of mind, and did not violate defendant's constitutional right of confrontation. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Statement of State of Mind as to Relationship with Defendant. — Testimony regarding murder victim's statements that victim had refused to allow defendant to move in with him and victim knew defendant did not like that were admissible as evidence of victim's state of mind as to his relationship with the defendant. State v. Patterson, 146 N.C. App. 113, 552 S.E.2d 246, 2001 N.C. App. LEXIS 856 (2001), cert. denied, 354 N.C. 578, 559 S.E.2d 549 (2001).

Testimony about a victim's statements that she was tired of defendant taking her money to buy drugs and that she had asked him to leave, which were made one day before defendant beat and strangled the victim in her home, indicated difficulties in the relationship prior to the murder; thus, the statements were admissible not as a recitation of facts, but to show the victim's state of mind pursuant to G.S. 8C-1, N.C. R. Evid. 803(3). State v. Carroll, 356 N.C. 526, 573 S.E.2d 899, 2002 N.C. LEXIS 1265 (2002), cert. denied, 539 U.S. 949, 123 S. Ct. 2624, 156 L. Ed. 2d 640 (2003).

Testimony As to Victim's Fear of the Defendant. — The admission of hearsay statements did not violate the defendant's Confrontation Clause rights as set forth in the Sixth and Fourteenth Amendments to the United States Constitution where the testimony was accompanied by descriptions of the victim's emotions or mental state. Statements unaccompanied by such description, such as statements regarding past factual events, were wrongly admitted but no prejudice resulted to the defendant. State v. Lathan, 138 N.C. App. 234, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000).

Testimony by the victim's friend was admissible to show the victim's state of mind prior to a meeting with defendant and revealed her fear of defendant and of an imminent encounter with him; the probative value of the testimony outweighed any prejudicial effect. State v. Williams, 151 N.C. App. 535, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 214 (2002).

The trial court's admission of the victim's testimony from a domestic violence protective order hearing did not violate his right to confront the witness against him, nor did it violate G.S. 8C-1, Rules 403, 404(b), or 803(3), where the hearsay statements constituted, and were admissible as, statements of the declarant's then-existing mental, emotional, or physical condition and where their probative value outweighed their prejudicial effect. State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000), cert denied, 531 U.S. 1155, 121 S. Ct. 1106, 148 L. Ed. 2d 976 (2001).

Testimony Held Admissible. — Testimony of witnesses that 10-year-old murder victim said she planned to go fishing with "a nice gray-haired man" indicated a clear intent to do a future act, and were admissible under subdivision (3) of this rule as evidence of victim's mental or emotional condition at the time she made the statements. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

Conversation between murder victim and her mother wherein victim stated that she had taken out a child support warrant against defendant and had sought advice from an attorney regarding obtaining custody of her children was admissible as a statement of then existing mental or emotional conditions under subdivision (3) of this rule on the date she disappeared. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Murder victim's statement that she planned to go to see a doctor about a place on her chest where "he" had hit her was a hearsay statement made admissible into evidence by subdivision (3) of this rule, as it went directly to victim's state of mind, emotional status and physical condition on the very date of her disappearance. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Admission into evidence in murder trial of the scope of a conversation between victim and paralegal three weeks before the murder, to the effect that victim told paralegal about several occasions on which defendant had beaten her in the past and that defendant had threatened to kill her if she tried to take back her children from him, and that paralegal's impression was that victim appeared terrified during the interview was proper under subdivision (3) of this rule as the conversation related directly to victim's existing state of mind and emotional condition. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Victim's statements to witnesses regarding threats made by defendant on her life and how these threats affected her were admissible under the state-of-mind exception to the hearsay rule. State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990).

Murder victim's statements to her son and sister regarding defendant's threat revealed her then-existing fear of defendant, further explaining why she did not want defendant visiting her home. The prohibition of visits to the home by the defendant was relevant to prove defendant's state of mind, that is, that he knew he was entering the victim's home without consent. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

Testimony concerning murder victim's fear, both shortly after being with defendant and while in the defendant's presence, was relevant, more probative than prejudicial, and therefore admissible. State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991).

Statements made by an alleged victim of a sexual assault during the course of diagnosis by her therapist as a sexually abused child and during her treatment were properly admitted by the trial court under subdivision (4) of this rule. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), 511 U.S. 1008, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, 511 U.S. 1102, 114 S. Ct. 1875 (1994).

Defendant's statement to his sister that he was going to meet two guys to buy stolen merchandise was admissible under subsection (3) as a statement of his then-existing intent to engage in a future act. State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994).

Statements made by the victim shortly before the victim's death that defendant was "very, very jealous," that "she was thinking about breaking up with him," and that "she was tired of his junk" were admissible, under the state of mind exception to the hearsay rule. State v. Jones, 337 N.C. 198, 446 S.E.2d 32 (1994).

Statement by a witness testifying as to the events leading up to shooting was properly admitted pursuant to subsection (3), as evidence of the alleged threats made by defendant to explain the victim's then-existing mental and emotional state. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

Murder victim's statements that his marriage "wasn't getting along like it should" and that he was leaving were statements indicating his mental condition at the time they were made and were admissible to rebut defendant's earlier testimony characterizing her marital relationship with the victim as "fine" and "excellent." State v. Lambert, 341 N.C. 36, 460 S.E.2d 123 (1995).

Uncommunicated threats made by decedents against defendant were hearsay but were admissible as state of mind expressions of decedents. State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996).

Victim's statements to his sister that he was depressed, lonely, and upset about his finances were statements indicating his mental condition at the time they were made and were not merely a recitation of facts and were admissible under subsection (3) of this Rule. State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996).

Victim's statements to his father about his feelings towards his marriage to the defendant expressed the victim's state of mind. State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996).

The victim's state of mind regarding his intention not to give defendant the money defendant wanted was relevant to the issue of defendant's motive. State v. Miller, 344 N.C. 658, 477 S.E.2d 915 (1996).

Victim's statements that she was concerned that defendant was stealing money from the sale of her property and that she planned to get an injunction against defendant to collect the money fell within the state of mind exception to the hearsay rule. State v. Bishop, 346 N.C. 365, 488 S.E.2d 769 (1997).

The murder victim's statements that she intended to go away for the summer and separate from her husband reflected her state of mind and therefore were admissible in the husband's murder trial to show a motive for the killing. State v. Murillo, 349 N.C. 573, 509 S.E.2d 752, 1998 N.C. App. LEXIS 851 (1998), cert. denied, 528 U.S. 838, 120 S. Ct 103, 145 L. Ed. 2d 87 (1999).

Witnesses' testimony regarding victim's/wife's prior statements was admissible to show her state of mind, despite the fact that the statements also contained descriptions of factual events. State v. Wilds, 130 N.C. App. 195, 515 S.E.2d 466 (1999).

Hearsay objections in capital murder case were properly overruled since statements reflected victim's state of mind and were therefore admissible under this rule. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Statements made by victim approximately six months prior to murder, to the effect that she and defendant were not getting along well, that she no longer wanted to be married, that if defendant had not left by May, 1997, she would "push the issue" for him to leave, that defendant told her that one day he would come home and find her dead with her throat cut, and that she believed defendant wanted her to sell her house so he could get some of her money, were admissible under this rule. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000), cert. denied, 353 N.C. 269, 546 S.E.2d 114 (2000).

Murder victim's statements about her frustration with the defendant and her intent to end their marriage were properly introduced into evidence since such statements indicated the victim's mental condition at the time the statements were made and were not merely a recitation of facts, and also related directly to circumstances giving rise to a potential confrontation with the defendant. State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001).

Testimony by a victim and a deceased victim's cousin regarding their relationships with the deceased was properly admitted under subdivision (3) of this rule since the testimony sufficiently expressed the deceased's emotional state and made the appropriate statements of fact which supplied context to the emotions. State v. Meadows, 158 N.C. App. 390, 581 S.E.2d 472, 2003 N.C. App. LEXIS 1189 (2003), cert. denied, 357 N.C. 467, 586 S.E.2d 774 (2003).

Testimony regarding the victim's state of mind was admissible because it related directly to the victim's fear of defendant. State v. Erickson, 181 N.C. App. 479, 640 S.E.2d 761, 2007 N.C. App. LEXIS 262 (2007), review improvidently granted, 2007 N.C. LEXIS 1102 (N.C. Nov. 9, 2007).

Evidence Improperly Excluded. — Trial court erred in excluding testimony regarding threats made by decedents against defendant where defendant relied upon the theory of self-defense. State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996).

Testimony of witness about telephone conversation with victim which tended to show victim's state of mind was properly admitted. State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996).

Uncommunicated Threat. — Defendant's conviction and sentence on a charge of first-degree murder pursuant to G.S. 14-17 was upheld; the trial court properly excluded the victim's uncommunicated threats to defendant into evidence, because defendant failed to put on evidence of self-defense as was required to admit such evidence pursuant to G.S. 8C-1, N.C. R. Evid. 803(3), and defendant did not suffer any prejudice pursuant to G.S. 15A-1443(a) (2001) because defendant testified to substantially the same evidence that was contained in the uncommunicated threat. State v. Messick, 159 N.C. App. 232, 585 S.E.2d 392, 2003 N.C. App. LEXIS 1493 (2003).

V. STATEMENTS FOR DIAGNOSIS OR TREATMENT.

Diagnosis for Purpose of Treatment. — The diagnosis for which the exception to the hearsay rule under subdivision (4) of this rule applies should be diagnosis for the purpose of treating a disease. State v. Stafford, 77 N.C. App. 19, 334 S.E.2d 799, writ allowed, 314 N.C. 673, 335 S.E.2d 500 (1985), aff'd, 317 N.C. 568, 346 S.E.2d 463 (1986).

Testimony is only admissible under the medical diagnosis or treatment exception when two inquiries are satisfied: first, the declarant intended to make the statements in order to obtain medical diagnosis or treatment; second, the declarant's statements were reasonably pertinent to medical diagnosis or treatment. Because the record indicated that no one explained to an alleged child sexual abuse victim the importance of truthful answers or the medical purpose for the interview, and because the interview took place in a non-medical environment, and the record did not demonstrate that the victim possessed the requisite intent, the testimony was not admissible. State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000).

The basis for allowing admission of statements for purposes of medical diagnosis or treatment as exceptions to the hearsay rule is that such statements are inherently trustworthy and reliable, for the reason that the patient has an interest in telling or relaying to medical personnel as accurately as possible the cause for the patient's condition. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Statements made for the purpose of diagnosis or treatment are inherently trustworthy and reliable because the patient is motivated to tell the truth in order to receive proper diagnosis or treatment. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Statements made for the purpose of medical diagnosis and treatment, because of their inherent reliability, are admissible under an exception to the hearsay rule. Statements made to a physician in preparation for trial, however, are considered to be less reliable and are inadmissible hearsay. Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988).

Subdivision (4) of this rule does not limit the permissible testifying recipient of the statement to a treating physician, so long as the purpose of the declarant's statement is to obtain medical treatment for himself. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986).

Subjective record plaintiff kept of her pain fell under the hearsay exception for statements for purposes of medical diagnosis or treatment under subsection (4) of this rule. Reed v. Abrahamson, 108 N.C. App. 301, 423 S.E.2d 491 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 624 (1993).

Statements Inadmissible under This Exception May Be Admissible for Some Other Reason. — While the testimony of the victim's mother—that the victim had explained that defendant touched her in her "private part," was "rubbing her hard," and that it hurt—was improperly admitted under this rule because the record revealed no evidence that the victim made these statements to her mother with the understanding that they would lead to medical treatment, such testimony was admissible to corroborate the victim's trial testimony or as an excited utterance. State v. McGraw, 137 N.C. App. 726, 529 S.E.2d 493, 2000 N.C. App. LEXIS 503 (2000).

Statements of the defendant's mother and wife were inadmissible under this rule because only the statements of the person being diagnosed or treated are excepted from the prohibition against hearsay. State v. Jones, 339

N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Rape victim's statements to medical personnel were properly admissible under subdivision (4), where they were made to medical personnel for the purpose of diagnosis and treatment. State v. Jackson, 320 N.C. 452, 358 S.E.2d 679 (1987).

In a second-degree rape case, where doctor testified he asked the victim if "anything" was put inside her and the victim responded, "Yes", the victim's statements to the doctor were made for the purpose of diagnosis and treatment and were reasonably pertinent to the doctor's diagnosis and treatment; therefore, the question and answer were permitted as an exception to the general hearsay rule. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

A child sexual abuse victim's statements to a nurse, social worker, and physician at a hospital were admissible as statements made for the purpose of medical diagnosis where the statements were made soon after the abuse and the child testified that she went to the hospital because defendant "hurt her privacy." State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212, 2001 N.C. App. LEXIS 860 (2001).

Statements to Rape Task Force Volunteers. — The hearsay exception under subdivision (4) of this rule was not created to except from the operation of the hearsay rule statements made to persons acting in the capacity of Rape Task Force Volunteers at a time after the victims had already reached the hospital and had received medical treatment and diagnosis. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Statement Six Weeks After Initial Hospitalization. — Statement made by victim to her doctor, identifying her assailant, made at least six weeks after her initial admission to the hospital for treatment, could not have been pertinent to the treatment of her injuries, and was not, therefore, admissible pursuant to subdivision (4) of this rule. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

Statements of Child Victim of Sexual Abuse to Health Care Professional. — Statements of child victim of sexual abuse were pertinent to diagnosis and treatment as they suggested to physician the nature of the problem, in which, in turn, dictated the type of examination she performed for diagnostic purposes, and additionally, the victim's identification of the defendant as perpetrator was pertinent to continued treatment of victim's possible psychological and emotional problems resulting from the rape. Thus, the victim's statements to the physician were properly admitted under subsection (4) of this rule. State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986).

In case where defendant was convicted of a sexual offense with a three-year-old female, trial court properly admitted doctor's testimony as to the out-of-court statements of the child pursuant to subdivision (4) of this rule; although doctor never treated the child, the doctor used the statements of the child in making his diagnosis and in recommending follow-up visits with another doctor and, while doctor's examination of the child did prepare him for his testimony at trial, it was clearly not the sole purpose for the examination. In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989).

Trial court, in a child abuse and neglect case, did not err in admitting the testimony of two doctors regarding out-of-court statements made by a minor female to them because the statements were made in the course of medical diagnosis and evaluation. In re Mashburn, 162 N.C. App. 386, 591 S.E.2d 584, 2004 N.C. App. LEXIS 175 (2004), appeal dismissed, — N.C. —, 603 S.E.2d 884 (2004).

Videotapes of the nurses' interviews of the children regarding defendant's sexual abuse of the children were admissible under the hearsay exception for statements made for the purpose of medical diagnosis and treatment under G.S. 8C-1-803(4); the statements were made in a medical atmosphere, a hospital, the statements were taken by nurses prior to a medical examination, the statements were taken for the children's first treatment after the abuse, and the statements, including identification of defendant, aided diagnosis of psychological problems and treatment for those problems. State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

Defendant's conviction of six counts of first-degree sexual offense of a child under the age of 13 years was affirmed because admission of videotape interviews of the children victims was permissible under G.S. 8C-1-803(4) because the challenged statements were made to pediatric nurses at the children's center prior to examination by the doctor; there was sufficient evidence to support the charges. State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007).

Statements of Child Victim of Sexual Abuse to Psychiatrist. — The defendant, convicted by a jury on one count of taking indecent liberties with a minor, was entitled to a new trial where the record on appeal failed to show that the child had a treatment motive when she told a psychiatrist about the defendant's conduct, especially considering that the interview took place in a "child-friendly" room that contained only child-sized furniture and lots of toys, an environment which, according to the Alabama Supreme Court, does not emphasize the need for honesty, and where none of the child's statements about the defendant was spontaneous; in fact, they lacked inherent reliability because of the nature of the psychiatrist's leading questions, the lack of physical evidence of abuse, and where the psychiatrist's testimony was treated as substantive, not corroborative. State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597, 2000 N.C. App. LEXIS 1271 (2000).

Statements Made by a Child Abuse Victim to Health Care Professional. — Hearsay testimony concerning statements made by a child to a licensed psychological associate during an evaluation interview by a medical center's child sexual abuse team did not violate the defendant's confrontation rights, where the child was found incompetent to testify, and the statements were found to be trustworthy in that they were made for the purpose of medical diagnosis or treatment, and there was no evidence that law enforcement officials were involved in the decision to evaluate the child. State v. Waddell, 130 N.C. App. 488, 504 S.E.2d 84, 1998 N.C. App. LEXIS 1005 (1998), aff'd in part and modified in part, 351 N.C. 413, 527 S.E.2d 644 (2000).

Statements made by a child victim of a sex offender to a nurse and then a doctor who examined her after she was taken to a hospital were admissible under the medical diagnosis exception to the hearsay rule as the required assurances of trustworthiness were present and the statements made were reasonably pertinent to diagnosis. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Where the declarant, a three-year-old child abuse victim, told nurses that defendant kicked the declarant, neither a psychological evaluation nor a voir dire examination was necessary for the determination of whether the declarant had the requisite intent to qualify the statements under the medical treatment exception of G.S. 8C-1, N.C. R. Civ. P. 803(4). State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772, 2002 N.C. App. LEXIS 1272 (2002).

Examining doctor's testimony as to what three and a half year old victim told him, including identification of defendant as the perpetrator of sexual offenses, fell within the statutory exception to the hearsay rule created for statements made for purposes of medical diagnosis or treatment. The doctor not only needed to know who the perpetrator was in order to plan for the psychological treatment of the victim, but also to comply with the North Carolina child abuse reporting and treatment statutes. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), aff'd, 900 F.2d 705 (4th Cir.), cert. denied, 498 U.S. 879, 111 S. Ct. 211, 112 L. Ed. 2d 171 (1990).

Statements of Child Victims to Grandmother. — In prosecution for rape of four- and five-year-old victims, grandmother's testimony regarding her conversations with the victims, including the identification of the defendant as the assailant, resulting in their being examined, diagnosed, and treated at the hospital, was properly admitted as substantive evidence pursuant to the hearsay exception of subdivision (4) of this rule, and as an excited utterance under subdivision (2). State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Statements of Child Victim to Mother. — In child abuse case where mother testified that she took child to see doctor because child complained that her "bottom" hurt and because child had used a sexually explicit four letter word, the doctor actually examined child on visit; therefore, mother's testimony of what she recounted to the doctor was admissible under subdivision (4) of this rule. State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989), overruled on other grounds, State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), appeal dismissed, 324 N.C. 544, 380 S.E.2d 772 (1989).

Mother's testimony regarding her conversations with her child was properly admitted as substantive evidence pursuant to subdivision (4) of this rule, where the statements of the child to the mother regarding what defendant allegedly did to her resulted in the child receiving, within 14 days, medical attention at a local hospital, and a subsequent evaluation by doctor, and the child's statements were pertinent to diagnosis and treatment as they suggested to the doctors the nature of the problem which in turn directed the doctors in their examination of the child. In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989).

A child sexual abuse victim's statements to her mother and to a police officer were admissible under the excited utterance and existing mental, emotional, and physical condition exceptions to the hearsay rule. State v. Hinnant, 131 N.C. App. 591, 508 S.E.2d 537 (1998).

Statements of Child Victim's Parent to Health Care Provider. — Assuming that a third-party's statements to medical personnel were admissible under G.S. 8C-1, N.C. R. Evid. 803(4), the trial court nonetheless properly excluded the statements of the minor victim's mother to a physician's assistant who conducted a physical examination of the victim because the mother's statements failed both prongs of the test for the admissibility of statements for the purpose of medical diagnosis or treatment. State v. Norman, — N.C. App. —, 675 S.E.2d 395, 2009 N.C. App. LEXIS 504 (2009).

Four-year-old victim's statements to social worker and coordinator and child evaluator for the Duke Child Protection Team were made for the purpose of medical diagnosis, and were properly admitted under this exception. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

The testimony of a social worker and coordinator and child evaluator for Child Protection Team was properly admitted as substantive evidence under Rule 803(4). State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994), cert. denied, 339 N.C. 617, 454 S.E.2d 261 (1995).

Statements Made to Expert in Pediatric Social Work. — On the facts, statements made by four year old victim to expert in pediatric social work were for the purpose of medical diagnosis or treatment, so as to permit admission of testimony that victim told her that juvenile respondent anally penetrated her as a statement for the purpose of medical diagnosis or treatment within the meaning of this rule. In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

Statements Made in Preparing "Rape Trauma Syndrome" Theory. — Testimony of pediatrician regarding statements of the prosecuting witness concerning symptoms she had experienced months earlier, which symptoms he indicated fulfilled some of the criteria for "rape trauma syndrome," was not admissible in defendant's rape trial, where witness' statements were made not for purposes of diagnosis or treatment, but for the purpose of preparing and presenting the State's "rape trauma syndrome" theory at trial. State v. Stafford, 317 N.C. 568, 346 S.E.2d 463 (1986).

Post-Traumatic Stress Disorder. — For case allowing admission of testimony by psychologist on post-traumatic stress disorder suffered by victim, and distinguishing State v. Stafford, 317 N.C. 568, 346 S.E.2d 463 (1986), see State v. Strickland, 96 N.C. App. 642, 387 S.E.2d 62 (1990).

A statement made by one physician to another regarding the nontestifying physician's observations of the patient and statements by yet a third physician regarding his concerns about the patient's condition did not come within the hearsay exception of statements made by a patient to a treating physician. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986) (decided under law in effect prior to this chapter).

Information Relied on by Physician. — A physician, as an expert witness, may render his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied to him by others, including the patient, if the information is inherently reliable, even though such information is independently admissible into evidence; and if the expert's opinion is admissible, the expert may testify to the information he relied upon in forming it, for the purpose of showing the basis of the opinion. State v. Spangler, 314 N.C. 374, 333 S.E.2d 722 (1985).

Statements made by a victim of child sexual abuse to a psychologist during the course of diagnosis and treatment are admissible. State v. Bullock, 320 N.C. 780, 360 S.E.2d 689 (1987).

Statements made by children to a psychologist counselling them were admissible in custody proceeding as statements made to a psychologist for purposes of medical diagnosis or treatment. Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986), overruled on other grounds, Petersen v. Rowe, 337 N.C. 397, 445 S.E.2d 901 (1994).

Statements of Mentally Retarded Victim to Psychologist. — In a prosecution for rape and sexual offense committed against a mentally retarded female, drawings and statements made by the prosecuting witness during interview with psychologist were held admissible. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Use of Anatomical Dolls to Illustrate Testimony. — The courts of this State have allowed the use of anatomical dolls in sexual abuse cases to illustrate the testimony of child witnesses since the practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony and it conveys the information sought to be elicited, while it permits the child to use a familiar item, thereby making him more comfortable. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Even though dolls were used to illustrate the testimony of a social worker rather than the abused children, the evidence was still admissible; the demonstration illustrated the social worker's testimony as to the manner in which the children communicated accounts of sexual abuse, and the social worker's demonstration of what she observed each child do with the dolls also corroborated the testimony of each child. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Statements Regarding Sexually Transmitted Diseases. — In a sexual abuse prosecution, testimony from a public health department that defendant and the victim were both diagnosed with and treated for gonorrhea at approximately the same time, according to the department's records, was admissible as statements for purposes of medical diagnosis or treatment, under G.S. 8C-1, N.C. R. Evid. 803(4). State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Statements Held Admissible. — Hearsay statements made to social workers and resulting in medical treatment and diagnosis were properly allowed by trial court. State v. Crumbley, 135 N.C. App. 59, 519 S.E.2d 94 (1999).

Statements Not Admissible. — Defendant's statements to a psychiatrist who saw defendant less than two months before trial and nine months after the killing, and whose interview with defendant was arranged by defense counsel, were not admissible. State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (1994).

The admission of hearsay statements concerning the rape of defendant's stepdaughter as substantive evidence under this section was error entitling him to a new trial where: the record was devoid of evidence that the victim understood she was making the statements for medical purposes, or that the medical purpose of the examination and importance of truthful answers were adequately explained to her; where the two doctors saw her almost three months after her initial examination; and the nurse's hearsay testimony was the only direct evidence of actual penetration. State v. Watts, 141 N.C. App. 104, 539 S.E.2d 37, 2000 N.C. App. LEXIS 1293 (2000).

Defendant's statement following a vehicular accident to medical personnel at a hospital that he had been drinking and had been driving the vehicle that crashed was not admissible into evidence as being related to medical diagnosis or treatment under subdivision (4) of this rule. State v. Smith, 157 N.C. App. 493, 581 S.E.2d 448, 2003 N.C. App. LEXIS 748 (2003).

Exclusion Held Harmless. — Trial court's decision to prevent defendant's expert from relating statements made by defendant to him and used by him to form the basis of his expert opinion of defendant's mental state at the time of the homicide, if an abuse of discretion, was harmless error, since the same information was related in answers given by the expert to other questions. State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

Statements to Social Worker Admissible. — Rape victim's statements to a social worker were admissible, since the victim made the statements to the social worker with the understanding that they would lead to medical diagnosis or treatment and the statements were reasonably pertinent to diagnosis or treatment. State v. Thornton, 158 N.C. App. 645, 582 S.E.2d 308, 2003 N.C. App. LEXIS 1277 (2003).

VI. RECORDED RECOLLECTION.

Subdivision (5) is a codification of the recorded past recollection rule that existed when the Rules of Evidence were adopted. State v. Nickerson, 320 N.C. 603, 359 S.E.2d 760 (1987).

Used to Refresh Recollection or Impeachment. — Where prior statements were used either to refresh the witnesses' recollections, or to impeach portions of his courtroom testimony which were inconsistent with them, use of the statements was proper. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

Used to Refresh Recollection or Impeachment. — Trial court did not err when it allowed a witness to refresh his memory from the written transcript of his interview with the police because the witness testified to some of the events of the night in question before he was shown the transcript of his police interview, and when he was shown the transcript he was equivocal about whether or not he remembered making the statements found therein; the trial court then allowed the witness to listen to the entire audio recording of his statements outside the presence of the jury, and after hearing the tape, the witness admitted that it refreshed his memory as to certain aspects of the case and then testified in detail to the events of the night in question, without further reference to the interview transcript. State v. Black, — N.C. App. —, 678 S.E.2d 689, 2009 N.C. App. LEXIS 1073 (July 7, 2009).

Improperly Admitted Statement Resulted in New Trial. — Defendant was entitled to yet another new trial where a witness' purported summary, allegedly written by an investigating officer who was not called as a witness by the State, was improperly and prejudicially admitted into evidence although it was not admissible as a recorded recollection under subdivision (5) of this rule, did not refresh the witness' recollection, was not properly used to impeach her under Rule 607, and the witness, in fact, objected to parts of the statement. State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129, 1999 N.C. App. LEXIS 1298 (1999).

Record Not Prepared According to Requirements in Subdivision (5) May Still Be Used to Refresh Memory. — In an action to remove the executor of an estate, where the court clerk independently recalled that she had awarded attorneys' fees for services performed by the executor, the clerk was allowed to refresh her memory as to specific services with a list she had prepared after reviewing the estate file and the answer filed by the executor, and there was no abuse of discretion by the judge's refusal to strike the clerk's testimony. Matthews v. Watkins, 91 N.C. App. 640, 373 S.E.2d 133 (1988), aff'd, 324 N.C. 541, 379 S.E.2d 857 (1989).

Where victim testified that when she wrote letter implicating defendant, it did not correctly reflect her knowledge of the events, and she did not know facts that she had forgotten by the time of the trial, the trial court should not have admitted the letter into evidence as a recorded recollection. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

Statement Made to Police over Two Hours And Forty Minutes After Crime. — A written statement, given by the victim to a police officer at the hospital two hours and forty-five minutes after the argument with the defendant, was a prior consistent statement that the trial court properly admitted for the limited purpose of corroborating her in-court testimony and was properly read aloud in court (with appropriate portions redacted as requested by defense counsel) although it was not identical to her in-court testimony. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Synopsis of Defendant's Statement to Police Was Not Recorded Recollection. — The trial court properly refused to admit a synopsis of defendant's statement given to police officer, as the synopsis did not did not fall within the recorded recollection hearsay exception under G.S. 8C-1, N.C. R. Evid. 803(5), because there was no showing that defendant had an insufficient recollection of events, and the trial court properly denied defendant's motion to dismiss pursuant to G.S. 15A-954, because the state adequately proved the elements of the crime of voluntary manslaughter. State v. Alston, 161 N.C. App. 367, 588 S.E.2d 530, 2003 N.C. App. LEXIS 2185 (2003), aff'd, 359 N.C. 61, 602 S.E.2d 674 (2004).

Statement of Defendant's Spouse to Police Properly Introduced As a Recorded Recollection Even Though Not Signed. — In defendant's trial on a charge of communicating threats, in violation of G.S. 14-277.1, the trial court properly admitted a statement that defendant's wife made to police shortly after defendant allegedly threatened to punch her, as a recorded recollection, even though the statement was not signed. State v. Love, 156 N.C. App. 309, 576 S.E.2d 709, 2003 N.C. App. LEXIS 114 (2003).

Cellmate's Statements. — Trial judge properly allowed written statements by cellmate to be read to jurors, where witness gave the statements within a reasonable time of having heard them and testified that they were accurate when given, even though he was unable at trial to recall what he knew and said. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

Tape Recording of Telephone Conversation. — Railroad was not entitled to military contractor immunity in a personal injury action filed by a brakeman who suffered a neck injury while sitting in a chair that did not meet the specification in the military contract, because recorded telephone conversations between a railroad official and an agency official, while admissible pursuant to G.S. 8C-1, N.C. R. Evid. 803, did not establish that the government assented to the use of the substandard chairs, and because the trial court erroneously prohibited the brakeman's expert from testifying about a conversation with a government official concerning the chairs, since the denial of approval by the official could have been allowed as an admission of a party opponent, G.S. 8C-1, N.C. R. Evid. 801(d). Stilwell v. Gen. Ry. Servs., 167 N.C. App. 291, 605 S.E.2d 500, 2004 N.C. App. LEXIS 2179 (2004), cert. denied, 359 N.C. 326, 611 S.E.2d 852 (2005).

VII. RECORDS OF REGULARLY CONDUCTED ACTIVITY.

Constitutionality. — The recorded recollection exception codified under this rule is firmly rooted and not a violation of defendant's constitutional right of confrontation. State v. Leggett, 135 N.C. App. 168, 519 S.E.2d 328 (1999).

"Other qualified witness" has been construed to mean a witness who is familiar with the business entries and the system under which they are made. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986).

Witness Qualified Despite Lack of Personal Knowledge About Method Used in Obtaining Data. — Defendant-employer's corporate safety specialist's knowledge of and relationship to air sample tests performed for the defendant-employer by a private laboratory were sufficient to qualify him as a "qualified other witness" who could introduce that data under subdivision (6) of this rule; even though the specialist was not personally knowledgeable about the scientific method used in obtaining the data, he was familiar with the system used by his company in obtaining tests and filing the results with his office. Barber v. Babcock & Wilcox Constr. Co., 98 N.C. App. 203, 390 S.E.2d 341 (1990), rev'd on other grounds on rehearing, 101 N.C. App. 564, 400 S.E.2d 735.

Document Prepared Under the Voting Rights Act. — Trial court erred in not treating a document prepared by an agency official to obtain federal preclearance under the Voting Rights Act as a public record under G.S. 8C-1-803(8) where it was prepared pursuant to a statutory duty. Blankenship v. Bartlett, 184 N.C. App. 327, 646 S.E.2d 584, 2007 N.C. App. LEXIS 1452 (2007), review granted, appeal dismissed, 668 S.E.2d 24 (N.C. 2008).

Results of Psychological Testing. — Even with the availability of the business exception to the hearsay rule, the results of a Minnesota Multiphasic Personality Inventory test were hearsay and incompetent, and were improperly admitted where the psychologist who administered the test was not present at the trial, there was no testimony at trial to establish that the test was properly administered, there was no testimony whether results of the analysis were temporary or permanent, the results were admitted for the truth of the matter asserted, and the trial court provided no limiting instruction with respect to the testimony. Barringer v. Mid

Pines Dev. Group, LLC, 152 N.C. App. 549, 568 S.E.2d 648, 2002 N.C. App. LEXIS 963 (2002).

Medical Records. — Subsection (6) explicitly permits use of a record custodian's testimony to establish a foundation for admission of the records; it does not require that this foundation be established by a "medical expert" as sought by defendant; thus, medical records were properly admitted. State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997).

In a sexual abuse prosecution, testimony from a public health department that defendant and the victim were both diagnosed with and treated for gonorrhea at approximately the same time, according to the department's records, was admissible under the hearsay exception for records of regularly conducted activity, in G.S. 8C-1, N.C. R. Evid. 803(6). State v. Wade, 155 N.C. App. 1, 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002).

Although medical records were admitted (in reliance on Rule 10.3, Twelfth Judicial District Juvenile Case Management Plan) into evidence without proper foundation, as required by G.S. 8C-1, N.C. R. Evid. 703, 803(6), in order to fit within the exceptions to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 801(c), 802, because — pursuant to G.S. 7B-804 — the rules of evidence in civil cases were to apply to child neglect cases, respondents, parents of the children, who were found neglected, had the burden of showing prejudice at the admission of the records; but they could not, given the other extensive direct testimony from medical experts upon which it was presumed the trial court had relied. In re T.M., 187 N.C. App. 694, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

Hospital Records. — Absent an allegation supported by proof that hospital routine was in some manner deviated from, the entries in a patient's permanent hospital record are inherently reliable and admissible under the business records exception upon authentication by the proponent. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986), cert. denied, 317 N.C. 711, 347 S.E.2d 448 (1986).

An affidavit from the director of medical records of the hospital stating that the records were being sent by certified mail in response to a subpoena, that the records were authentic copies, and that they were made in the course of business at or near the time of the acts recorded satisfied the requirements of G.S. 8C-1-803(6). Chamberlain v. Thames, 131 N.C. App. 705, 509 S.E.2d 443 (1998).

Trial court's limiting instructing to the jury to not consider as substantive evidence anything in the hospital records stating that the defendant was driving the vehicle that crashed rendered harmless any error in the admitting of any such hearsay evidence in the hospital records. State v. Smith, 157 N.C. App. 493, 581 S.E.2d 448, 2003 N.C. App. LEXIS 748 (2003).

Shopping Mall's Security's Testimony as to Handling of Worthless Checks. — Director of security at the mall where defendant passed the worthless checks to obtain gift certificates was porperly permitted to testify where the director testified only about the mall's handling of the checks, not the bank's process of the same. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

When Medical Records Must Be Made. — For purposes of the medical records exception, it is not necessary that the notes, records or memoranda be made at or near the time of the accident, but that they be made at or near the time of the treatment rendered to plaintiff. Chamberlain v. Thames, 131 N.C. App. 705, 509 S.E.2d 443 (1998).

Blood Test Results. — The results of defendant driver's blood test, even though hearsay, are nonetheless admissible if they fall within the business records exception to the hearsay rule. Business records are defined to include the records of hospitals. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986), cert. denied, 317 N.C. 711, 347 S.E.2d 448 (1986).

Authentication of blood test results was not undermined because the person who actually analyzed the blood in the laboratory was not present to testify as a witness. State v. Miller, 80 N.C. App. 425, 342 S.E.2d 553 (1986), cert. denied, 317 N.C. 711, 347 S.E.2d 448 (1986).

Highway Accident Reports. — Under subdivision (6) of this rule, highway accident reports may be admissible as a business records exception to the hearsay rule. To be admissible, such reports must be authenticated by their writer, prepared at or near the time of the acts reported, by or from information transmitted by a person with knowledge of the acts, and kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity, unless the circumstances surrounding the report indicate a lack of trustworthiness. Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198, cert. denied, 322 N.C. 610, 370 S.E.2d 257 (1988).

The trial court properly admitted sections of an authenticated police report, prepared in the regular course of business, containing accident information about a hit-and-run vehicle because the record indicated that the information about that car's positioning, etc. was obtained from witnesses with "first-hand knowledge" and because the defendant did not initially object to the report's contents. Nunnery v. Baucom, 135 N.C. App. 556, 521 S.E.2d 479, 1999 N.C. App. LEXIS 1176 (1999).

A federal firearms form which was filled out by defendant and the salesman who sold defendant the murder weapon was clearly admissible under subdivision (6) of this rule.

State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987), cert. denied, 486 U.S. 1061, 108 S. Ct. 2835, 100 L. Ed. 2d 935 (1988).

Records Prepared Ante Litem Motam. — Although a worksheet evidencing lab test results was produced after defendant's arrest, where none of the technicians performing the tests knew of the charges against defendant, the worksheet was prepared ante litem motam for purposes of admission under the business records exception. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

Fingerprint Records. — Because a fingerprint card created upon defendant's arrest, and contained in the Automated Fingerprint Identification System database, was a business record and therefore non-testimonial, the trial court did not violate defendant's Sixth Amendment right to confrontation by admitting into evidence law enforcement record cards allegedly bearing his fingerprints. State v. Windley, 173 N.C. App. 187, 617 S.E.2d 682, 2005 N.C. App. LEXIS 1927 (2005).

Pretrial Release Form. — Where pretrial release officer testified about where correspondence directed to the defendant was sent while defendant was on pretrial release, defendant asserted that because witness was not present when defendant filled in the form and was not the record keeper for the pretrial release office, the witness' testimony was inadmissible hearsay; however, witness' testimony was admissible under the exception to the hearsay rule permitting admission of business records; the witness testified that the record was kept in the ordinary course of the pretrial release office's business, and that while she was not the records custodian for the entire pretrial release office, she had custody and control over defendant's file. State v. Marshall, 94 N.C. App. 20, 380 S.E.2d 360, appeal dismissed and cert. denied, 325 N.C. 275, 384 S.E.2d 526 (1989).

Sales Ticket. — Sales ticket and testimony concerning the purchase of ammunition from store was admissible under the business records exception. State v. Ligon, 332 N.C. 224, 420 S.E.2d 136 (1992).

Reservation deposit receipts, photographic copies of checks written to condominium development corporation by potential purchasers as deposits, and receipts for public offering statements signed by the purchaser and sales person were admissible in trial for embezzlement pursuant to the business records exception to the hearsay rule. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Business Records Held Admissible. — Where business records involved evidence of plaintiff's damages as a result of whitened walnut furniture, where records were made in the usual course of plaintiff's business and were made contemporaneously with the occurrences of situations involving the damaged furniture, and where the evidence was identified through the testimony of a witness familiar with the business entries and the system under which they were made and who could have also authenticated the records, the trial court's ruling that this evidence was inadmissible was in error. Steelcase, Inc. v. Lilly Co., 93 N.C. App. 697, 379 S.E.2d 40, cert. denied, 325 N.C. 276, 384 S.E.2d 530 (1989).

Where a witness testified that records were public, kept in the ordinary course of business and prepared under his personal supervision at or near the time of the events depicted in the documents, the witness should have been permitted to testify about the records and their significance; however, since the records themselves were admitted into evidence, any error in refusing the witness permission to read from the records was not prejudicial to defendant. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Monthly rental report created based on personal knowledge and in the regular course of business qualified as a business record under the regularly conducted activity exception to the hearsay rule. State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004).

Results of a drug test performed on the mother and a letter from Alcohol and Drug Services were admissible under the business records exception to the hearsay rule because the social worker for the Department of Social Services was qualified to introduce the results of the drug test and the letter under the business records exception where the social worker, in the course of regularly conducted business activity, collected the mother's sample, ordered the drug test, and filed the results of the drug test with the social worker's office. In re S.D.J., — N.C. App. —, 665 S.E.2d 818, 2008 N.C. App. LEXIS 1617 (2008).

DNA Results Properly Admitted. — State investigative reports that gave the results of DNA tests incriminating defendant were properly admitted at his trial for murder and rape as business records under G.S. 8C-1, N.C. R. Evid. 803(6), even though the investigator who made the reports did not testify. His supervisor testified, and the reports were not testimonial but were neutral and were not prepared exclusively for trial. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

Sex Offender Registration. — Notice of Pending Registration and a Sex Offender Registration Worksheet were properly admitted under G.S. 8C-1-803(6). State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

Foundational Requirements for Business Records. — Trial court erred in considering affidavits at summary judgment because none of the affidavits addressed the foundational requirements for the admission of evidence to establish an employee's on-call pay rate through a business record under G.S. 8C-1, N.C. R. Evid. 803(6), and thus did not present personal knowledge setting forth facts admissible in evidence. Further, nothing in one affiant's affidavit established a foundation that a facsimile cover page was a record of regularly conducted activity, which would fall under the business records exception to the hearsay rule, because the affiant relied on a hand-written note on a cover page that purported to summarize the contents of missing memos. Gilreath v. N.C. HHS, 177 N.C. App. 499, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

Testimony About Matters Contained in Business Records. — Although a witness did not have personal knowledge of the matters contained in documents in plaintiff's file, the documents were admissible in evidence under the business records exception to the hearsay rule; thus, the witness's subsequent testimony about the matters contained in the business records was admissible. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Detention Center Incident Reports. — With regard to defendant's convictions on two counts of first-degree murder, the trial court did not violate defendant's right to confrontation with regard to allowing a captain to read from various detention center incident reports because the detention center incident reports were not testimonial in nature nor were the statements contained therein testimonial. The reports were more like business records, which by their nature are not testimonial, pursuant to G.S. 8C-1, N.C. R. Civ. P. 803(6). State v. Raines, 362 N.C. 1, 653 S.E.2d 126, 2007 N.C. LEXIS 1233 (2007).

VIII. PUBLIC RECORDS AND REPORTS.

Relation to Business Records Exception. — Where defendant argued that the language of G.S. 8C-1-803(8), regarding the hearsay exception for public records and reports, restricted the business records exception of G.S. 8C-1-803(6), the argument failed; G.S. 8C-1-803(8) was adopted without the intention of changing the common law rule allowing admissions of public records of purely ministerial observations, as the intended purpose of G.S. 8C-1-803(8) was to prevent prosecutors from attempting to prove their cases through police officers' reports of their observations during the investigation of crime. State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890, 2005 N.C. App. LEXIS 1424 (2005), appeal dismissed, 360 N.C. 73, 622 S.E.2d 625 (2005).

Reports, etc., from Investigation Pursuant to Authority Granted by Law. — Under subdivision (8)(C) of this rule, records, reports or statements, in any form, of public offices or agencies, setting forth factual findings, although hearsay, are admissible against the State in a criminal case if they result from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness. State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986).

Medical Examiner's Report. — Termination of a mother's parental rights to her children pursuant to G.S. 7B-1111(a)(8) was affirmed because the trial court's findings fully supported its determination that the mother committed voluntary manslaughter, as the evidence indicated that the child died from injuries arising from abuse, and the trial court properly admitted evidence pursuant to hearsay exceptions, as a medical examiner's report was admissible under G.S. 8C-1-803(8) as a public record, and a police officer was properly allowed to to testify as to statements by the mother's daughter that she saw her mother hit the deceased child on the head pursuant to the excited utterance exception. In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

Driver's License Records. — Instead of being error, receiving the civil part of the revocation order into evidence, to show that defendant's driver's license was revoked and he knew it, was authorized by the public records exception to the hearsay rule. State v. Woody, 102 N.C. App. 576, 402 S.E.2d 848 (1991).

Prison records. — Prison records on defendant's father were admissible under the public records exception to the hearsay rule. State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Highway accident reports may be admissible as "official" reports under subdivision (8) of this rule if properly authenticated. Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198, cert. denied, 322 N.C. 610, 370 S.E.2d 257 (1988).

Out-of-Court Exculpatory Statements by Defendant to Police Officer. — Subdivision (8) of this rule specifically excludes in criminal cases matters observed by police officers and other law enforcement personnel, and thus out-of-court exculpatory statements made by defendant to police officer were not admissible as public records and reports. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Evidence in a Police Report Properly Admitted. — Testimony of police officer concerning statements made by decedent at the scene of the accident, made via police officer's investigative report, was admissible pursuant to subdivision (6) as a record of regularly conducted activity and subdivision (8) as a public record and report. Keith v. Polier, 109 N.C. App. 94, 425 S.E.2d 723 (1993).

Evidence in a Police Report Properly Excluded. — Police report containing evidence that police officer assumed that another person was the driver and that defendant was only a passenger, was not admissible under the provisions of this section since the evidence had no probative value and was therefore properly excluded. State v. Williams, 90 N.C. App. 615, 369 S.E.2d 832, cert. denied, 323 N.C. 369, 373 S.E.2d 555 (1988).

S.B.I. Reports. — In trial for first-degree rape and first-degree kidnapping, the trial court committed prejudicial error in refusing to admit laboratory reports prepared by two forensic chemists with the State Bureau of Investigation, showing that a hair examination comparison on hairs taken from the victim's head and pubic area and hairs taken from the defendant's pubic area revealed that a pubic hair found in the pubic hair combings received from the victim after the rape was microscopically different from defendant's pubic hairs, and that the semen found was not attributable to defendant. State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986).

National Transportation Safety Board Report. — Where National Transportation Safety Board (NTSB) reports contained statements by pilots, witnesses and other non-officials who were not present to testify at trial, trial court properly exercised its discretion in excluding the hearsay portions thereof; to the extent portions were admissible independent of the report, those portions were admissible. Bolick v. Sunbird Airlines, 96 N.C. App. 443, 386 S.E.2d 76 (1989), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition denied as to additional issues, 326 N.C. 363, 389 S.E.2d 811 (1990).

Occupational Safety and Health Administration Report. — Trial court was correct to allow author of Occupational Safety and Health Administration (OSHA) report to introduce the report and discuss its findings, but not allow him to state the report's conclusion that the accident was caused by brake failure. Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994).

Undercover officer's written summaries of two drug transactions with defendant were inadmissible hearsay. State v. Harper, 96 N.C. App. 36, 384 S.E.2d 297 (1989).

Error Held Cured by Testimony. — Where plaintiff's attorney's question invited a police officer to express an opinion as to fault in an automobile accident, the question was clearly prohibited. The officer saved the situation, however, by limiting his response to repeating from his report what he had been told about what happened. Since the sum total of the officer's testimony was to disavow any assessment or attribution of fault, the error of the trial court in not sustaining plaintiff's objection was rendered nonprejudicial. Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991).

Report Not Within Exception. — Report did not fall within the subsection (8)(C) exception where the report was not the result of "authority granted by law" to conduct an investigation into the murder, there was no assurance that the report contained factual findings that would be admissible, the report was not prepared for the purpose of being introduced against the State in a criminal case, and the prosecution did not have an opportunity to cross-examine the persons interviewed for the report. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

DNA Reports Properly Admitted. — State investigative reports that gave the results of DNA tests incriminating defendant were properly admitted at his trial for murder and rape under G.S. 8C-1, N.C. R. Evid. 803(8), as public records, even though the investigator who made the records did not testify. His supervisor testified, the reports concerned routine matters and recorded only ministerial observations, and defendant's right of confrontation was not violated. State v. Forte, 360 N.C. 427, 629 S.E.2d 137, 2006 N.C. LEXIS 45 (2006).

IX. VITAL STATISTICS.

Opinions contained on death certificates are no longer barred by the hearsay rule. In order to be admissible, however, pursuant to subdivision (8) of this rule the opinion expressed must result from an investigation made pursuant to authority granted by law. Segrest v. Gillette, 331 N.C. 97, 414 S.E.2d 334 (1992), reh'g denied, 331 N.C. 97, 414 S.E.2d 334 (1992).

Exclusion of Statements on Death Certificate Held Proper. — In case brought by widow of insured to recover under life insurance policy, coroner's statement on death certificate that the gunshot wound which killed the insured was intentionally self-inflicted was not based on personal knowledge of the events which took place and could only be described as hearsay and conclusory. The admission of such a statement would thwart the fairness of the trial and in essence shift the burden of proof on the issue of the cause of death from defendant to plaintiff. Therefore, the exclusion of this statement on the death certificate was proper. Likewise, statements listing suicide as cause of death in medical examiner's report were properly excluded at trial. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

X. LEARNED TREATISES.

Failure to Challenge Reliability of Authority. — A party who fails to challenge the reliability of authority prima facie admissible under subdivision (18) must overcome a presumption of admissibility on appeal. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64 (1987).

Expert Need Not Rely on Treatise. — This rule does not require that the treatise at issue must have been relied on by the expert during his direct examination. Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991), aff'd in part, disc. rev. improvidently granted, 332 N.C. 1, 418 S.E.2d 648 (1992).

Learned Treatise Not Shown. — Article about which the state cross-examined doctor was not established as a learned treatise and thus was not admissible as substantive evidence. State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995).

XI. REPUTATION AS TO BOUNDARIES OR GENERAL HISTORY.

Customs Affecting Land. — Reputation as to customs affecting land is not excluded by the hearsay rule, and such evidence is not limited to the lifetime of the witness. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986); McFadyen v. Olive, 89 N.C. App. 545, 366 S.E.2d 544 (1988).

XII. REPUTATION AS TO CHARACTER.

Questioning by Prosecutor Upheld. — Prosecutor's cross-examination of two of defendant's character witnesses regarding a purported rumor that defendant had an affair with a certain 18-year-old girl and regarding defendant's wife's purported statement that she had "expected something was going on" between defendant and their daughter, were held proper. State v. Wall, 87 N.C. App. 621, 361 S.E.2d 900, cert. denied, 321 N.C. 479, 363 S.E.2d 72 (1987).

XIII. OTHER EXCEPTIONS.

Trials Prior to July 1, 1984. — The requirement that hearsay evidence not falling within a recognized exception to the hearsay rule and offered because of necessity and a reasonable probability of truthfulness may be resorted to only when more probative evidence on the point cannot be procured through reasonable efforts applies to hearsay evidence offered in a trial conducted prior to the effective date of the North Carolina Rules of Evidence. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986).

Subdivision (16) is identical to the federal rule and may be applied to any kind of document. Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991), aff'd in part, disc. rev. improvidently granted, 332 N.C. 1, 418 S.E.2d 648 (1992).

Evidence Offered Under Ancient Document Exception. — Evidence offered under this rule is subject to the general requirements applicable to hearsay exceptions, for example, firsthand knowledge by the declarant (which may appear from the statement or be inferable from circumstances) and probative value balanced against the danger of unfair prejudice. Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991), aff'd in part, disc. rev. improvidently granted, 332 N.C. 1, 418 S.E.2d 648 (1992).

Residual Hearsay Exception is Disfavored. — The residual hearsay exception in G.S. 8C-1, N.C. R. Evid. 803(24) is disfavored and should be invoked very rarely and only in exceptional circumstances; additionally, In addition, any evidence proffered under this exception must be carefully scrutinized. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Trial Court's Inquiry for Admission Under G.S. 8C-1, Rule 803(24) and G.S. 8C-1, Rule 804(b)(5). — Under Rules 803(24) and 804(b)(5), the trial judge is required to analyze hearsay's admissibility by undertaking a six-part inquiry; specifically, the trial court must determine the following: First, that proper notice was given of the intent to offer hearsay evidence under G.S. 8C-1, Rules 803(24) or 804(b)(5); second, that the hearsay evidence was not specifically covered by any of the other hearsay exceptions; third, that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; fourth, that the evidence is material to the case at bar; fifth, that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and sixth, that admission of the evidence will best serve the interests of justice. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

While trial court erred by not making specific findings for each step in the six-part inquiry into the admissibility of hearsay evidence, the error did not prejudice defendant because the evidence would still have been excluded. While the six-part inquiry is useful to appellate review of the admission of hearsay under G.S. 8C-1, Rule 803(24) or under this rule, its utility is diminished when an appellate court reviews the exclusion of hearsay; in other words, if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary. State v. Harris, 139 N.C. App. 153, 532 S.E.2d 850, 2000 N.C. App. LEXIS 809 (2000).

Requirements for a hearsay statement to be admissible under G.S. 8C-1, Rule 803(24) where the availability of the declarant is immaterial are: (1) the proponent must notify his adversary in writing of his intent to introduce the statement; (2) the statement must not be admissible under any of the listed hearsay exceptions; (3) the statement must possess circumstantial guarantees of trustworthiness equivalent to those of the listed exceptions; (4) the statement must be offered as evidence of a material fact; (5) the statement must be more probative on the point for which it is offered than other evidence which the proponent can produce through reasonable efforts; and (6) the general purposes of the rules of evidence and the interests of justice must best be served by admission of the statement into evidence. For a hearsay statement to be admissible under G.S. 8C-1, Rule 804(b)(5), where the availability of the declarant is material, the same six requirements must be met after the proponent first proves that the declarant is unavailable. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

The six-part inquiry employed to evaluate hearsay is very useful when an appellate court reviews the admission of hearsay under subdivision (24) of this rule or G.S. 8C-1, Rule 804(b)(5), but its utility is diminished when the court reviews the exclusion of hearsay; if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary. State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233, 2001 N.C. App. LEXIS 222 (2001).

Victim's statements to his friends that he had a confrontation with defendant and was afraid of defendant were properly admissible under G.S. 8C-1, N.C. R. Evid. 803(24) and G.S. 8C-1, N.C. R. Evid. 804(b)(5) because the victim (1) had personal knowledge of the events the statements described, and the statements were made within two hours of the first altercation between defendant and the victim; (2) had no reason to lie to his friends, and there was no indication he would have benefitted from altering the story; (3) never recanted the statements and he died shortly after making them; and (4) was unavailable to testify, having died, so the evidence established that the statements possessed "equivalent circumstantial guarantees of trustworthiness." State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Section 8C-1, Rule 804(b)(5) Compared. — Section 8C-1, Rule 804(b)(5) is a verbatim copy of subdivision (24) of this rule, except that G.S. 8C-1, Rule 804(b)(5) also requires that the declarant be unavailable before the hearsay may be admitted and subdivision (24) does not. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

The hearsay exception under G.S. 8C-1, N.C. R. Evid. 803(24) is almost identical to the exception in G.S. 8C-1, N.C. R. Evid. 804(b)(5), except that a party may invoke G.S. 8C-1, N.C. R. Evid. 803(24) even if a declarant is available. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Evidence proffered for admission pursuant to subdivision (24) of this rule must be carefully scrutinized by the trial judge within the framework of the rule's requirements. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Because of the residual "catchall" nature of the hearsay exception in subdivision (24) of this rule, it is potentially subject to abuse in the face of unfettered judicial discretion. Accordingly, evidence proffered for admission pursuant to subdivision (24) must be carefully scrutinized by the trial court within the framework of the rule's requirements. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Court Must Determine Trustworthiness. — Before statements in a letter purportedly written by unavailable declarant could be received into evidence under either this rule or G.S. 8C-1, Rule 804, the trial court had to determine, inter alia, that the surrounding circumstances indicated that the statements were trustworthy. State v. Agubata, 94 N.C. App. 710, 381 S.E.2d 191 (1989).

The trial judge must engage in the inquiry required by the rule prior to admitting or denying proffered hearsay evidence pursuant to subdivision (24) of this rule. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

For case setting out comprehensive requirements for admission of evidence under subdivision (24) of this rule, see State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), made applicable only to cases the trial of which begins after the certification date of the opinion.

Racial Correlation Between Defendants and Witnesses. —Any judicial suggestion that racial correlation between defendants and witnesses constitutes an important factor in determining the reliability of a witness' testimony is at best inappropriate. State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

Reliance by the court, however minimal, upon the racial identity of defendant and the witness in admitting the latter's hearsay statement into evidence constituted error. State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

Availability as Crucial Consideration. — The availability of a witness to testify at trial is a crucial consideration under the residual hearsay exceptions, subdivision (24) of this rule and G.S. 8C-1, Rule 804 (b)(5). The "availability" of the declarant to testify at trial unavoidably enters into the determination of admissibility of a "hearsay" witness' testimony as to out-of-court statements made by the declarant pursuant to either residual hearsay exception. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

The availability of the witness to testify at trial is a crucial consideration under the residual hearsay exceptions, subdivision (24) of this rule and G.S. 8C-1, Rule 804 (b)(5), because usually the live testimony of the declarant will be the more probative evidence on the point for which it is offered. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

Although G.S. 8C-1, N.C. R. Evid. 803(24) is an exception to the hearsay rule where availability of a witness is immaterial, the availability of a witness to testify at trial is a crucial consideration under both of the residual hearsay exceptions found at G.S. 8C-1, N.C. R. Evid. 803(24) and 804(b)(5). Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

"Guarantees of Trustworthiness." — In determining whether a statement has the necessary "guarantees of trustworthiness," evidence that the declarant later recanted the statement is relevant. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

In determining whether a statement proffered under a "catchall" exception to the hearsay rule possesses circumstantial guarantees of trustworthiness, certain factors are significant in guiding trial courts; among these factors are (1) assurance of personal knowledge of the declarant of the underlying event; (2) "the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the statement"; and (4) the reasons, within the meaning of G.S. 8C-1, Rule 804(a), for the declarant's unavailability. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Lack of Circumstances Indicating Statements' Trustworthiness. — Where the only evidence that the purported declarant existed was defendant's statements to that effect, the declarant was not produced at trial and no one other than defendant was produced to testify that the declarant existed or lived at defendants' residence where drugs were found, letters allegedly written by the declarant purporting to admit declarant's ownership of the contraband were properly excluded. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Trustworthiness of Child Victim's Out-of-Court Statements in Sexual Abuse Case. — In defendant's trial for first-degree rape of a five-year-old, the victim's out-of-court statements to social worker contained sufficient guarantees of trustworthiness for admission under subdivision (24) of this rule. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989), applying State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Absent a history of fabrication in a child, there is no authority for the proposition that to be motivated to tell the truth a five-year-old must be subject to punishment. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

There was no reason to question the truthfulness of a five-year-old simply because she did not initiate conversations with a social worker and doctor to report an incident of child abuse; in cases of sexual abuse, it is often necessary to ask questions designed to help the child describe what happened. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

In a rape prosecution, child victim's hearsay statements to police officer and counselor were sufficiently trustworthy to be admitted pursuant to residual hearsay exception of subdivision (24) of this rule despite trial judge's lone statement, found in the transcript of the in camera hearing, that the child "did not seem to understand the consequences of not telling the truth." State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415, appeal dismissed, 332 N.C. 669, 424 S.E.2d 413 (1992).

Expert's testimony regarding defendant's sexual abuse of son was precluded from admission under the residual exception to hearsay where the State declared that "The testimony of [the expert] comes in under the medical diagnosis" and the trial court failed to make any findings of fact and conclusions of law supporting admissibility as residual hearsay; however, its admission was not reversible error because defendant not only did not object to the admission of the testimony at trial, but also stated he thought the testimony as to the examination of the child was admissible, and he failed to show that a different result would have been reached by the jury without the testimony. State v. Waddell, 351 N.C. 413, 527 S.E.2d 644, 2000 N.C. LEXIS 235 (2000).

Three boys' statements possessed equivalent guarantees of trustworthiness for purposes of the residual hearsay exception as, inter alia: (1) the discussion of sexual matters was initiated spontaneously by the children; (2) the adults to whom the statements were made were credible witnesses; (3) the nature of the statements tended to show that they were trustworthy as they were very explicit sexual statements that would not ordinarily be stated by boys of their age unless the statements were true; and (4) the trial court had an opportunity to see the boys on the witness stand at the motion hearing and it appeared obvious that their presence on the witness stand in front of defendant was traumatic for them. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Findings and Conclusions Required for Admission of Hearsay Under Subdivision (24). — Before allowing the admission of hearsay evidence to be presented under subdivision (24) of this rule, the trial judge must enter appropriate statements, rationale, or findings of fact and conclusions of law in the record to support his discretionary decision that such evidence is admissible under that rule. If the record does not comply with these requirements and it is clear that the evidence was admitted pursuant to subdivision (24), its admission must be held to be error. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Notice of Intent to Proffer Statement Under Subdivision (24). — It is the duty of the proponent of a proffered hearsay statement to alert the trial judge that the statement is being offered as a hearsay exception under subdivision (24) of this rule. Should the trial judge determine that notice of the intent to proffer hearsay testimony under subdivision (24) was not given, was inadequate, or was untimely provided, his inquiry must cease and a proffered hearsay statement must be denied admission under subdivision (24). State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

A hearsay statement may not be admitted under subdivision (24) of this rule unless notice (a) is in writing; and (b) is provided to the adverse party sufficiently in advance of offering it to allow him to prepare to meet it; and (c) contains (1) a statement of the proponent's intention to offer the hearsay testimony, (2) the "particulars" of the hearsay testimony, and (3) the name and address of the declarant. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Notice of Intent to Use Hearsay Statements at Trial Held Sufficient. — Although the address of the declarant was not provided as required by State v. Smith, 315 N.C. at 92, 337 S.E.2d at 844 (1985), defense counsel's letter informed the prosecutor that the declarant's address was unknown; therefore, where the prosecutor did not request additional information about the purported declarant's letter or a copy of the letter prior to trial, the notice provided by defense counsel, a full month prior to trial, was sufficient to provide the prosecution with a fair opportunity to prepare to meet the hearsay statements contained in the letter. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Notice of Intent to Use Hearsay at Trial Insufficient. — Witness's hearsay statement identifying the perpetrator was not admissible under G.S. 8C-1, Rule 803 because the State did not provide sufficient written notice to defendant of its intent to use the statement prior to trial. State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

Admitting Evidence Without Conforming to § 8C-1, Rule 804(b)(5) Held Reversible Error. — The trial court erred by admitting into evidence the statement given by the child witness in a sexual offense case to the investigating officer without making the specific findings of fact and conclusions of law pursuant to G.S. 8C-1, Rule 804(b)(5), as required by State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986); State v. Benefield, 91 N.C. App. 228, 371 S.E.2d 306, cert. denied, 323 N.C. 367, 323 N.C. 478, 373 S.E.2d 868, 373 S.E.2d 868 (1988).

Failure to Determine Competency of Child Victim. — In a prosecution charging defendant with first-degree rape, incest, and taking indecent liberties with his three-year-old daughter, the trial judge's adoption of counsel's stipulation in concluding that the child victim was incompetent to testify, where he never personally examined or observed the child's demeanor in responding to questions during a voir dire examination, was reversible error, where highly prejudicial testimony was erroneously admitted pursuant to subdivision (24) of this rule and G.S. 8C-1, Rule 804 (b)(5) on the basis of this improperly based conclusion. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Admission of Child Victim's Statements Where Child Adjudged Incompetent as Witness. — When considering admission of a child victim's statement to a social worker when the child is found to be incompetent as a witness, the confrontation clause and subdivision (24) of this rule require a case-by-case examination of the facts of each case. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

State of Mind Exception. — Sister's conversations with victim following attack by defendant were within the state of mind exception to the hearsay rule. State v. Exum, 128 N.C. App. 647, 497 S.E.2d 98 (1998).

Evidence Admissible to Rebut Testimony And Indicate State of Mind. — The decedent/wife's statements that her husband was jealous and had repeatedly threatened to kill her were admissible although arguably no more than recitations of fact where the facts that she recited tended to show her state of mind as to her marriage, indicated her relationship with the defendant and, therefore, were relevant under Rule 403, and rebutted testimony by the defendant that they had a good marriage. State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000).

Evidence Held Inadmissible. — Trial judge's ruling which in effect allowed testimony of Rape Task Force Volunteer to be considered as substantive evidence in prosecution for rape and first-degree sexual offense involving four or five year old victim constituted reversible error where the record on appeal showed no support for admission of the testimony under subdivision (24) of this rule, and the testimony as to commission of first-degree sexual offense was in direct conflict with the testimony of the victim. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Defendant's contention that the trial court erred in not allowing him to testify that witness in the car during the killing of a State Trooper said "You don't remember killing a State Trooper?" was without merit as defendant's testimony was hearsay and not within any of the exceptions to the rule prohibiting hearsay. See State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989).

Where there was no express or implied statement of fact that a "sexual act" occurred, the testimony of witnesses concerning victim's prior statements to the contrary was inadmissible for any purpose. State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990).

Trial court properly excluded hearsay testimony that the defendant sought to admit under the residual exception of G.S. 8C-1, N.C. R. Evid. 803(24) because the court found that the defendant did not give proper notice of his intention to offer hearsay testimony, and that even if the defendant had given proper notice, the testimony of the witnesses concerning the decedent's statements lacked sufficient guarantees of trustworthiness. State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003).

Evidence Held Admissible. — The hearsay statement of an unavailable declarant was properly admitted where: (1) the statement was made while the declarant was in a law enforcement vehicle; (2) the declarant had first-hand knowledge of the event; (3) the declarant had no motive to lie, as the statement was adverse to the interests of a relative, and the declarant was not trying to evade personal responsibility for the crime; (4) there was no indication the statement was recanted; and (5) the declarant was unavailable for the trial, despite the State's diligent efforts to locate the declarant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

Victim's statements accompanied by pictures showing her with a black eye, reflected the victim's fear of her uncertain future and thus, there was a sufficient relation to both the victim's state of mind and the status of her relationship with defendant to be admissible under the state of mind hearsay exception. State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324, 2004 N.C. App. LEXIS 116 (2004), cert. denied, 358 N.C. 237, — S.E.2d — (2004).

As two children were available to testify, although neither the State nor defendant called them to testify, defendant waived her right to confront the children; additionally, none of the challenged statements constituted formal statements to the police or other government officers because the statements were not procured by a government officer but by the children's foster parents, and although the statements were conveyed both to the department of social services and the police, the statements were not formal testimonial statements. State v. Brigman, 171 N.C. App. 305, 615 S.E.2d 21, 2005 N.C. App. LEXIS 1264 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Children's statements to their foster parents were properly admitted under the residual hearsay exception as, inter alia: (1) the children were unavailable as they had no memory of the subject matter; (2) the statements were evidence of material facts; (3) the statements were not covered by any of the hearsay exceptions listed in G.S. 8C-1-804(b)(1)-(4) and G.S. 8C-1-803(1)-(23); and (4) the statements possessed equivalent circumstantial guarantees of trustworthiness. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Exclusion Held Proper. — The trial court incorrectly found that defendant failed to give the proper written notice to the prosecutor of his intent to offer hearsay evidence under G.S. 8C-1, Rules 803(24) and 804(b)(5); however, the trial court's findings that the defendant did not satisfy the requirement that "equivalent circumstantial guarantees of trustworthiness" be shown and the finding that the interests of justice would not be served by the letters' admission into evidence were proper; therefore, the trial court's exclusion of the letters was proper. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Rule 804. Hearsay exceptions; declarant unavailable.

(a) *Definition of unavailability.* — "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. — A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement Against Interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. — (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the

proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 804 except for the last sentence of Exception (3), which is discussed below.

Subdivision (a) defines unavailability. The Advisory Committee's Note states:

"The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. *** However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform. ***

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *** A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. ***

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as grounds. ***

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. ***

If the conditions otherwise constituting unavailability result from procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Under North Carolina law the unavailability requirement varies with respect to particular hearsay requirements.

Under the hearsay exception for former testimony, North Carolina courts recognize grounds (1), (4), and (5). *Brandis on North Carolina Evidence* § 145 (1982). Although grounds (2) and (3) are not explicitly accepted or rejected by existing North Carolina precedents, Professor Brandis asserts that they should be accepted when occasion arises. *Id.* at 575.

Under the hearsay exception for dying declarations, G.S. 8-51.1 requires that the declarant be dead.

Under the exception for statements against interest, apparently any legitimate reason for unavailability is sufficient. *Brandis on North Carolina Evidence* § 147, at 589, n. 80 (1982).

With respect to statements of family history, it was said in the older cases that the declarant must be dead. However, Professor Brandis asserts that any legitimate reason for unavailability should be acceptable. *Id.* at 597.

The Advisory Committee's Note states:

"If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Exception (1) concerns former testimony.

In North Carolina, the "testimony must have been given at a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which the testimony is directed at the current trial." *Brandis on North Carolina Evidence* § 145, at 575-76 (1982) (footnotes omitted). The Advisory Committee's Note states:

"The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to 'substantial' identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.*"

Also, the Advisory Committee's Note states:

"Under the exception, the testimony may be offered (1) against the party *against* whom it was previously offered or (2) against the party *by* whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one *against* whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one *by* whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. *** A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. *** Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice."

North Carolina practice currently permits testimony against the party *against* whom it was offered. *Brandis on North Carolina Evidence* § 145, at 577 (1982). There are no North Carolina cases concerning testimony offered against the party *by* whom it was previously offered.

With respect to identity of the parties, the Advisory Committee's Note states:

"As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. *** The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered."

North Carolina practice apparently departs from the privity requirement to the extent of allowing former testimony "if the party against whom it was admitted had not merely an opportunity for cross-examination but the same motive for cross-examination as the party against whom it is offered." *Brandis on North Carolina Evidence* § 145, at 577 (1982). Exception (1) permits former testimony in civil cases if a predecessor in interest had an opportunity and similar motive to develop the testimony.

Under certain circumstances, Exception (1) permits a broader use of depositions than does N.C. Civ. Pro. Rule 32. See also G.S. 8-83.

Exception (2) differs from Fed. R. Evid. 804(b)(2) in that it omits the phrase "In a prosecution for homicide or in a civil action or proceeding".

The exception is similar to G.S. 8-51.1. Unlike Fed. R. Evid. 804(b)(2) which limits admissibility of dying declarations in criminal cases to homicide prosecution, Exception (2) and G.S. 8-51.1 permit dying declarations to be admitted in all types of criminal and civil actions and proceedings. Under G.S. 8-51.1 the declarant must have died from the causes or circumstances on which he commented. Upon adoption of Exception (2), G.S. 8-51.1 should be repealed.

Exception (3) concerns statements against interest and differs from Fed. R. Evid. 804(b)(3) as noted below. The Advisory Committee's Note states:

"The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *** If the statement is that of a party, offered by his opponent, it comes in as an admission, *** and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents."

North Carolina cases have recognized declarations against pecuniary or proprietary interest as an exception to the hearsay rule. See *Brandis on North Carolina Evidence* § 147 (1982). In *State v. Haywood,* 295 N.C. 709, the North Carolina Supreme Court abandoned the Court's previous approach that excluded from the exception declarations against penal interest.

The last sentence of Fed. R. Evid. 804(b)(3) provides that: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Requiring corroborating circumstances to indicate clearly the trustworthiness of statements exculpating the accused while imposing no such requirement with respect to statements implicating the accused raises serious constitutional questions. Accordingly, Exception (3) differs from Fed. R. Evid. 804(b) (3) in that it imposes the requirement of corroborating circumstances with respect to both exculpating and implicating statements.

In *Haywood,* the Court listed several very restrictive requirements that a declaration against penal interest must meet. The exception should not be construed to add requirements in addition to the requirement that "corroborating circumstances clearly indicate the trustworthiness of the statement." As the Advisory Committee's Note states: "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Declarations against penal interests are admissible in both criminal and civil cases. However, the requirement of corroborating circumstances applies only in criminal cases.

The exception does not purport to deal with questions of the right to confrontation.

Exception (4) concerns statements of personal or family history.

The common law requirement in North Carolina that a declaration in this area must have been made before the beginning of the controversy was dropped in Fed. R. Evid. 804(b) (3), which is identical to this exception, as bearing more appropriately on weight than admissibility. See *Brandis on North Carolina Evidence* § 149 (1982); Advisory Committee's Note. Unlike North Carolina law that requires that the declarant be dead, Rule 804 merely requires that the declarant be unavailable. See *Brandis, supra.*

The first part of the rule specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. Advisory Committee's Note.

The second part of the rule deals with declarations concerning the history of another person. North Carolina common law provides that the declarant is qualified if related by blood or marriage. *Brandis, supra.* In addition, and contrary to the common law in North Carolina, the declarant qualifies under the exception by virtue of intimate association with the family.

The Advisory Committee's Note states that: "The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal." There are no North Carolina cases on this point.

Exception (5) is identical to Rule 803(24) and differs from the federal rule. See commentary to Rule 803(24).

Legal Periodicals. — For note, "State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases," see 64 N.C.L. Rev. 1352 (1986).

For article, "Guilty by Intuition: The Insufficiency of Prior Inconsistent Statements To Convict," see 65 N.C.L. Rev. 1 (1986).

For article, "Not So 'Firmly Rooted': Exceptions to the Confrontation Clause," see 66 N.C.L. Rev. 1 (1987).

For note, "North Carolina Relaxes Foundation Requirements for Mitigating Evidence in Capital Sentencing Hearings," see 66 N.C.L. Rev. 1221 (1988).

For note, "Criminal Procedure — Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation — Coy v. Iowa," see 11 Campbell L. Rev. 381 (1989).

For note, "Constitutional Admissibility of Hearsay Under the Confrontation Clause: Reliability Requirement for Hearsay Admitted Under a Non-'Firmly Rooted' Exception," see 14 Campbell L. Rev. 347 (1993).

For article, "Confrontation and Hearsay: New Wine in An Old Bottle," 16 Campbell L. Rev. 1 (1994).

For article, "Issues Once Moot: The Other Evidentiary Objections to the Admission of Exculpatory Polygraph Examinations," see 32 Wake Forest L. Rev. 1045 (1997).

For note, "State v. Alston: North Carolina Continues to Broaden its Mind to Admissibility of a Victim's Out-of-Court Statements Under the Rule 803(3) Hearsay Exception in Criminal Cases," see 32 Wake Forest L. Rev. 1327 (1997).

For note, "Not-So-Secrets? The State of the Attorney-Client Privilege in North Carolina in the Wake of In re Investigation of Death of Eric Miller and Crawford v. Washington," see 83 N.C. L. Rev. 1591 (2005).

For note, "Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina," see 83 N.C. L. Rev. 1613 (2005).

CASE NOTES

I. General Consideration.
II. Unavailability as a Witness.
III. Former Testimony.
IV. Belief of Impending Death.
V. Statement against Interest.
VI. Other Exceptions.

I. GENERAL CONSIDERATION.

Every writing sought to be admitted must be properly authenticated, and must satisfy the requirements of the "best evidence rule," G.S. 8C-1, Rule 1002, or one of its exceptions, set forth in G.S. 8C-1, Rule 1003, et seq. Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by Rule 803 and this rule. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Written Notice as Condition of Admission. — Admission of a hearsay statement when the declarant is unavailable is conditioned upon the proponent's written notice of his intention to offer the statement to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to meet the statement. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Defense counsel failed to give the prosecutor timely, written notice of her intent to use witness' testimony, a prerequisite to admission of evidence under subsection (b)(5). State v. Hester, 343 N.C. 266, 470 S.E.2d 25 (1996).

Notice Held Sufficient. — Defendant received adequate notice of the State's intention to offer hearsay evidence where, almost two months before trial, in compliance with discovery request, the State disclosed the substance of witness's statements, and defendant conceded that he knew the State intended to call witness and, in general, the expected content of his testimony. State v. Bullock, 95 N.C. App. 524, 383 S.E.2d 431 (1989).

State provided timely written notice of intent to offer statements of unavailable witness at trial where: (1) it filed written notice of its intent about one month prior to the pretrial hearing; (2) it attached to that notice a copy of one of the statements as well as an officer's notes concerning the other statement (there is relevancy in a defendant's receipt of the declarant's statement well in advance of trial); and (3) it filed an amended notice providing defendant with a telephone number for the witness and indicating that the witness was living at an unknown address in India. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Admissibility Upheld Despite Lack of Written Notice. — Where defendants did not receive written notice of prosecution's intention to offer the written statement of the decedent until the morning of the trial, but were given a continuance to prepare to meet the prosecution's proffer of the written statement, and the trustworthiness of the statement was well litigated by cross-examination of the person who took the statement and by approximately 50 pages of direct examination of the attending physician in the presence of the jury and with access to all medical records requested by defendants, it was not error for the court to admit the statement. State v. Howard, 78 N.C. App. 262, 337 S.E.2d 598 (1985), appeal dismissed, 316 N.C. 198, 341 S.E.2d 581 (1986).

Written Notice on Day of Trial. — Written notice of State's intent to offer victim's statements, given to defendant on the day defendant's trial began, when considered in light of prior oral notice, provided defendant a fair opportunity to prepare to meet the statements and to contest their use, and the trial judge did not err by admitting them into evidence. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

This Section Contains Requirements for Unavailability, Not Competency. — The trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses because the focus of the voir dire was incorrectly directed to the effect the children's testifying would have on their mental health, rather than upon the ability of the children to understand their obligation to tell the truth and to relate events which they may have seen, heard or experienced; rather than determining whether all or any of them were competent to testify under G.S. 8C-1, Rule 601, the trial court disqualified them as being "unavailable," apparently relying upon the definition of "unavailability" contained in this section, but the question of a potential witness' unavailability becomes relevant only with respect to the admissibility of his hearsay declarations. In re Faircloth, 137 N.C. App. 311, 527 S.E.2d 679, 2000 N.C. App. LEXIS 327 (2000).

Right of Confrontation. — Admission of the victim's statement to a police detective did not violate defendant's confrontation rights; the admission of the evidence under an exception to the hearsay rule trumped the right of confrontation. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

Error Was Harmless Beyond a Reasonable Doubt. — Defendant was not entitled to a new trial because the State demonstrated that the error of admitting prejudicial testimony of a co-conspirator was harmless beyond a reasonable doubt since the evidence of defendant's participation in the crimes was overwhelming. State v. Harris, 136 N.C. App. 611, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Findings Held Insufficient. — The court failed to make the requisite findings and conclusions necessary in order to admit a letter from the plaintiffs' doctor to plaintiffs' counsel in which the doctor opined that the minor who was injured in a car accident had suffered brain damage; in light of the conflicting testimony by experts at trial and because the opinion of the minor's treating medical doctor for more than two years after the accident carried significant weight, the error was prejudicial, entitling defendants to a new trial. Fox-Kirk v. Hannon, 142 N.C. App. 267, 542 S.E.2d 346, 2001 N.C. App. LEXIS 92 (2001), review denied, 353 N.C. 725, 551 S.E.2d 437 (2001), review dismissed, 353 N.C. 725, 551 S.E.2d 437 (2001).

Defendant waived his right to appellate review of the admissibility of hearsay evidence under G.S. 8C-1, Rule 803(3) where he only argued erroneous admission under subsection (b)(5) of this rule. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Not Admissible Where no Findings Made by Trial Court. — Although a victim's statement was not properly admissible under the present sense impression exception to the hearsay rule, pursuant to G.S. 8C-1, N.C. R. Evid. 803(1), where it was made approximately seven hours after she was shot by defendant's co-conspirators and after the victim had undergone general anesthesia and surgery, and there were no requisite findings made by the trial court to allow it to be admitted under G.S. 8C-1, N.C.R. Evid. 804(b)(5), the admission was deemed harmless error; it was noted that the same information contained in the victim's written statement had been properly introduced into evidence by other witnesses and through other means. State v. Wiggins, 159 N.C. App. 252, 584 S.E.2d 303, 2003 N.C. App. LEXIS 1502 (2003), cert. denied, 541 U.S. 910, 124 S. Ct. 1617, 158 L. Ed. 2d 256 (2004).

Applied in State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986); State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989); State v. Harrell, 96 N.C. App. 426, 386 S.E.2d 103 (1989); State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990); State v. Whitted, 99 N.C. App. 502, 393 S.E.2d 590 (1990); State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991); Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992); State v. Reeb, 331 N.C. 159, 415 S.E.2d 362 (1992); State v. Harris, 338 N.C. 211, 449 S.E.2d 462 (1994); State v. Brown, 339 N.C. 426, 451 S.E.2d 181 (1994); State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995); State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997); Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998); In re Rhyne, 154 N.C. App. 477, 571 S.E.2d 879, 2002 N.C. App. LEXIS 1454 (2002).

Cited in In re Helms, 77 N.C. App. 617, 335 S.E.2d 917 (1985); State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Roberts, 82 N.C. App. 733, 348 S.E.2d 151 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987); State v. Kerley, 87 N.C. App. 240, 360 S.E.2d 464 (1987); State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989); State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); Braswell v. Braswell, 98 N.C. App. 231, 390 S.E.2d 752 (1990); State v. Sherrill, 99 N.C. App. 540, 393 S.E.2d 352 (1990); State v. Ali, 329 N.C. 394, 407 S.E.2d 183 (1991); State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992); State v. Holden, 106 N.C. App. 244, 416 S.E.2d 415 (1992); State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992); State v. Jolly, 332 N.C. 351, 420 S.E.2d 661 (1992); State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Swindler, 339 N.C. 469, 450 S.E.2d 907 (1994); State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); State v. Ransome, 342 N.C. 847, 467 S.E.2d 404 (1996); State v. Sharpe, 344 N.C. 190, 473 S.E.2d 3 (1996); State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996); State v. Taylor, 344 N.C. 31, 473 S.E.2d 596 (1996); State v. Norwood, 344 N.C. 511, 476 S.E.2d 349 (1996); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Jordan, 130 N.C. App. 236, 502 S.E.2d 679 (1998); State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998); State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998); State v. Childers, 131 N.C. App. 465, 508 S.E.2d 323 (1998); State v. Small, 131 N.C. App. 488, 508 S.E.2d 799 (1998); State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (1999); State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000); State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797, 2000 N.C. LEXIS 615 (2000); State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000); State v. Anthony, 354 N.C. 372, 555 S.E.2d 557, 2001 N.C. LEXIS 1222 (2001); State v. King, 353 N.C. 457, 546 S.E.2d 570, 2001 N.C. LEXIS 527 (2001); State v. Allen, 353 N.C. 511, 546 S.E.2d 372, 2001 N.C. LEXIS 528 (2001); Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002); Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002); Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

II. UNAVAILABILITY AS A WITNESS.

Trial Courts' Inquiry for Admission Under G.S. 8C-1, Rule 803(24) and G.S. 8C-1, Rule 804(b)(5). — Requirements for a hearsay statement to be admissible under G.S. 8C-1, Rule 803(24) where the availability of the declarant is immaterial are: (1) the proponent must notify his adversary in writing of his intent to introduce the statement; (2) the statement must not be admissible under any of the listed hearsay exceptions; (3) the statement must possess circumstantial guarantees of trustworthiness equivalent to those of the listed exceptions; (4) the statement must be offered as evidence of a material fact; (5) the statement must be more probative on the point for which it is offered than other evidence which the proponent can produce through reasonable efforts; and (6) the general purposes of the rules of evidence and the interests of justice must best be served by admission of the statement into evidence. For a hearsay statement to be admissible under G.S. 8C-1, Rule 804(b)(5), where the availability of the declarant is material, the same six requirements must be met after the proponent first proves that the declarant is unavailable. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

Determination of Trustworthiness. — Factors to be considered in determining whether hearsay statements admitted under this rule possess sufficient indicia of trustworthiness are: (1) Assurances of the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant recanted the statements; and (4) the practical availability of the declarant at trial for meaningful cross-examination. State v. Stutts, 105 N.C. App. 557, 414 S.E.2d 61 (1992); State v. Chapman, 342 N.C. 330, 464 S.E.2d 661 (1995), cert. denied, 518 U.S. 1023, 116 S. Ct. 2560, 135 L. Ed. 2d 1077 (1996).

As to the admission of hearsay testimony under G.S. 8C-1, Rule 804(b)(5), the trial court must first find that the declarant is unavailable, and second, the trial court must conduct a six-prong inquiry to determine admissibility; the trial court should consider the following factors when analyzing the question of the third prong, trustworthiness: (1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth, (3) whether the declarant recanted, and (4) the practical availability of the declarant at trial for meaningful cross-examination. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Determination of Trustworthiness Necessary. — Before statements in a letter purportedly written by unavailable declarant could be received into evidence under either G.S. 8C-1, Rule 803 or this rule, the trial court had to determine, inter alia, that the surrounding circumstances indicated that the statements were trustworthy. State v. Agubata, 94 N.C. App. 710, 381 S.E.2d 191 (1989).

Trustworthiness Shown. — Declarant's identification possessed sufficient guarantees of trustworthiness to be admissible under G.S. 8C-1, N.C. R. Evid. 804 where the declarant was an eyewitness to the incident and had personal knowledge of the event, she was motivated to speak the truth in order to aid in the apprehension of her daughter's killer, and she never recanted her identification of the individual who shot her daughter. State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Three boys' statements possessed equivalent guarantees of trustworthiness for purposes of the residual hearsay exception as, inter alia: (1) the discussion of sexual matters was initiated spontaneously by the children; (2) the adults to whom the statements were made were credible witnesses; (3) the nature of the statements tended to show that they were trustworthy as they were very explicit sexual statements that would not ordinarily be stated by boys of their age unless the statements were true; and (4) the trial court had an opportunity to see the boys on the witness stand at the motion hearing and it appeared obvious that their presence on the witness stand in front of defendant was traumatic for them. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Trustworthiness Not Shown. — Although the record contained sufficient evidence upon which the trial court could have made sufficient findings of fact and conclusions of law regarding the trustworthiness of statement, it failed to do so; therefore, defendant was awarded a new trial. State v. Dammons, 121 N.C. App. 61, 464 S.E.2d 486 (1995).

Trial court did not err in denying the testimony of an unavailable witness where defendant did not establish that the declarant's statement possessed equivalent circumstantial guarantees of trustworthiness, and the trial judge specifically concluded that the general purposes of the rules and the interests of justice would not be best served by the admission of the statement. State v. Williams, 355 N.C. 501, 565 S.E.2d 609, 2002 N.C. LEXIS 538 (2002), cert. denied, 537 U.S. 1125, 123 S. Ct. 894, 154 L. Ed. 2d 808 (2003).

Witness's hearsay statement identifying the perpetrator was not admissible under G.S. 8C-1, Rule 804 since the trial court did not find the witness to be unavailable and there was no indicia of reliability regarding the statement. State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

Trial court properly concluded that a statement lacked the trustworthiness necessary to be admitted under G.S. 8C-1-804(b)(5), given the large amount of alcohol consumed at the declarant's house and defendant's choice not to call the other people present at the declarant's house to testify; moreover, the statement was not more probative than evidence that could be secured from other alibi witnesses. State v. Ryals, — N.C. App. —, 635 S.E.2d 470, 2006 N.C. App. LEXIS 2161 (2006).

Burden of Proof upon Proponent. — Where the author of letter was unknown, and, therefore, there was no evidence as to his or her availability as a witness, the defendant, as the proponent of the evidence, bore the burden of satisfying the requirements of unavailability under this rule. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

The degree of detail required in a finding of unavailability of a witness will depend on the circumstances of a particular case; for example, in a case where the declarant is dead, a trial judge's determination of unavailability in such cases must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death. Situations involving out-of-state or ill declarants or declarants invoking their fifth amendment right against self-incrimination may require a greater degree of detail in the findings of fact. Furthermore, while parties are not required to establish beyond doubt that a declarant is unavailable at the summary judgment stage of the proceedings, parties must at least put forth some evidence of a declarant's unavailability. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Good-Faith Effort to Obtain Presence. — A witness is not unavailable for purposes of the (a)(4) exception to the confrontation requirement unless the State has made a good-faith effort to obtain her presence at trial. State v. Swindler, 129 N.C. App. 1, 497 S.E.2d 318 (1998), cert. denied, 348 N.C. 508, 510 S.E.2d 670 (1998), aff'd, 349 N.C. 347, 507 S.E.2d 284 (1998).

Where defendant argued that, because the victim was unavailable due to the actions of the State, the victim's statement to the police detective should have been excluded, the argument failed as there was no evidence that the State acted in any way to keep the victim from testifying, especially since the victim was subpoenaed. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

In a capital murder case, defendant's confrontation rights were violated where there was insufficient evidence to support a conclusion that the State employed good-faith efforts to contact and produce a witness at sentencing. State v. Nobles, 357 N.C. 433, 584 S.E.2d 765, 2003 N.C. LEXIS 830 (2003).

Admission of witness's statement through a police officer was proper under G.S.8C-1, N.C. R. Evid. 804(b)(5) since the prosecution made sufficient effort to locate the witness and defendant failed to show he was prejudiced by the amount of notice he received regarding the testimony. State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738, 2004 N.C. App. LEXIS 300 (2004), appeal dismissed, cert. denied, 358 N.C. 733, 601 S.E.2d 861 (2004).

G.S. 8C-1, N.C. R. Evid. 804 creates a hearsay exception and allows admission of prior testimony into evidence if the declarant is unavailable, and Rule 804 lists several definitions for "unavailability as a witness," including situations where the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213, 2004 N.C. App. LEXIS 1167 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 866 (2004), cert. dismissed, 359 N.C. 192, 607 S.E.2d 651 (2004), cert. dismissed, — N.C. —, 631 S.E.2d 136 (2006).

When a police officer testified that he had "repeatedly" tried to locate a witness, and the prosecutor's statements regarding unsuccessful efforts to locate the witness corroborated the officer's testimony, this sufficiently demonstrated the State's good-faith efforts to procure the witness for the trial court to declare the witness unavailable. State v. Clark, 165 N.C. App. 279, 598 S.E.2d 213, 2004 N.C. App. LEXIS 1167 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 866 (2004), cert. dismissed, 359 N.C. 192, 607 S.E.2d 651 (2004), cert. dismissed, — N.C. —, 631 S.E.2d 136 (2006).

The assertion of a conflict of interest due to retention of witness' law firm by the plaintiff subsequent to the first trial was not a privilege under paragraph (1) of subsection (a) of this rule, and the trial court erred in finding the witness to be unavailable and in admitting his testimony from the first trial. Asheville Mall, Inc. v. F.W. Woolworth Co., 83 N.C. App. 532, 350 S.E.2d 875 (1986), cert. denied, 319 N.C. 402, 354 S.E.2d 709 (1987).

To be admissible at trial, the deposition of an unavailable non-party witness must meet the requirements of both N.C.R. Civ.P. 32 and subdivision (b)(1). Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995).

Court's Consideration of Unavailability Sufficient. — Where judge noted witness was under court order to appear and testify, witness refused, and judge concluded that in witness's statements there was a circumstantial guarantee of trustworthiness, trial court clearly took into account the reason for the declarant's unavailability. State v. Bullock, 95 N.C. App. 524, 383 S.E.2d 431 (1989).

Unavailability Requirement Satisfied. — Unavailability requirement was satisfied where the defendant was unable to procure the purported declarant's attendance by process.

State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Where four year old child was unable to answer question put to her regarding sexual abuse due to fear, judge's declaration that the child "is simply going to be unable to testify," amounted to an implicit declaration of unavailability within the meaning of subdivision (a)(4) of this rule and medical testimony was not required for that conclusion; the witness was not unavailable as the result of an existing medical condition, and the trial judge had the opportunity to observe the demeanor of the witness and her inability to respond to questions. In addition, State fulfilled the constitutional requirement of the confrontation clause by showing a good-faith attempt to secure the witness for trial by producing the witness and attempting to elicit her testimony. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Where the State had subpoenaed potential witness numerous times to appear in court, but was unable to locate her and defendant was made aware that the State was going to use potential witness' statement at trial, the trial court's determination that potential witness was unavailable was sufficient. State v. Dammons, 121 N.C. App. 61, 464 S.E.2d 486 (1995).

Witness's first trial testimony was properly admitted into evidence over defendant's objections where witness was unavailable because he asserted his constitutional right against self-incrimination. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Witness was unavailable under G.S. 8C-1, Rule 804(a)(5), after the State was unable to determine the witness's exact address in India, and the witness refused to attend proceedings because of the witness's gunshot injuries and fear for the witness's safety, despite the State's offer to pay the witness's travel and other expenses. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Victim was unavailable to testify within the meaning of unavailability of subdivision (a)(2) of this rule where the victim persisted in refusing to testify at trial. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

Declarants who were in Mexico, refused to return for trial, and could not be located were unavailable for purposes of testifying. State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Unavailability Requirement Not Satisfied. — An order to testify from the trial court is an essential component in a declaration of unavailability under G.S. 8C-1, Rule 804(a)(2). State v. Linton, 145 N.C. App. 639, 551 S.E.2d 572, 2001 N.C. App. LEXIS 739 (2001), cert. denied, 355 N.C. 498, 564 S.E.2d 229 (2002).

Hearsay testimony that another individual committed the murder that defendant was charged with was properly excluded because defendant was unable to prove the declarant's unavailability due to death, under G.S. 8C-1, N.C. R. Evid. 804(a)(4). State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Trial court did not err in excluding the transcript of the testimony of a witness from the first trial where the employee presented no evidence showing that the witness was unavailable and thus, failed to meet his burden of proving the unavailability of the witness. Brewer v. Cabarrus Plastics, Inc., 160 N.C. App. 688, 586 S.E.2d 819, 2003 N.C. App. LEXIS 1924 (2003).

Trial court erred in admitting testimony of a witness regarding another parties' statements regarding duplicate keys defendant allegedly made for the victim's home because the trial court failed to make any findings regarding the declarant's availability to testify and the reliability of her statements; however, the error did not require reversal. State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

Effect of Unavailability of Witness on Defendant's Right to Confrontation. — For purposes of a claim of a confrontation clause violation under N.C. Const. art. I, § 23, a trial court's confrontation clause analysis of a statement should proceed as follows: the initial determination is whether the statement is testimonial or nontestimonial, and if the statement is testimonial, the trial court must then ask whether the declarant is available or unavailable to testify during the trial; if the declarant is unavailable pursuant to the G.S. 8C-1, N.C. R. Evid. 804(b)(5) hearsay exception, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about this statement, and if the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay, but if the accused did not have this opportunity, the statement must be excluded. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

Suicidal Tendency of Witness. — Where the trial judge not only observed the demeanor of the witness, but heard the testimony of the witness's former psychiatrist that the witness suffered from a mental infirmity such that testifying could make her suicidal, the record supported the trial court's determination that the witness was unavailable. State v. Carter, 338 N.C. 569, 451 S.E.2d 157 (1994), cert. denied, 515 U.S. 1107, 115 S. Ct. 2256, 132 L. Ed. 2d 263 (1995).

Evidence held to support finding that witness was unavailable so as to allow an admission to the investigating officers. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995), cert denied, 516 U.S. 994, 116 S. Ct. 529, 113 L.E.2d 435 (1995), State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Surviving Witness. — The hearsay statements of an unavailable witness were more probative than any other evidence because he was the only surviving victim of the crimes, he was the only eyewitness to the entire event, and he was the closest person to the assailants and therefore had the best opportunity to observe them. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Diligent Attempt to Produce Witness. — State acted diligently in trying to produce unavailable witness to testify, and it was practically impossible to return him to this country to testify, where: (1) state officials contacted him in India, and he informed them there was no way he would return to the United States to testify; (2) he was not willing to return to this country because his painful injuries made travel difficult and he feared for his safety; (3) the State spoke numerous times with his brother in California in attempts to locate him; (4) the State offered to provide him with police protection during his stay; and (5) the State offered to pay for his airfare, lodging, meals, and care for his injuries during his stay. State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1322, 152 L. Ed. 2d 230 (2002).

Defendant's Right to Confrontation of Witnesses. — Appellate court erred in finding that defendant's right to confrontation pursuant to N.C. Const. art. I, § 23 was violated by allowing an officer to testify pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), that the deceased victim picked defendant from a lineup; although the hearsay statement was testimonial, and thus implicated the confrontation clause, the error was harmless pursuant to G.S. 15A-1443(b), as the outcome of the trial probably would have been the same if the lineup was excluded based on the victim's independent identification of defendant as the perpetrator. State v. Lewis, 360 N.C. 1, 619 S.E.2d 830, 2005 N.C. LEXIS 1000 (2005), vacated, remanded, Lewis v. North Carolina, 126 S. Ct. 2983, 165 L.Ed.2d 985 (2006) (remanded for further consideration in light of Davis v. Washington, 126 S. Ct. 226, 165 L.Ed.2d 224 (2006)).

Statement Held Admissible. — Hearsay statement of unavailable declarant was properly admitted where: (1) the statement was made while the declarant was in a law enforcement vehicle; (2) the declarant had first-hand knowledge of the event; (3) the declarant had no motive to lie, as the statement was adverse to the interests of a relative, and the declarant was not trying to evade personal responsibility for the crime; (4) there was no indication the statement was recanted; and (5) the declarant was unavailable for the trial, despite the State's diligent efforts to locate the declarant. State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574, 2002 N.C. App. LEXIS 360 (2002), cert. denied, 357 N.C. 508, 587 S.E.2d 885 (2003).

In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court (1) properly admitted the videotaped statement that defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial, (2) properly admitted letters one of defendant's co-conspirators wrote to a girlfriend urging her to lie about her involvement in the co-conspirator's attempt to conceal evidence of the crime, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(3), (b)(5), and (3) properly admitted evidence of similar crimes that defendant committed shortly after the murder, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b). State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

Statements of the unknown men that the store was being robbed and then, moments after the robbery, that the robbers had driven off in a gray jeep described events either while they were happening or immediately afterwards and therefore, qualified as a present sense impression; there was also sufficient evidence of a startling experience-an armed robbery-and that the statements were a spontaneous reaction to justify admission as excited utterances. State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680, 2003 N.C. App. LEXIS 1491 (2003).

Because the child's statements were made to a person close to him (his foster mother) and without the reasonable belief that the statements would be used at a subsequent trial, the statements were not testimonial and therefore did not violate the Confrontation Clause; additionally, although the child was unavailable to testify, the trial court did not err in admitting the statements as hearsay exceptions. State v. Brigman, 171 N.C. App. 305, 615 S.E.2d 21, 2005 N.C. App. LEXIS 1264 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Children's statements to their foster parents were properly admitted under the residual hearsay exception as, inter alia: (1) the children were unavailable as they had no memory of the subject matter; (2) the statements were evidence of material facts; (3) the statements were not covered by any of the hearsay exceptions listed in G.S. 8C-1-804(b)(1)-(4) and G.S. 8C-1-803(1)-(23); and (4) the statements possessed equivalent circumstantial guarantees of trustworthiness. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Trial court did not abuse its discretion in admitting decedent's statements before decedent's death that defendant and another man were the shooters as the statements constituted a dying declaration under G.S. 8C-1, N.C. R. Evid. 804(b)(2). State v. Calhoun, 189 N.C. App. 166, 657 S.E.2d 424, 2008 N.C. App. LEXIS 402 (2008), review denied, appeal dismissed, 362 N.C. 476, 666 S.E.2d 651 (2008).

Statement Held Inadmissible. — Trial court properly excluded hearsay testimony that the defendant sought to admit under the residual exception of G.S. 8C-1, N.C. R. Evid. 804(b)(5) because the court found that the defendant did not give proper notice of his intention to offer hearsay testimony and that even if the defendant had given proper notice, the testimony of the witnesses concerning the decedent's statements lacked sufficient guarantees of trustworthiness. State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003).

III. FORMER TESTIMONY.

Even though there exists a preference for face-to-face confrontation at trial subsection b(1) recognizes an exception to this requirement. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

Testimony at Preliminary Stage of Same Cause. — When the original witness is unavailable, his testimony at a preliminary stage of the same cause is admissible under the prior testimony exception to the hearsay rule and may be proved by the testimony of a person who heard it. State v. Highsmith, 74 N.C. App. 96, 327 S.E.2d 628, cert. denied, 314 N.C. 119, 332 S.E.2d 486 (1985).

Unavailability Requirement Not Satisfied. — Neither the fact that witnesses failed to remember every detail of killing, nor the fact that they disagreed with officer's account of their out-of-court statements, was sufficient to render them "unavailable" as witnesses for the purposes of this rule. State v. Miller, 330 N.C. 56, 408 S.E.2d 846 (1991).

Testimony from Criminal Trial Offered at Civil Proceeding Held Properly Excluded. — Decedent's father, plaintiff in civil action, was not a party to the criminal proceeding brought against defendant based upon the same facts and had no opportunity to cross examine the proposed witness; therefore, although the state's prosecuting attorney may have had a similar motive to develop the testimony, he was not a predecessor in interest to decedent's estate, and exclusion of the former testimony was correct. Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989).

Testimony Properly Admitted. — Co-conspirator/brother's prior trial testimony was not statutorily inadmissable under subsection (b)(5) where the record supports the court's conclusion that he was unavailable under subsection (a)(2) because he willfully refused to testify at the defendant's trial and where his testimony was trustworthy, material, probative and served the interest of justice: because he had personal knowledge of the underlying events, his prior testimony was material and (in light of his refusal to testify at defendant's trial) more probative than any evidence the State could procure through reasonable efforts. State v. McNeill, 140 N.C. App. 450, 537 S.E.2d 518, 2000 N.C. App. LEXIS 1208 (2000).

Testimony of defendant's former girlfriend given at his bond hearing was properly admitted against him at his trial, under G.S. 8C-1, N.C. R. Evid. 804(b)(1), because the girlfriend was unavailable at trial and the bond hearing was a preliminary proceeding to the trial in which the testimony was offered at which defendant was represented by counsel and had the same motive to cross-examine the witness as at trial. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Testimony Properly Excluded. — When taxpayers sued county commissioners for entering into a contract which benefitted one of the commissioners, the trial court properly excluded the testimony of a former county manager given in another proceeding because the prior testimony was not admissible under G.S. 8C-1, N.C. R. Evid. 804(b)(5); given the manager's motivation to exculpate himself by attempting to blame the commissioners, his statements did not meet the "circumstantial guarantees of trustworthiness." Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

In taxpayers' suit against county commissioners for entering into a contract that benefitted one of the commissioners, the trial court properly excluded the testimony of a former county manager given in another proceeding because, while the manager was unavailable, pursuant to G.S. 8C-1, N.C. R. Evid. 804(a)(1), because he asserted his Fifth Amendment privilege, his statements did not fall within the hearsay exceptions in G.S. 8C-1, N.C. R. Evid.

804(b)(1), as the issues from the other proceeding were far different from the issues in the trial at which the evidence was sought to be introduced. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

Testimony Improperly Excluded. — In a criminal case, where the trial court had already declared that a victim-witness was an unavailable witness, and where that witness had given testimony under oath during voir dire, it was improper for the trial court to deny the defendant's attempt to admit that sworn testimony as rebuttal evidence against the State's evidence; the State was permitted an opportunity to examine the witness concerning the voir dire testimony, so it was admissible under Rule 804(b)(1). State v. Finney, 358 N.C. 79, 591 S.E.2d 863, 2004 N.C. LEXIS 10 (2004).

IV. BELIEF OF IMPENDING DEATH.

Videotape Recording of Identification. — In a murder trial, the trial court did not err in allowing the State to introduce a videotape recording of victim's out-of-court identification of the defendant in a photographic line-up, made one day before his death, when he knew death was imminent. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Surrounding Circumstances Supported Dying Declaration. — Trial court did not abuse the court's discretion in admitting a victims's dying declaration evidence where: (1) three and a half minutes after the victim called 911, he told his mother that he was going to die; (2) he had been shot five times and was bleeding; and (3) he was taken to the hospital, received medical treatment in the emergency room, and later died the same day. The circumstances surrounding the victim's statements supported the requirements for admission of a dying declaration under G.S. 8C-1, N.C. R. Evid. 804(b)(2). State v. Bodden, 190 N.C. App. 505, 661 S.E.2d 23, 2008 N.C. App. LEXIS 1022 (2008), review denied, appeal dismissed 336 N.C.131, 675 S.E.2d 660 (2009).

V. STATEMENT AGAINST INTEREST.

Subdivision (b)(3) of this rule requires a two-pronged analysis. Once a statement is deemed to be against declarant's penal interest, the trial judge must be satisfied that corroborating circumstances clearly indicate the trustworthiness of the statement if it exposes declarant to criminal liability. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless they are satisfied for good reasons that they are true. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Co-conspirator's statements against interest must contain "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability; the indicia of reliability must be present in the statement itself and not by reference to other evidence presented at trial. State v. Harris, 136 N.C. App. 611, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000).

Criminal Liability. — Subdivision (b)(3) of this rule requires that in order for a statement to be admissible, it must actually subject the declarant to criminal liability. State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, appeal dismissed and cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

Identity of Declarant. — It is only where the identity of the declarant is revealed in the statement that the guaranty of reliability arises; the statement must actually subject the declarant to criminal liability. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Circumstances of the Statement. — If the evidence had been properly developed at the time of trial, counsel could have persuasively argued that the statement was against penal interest and sufficiently credible to place before the jury for consideration and/or that the statements were sufficiently trustworthy and that due process required admission so that the jury could weigh the boyfriend's admission against the eyewitness accounts, the only evidence presented of the inmate's guilt. Although the state court reasoned that the trial court would have rejected admission of the evidence as a statement against penal interest because the boyfriend made the statement to his live-in girlfriend, the boyfriend's repeated inculpatory statements to his girlfriend, especially in light of the reward for information, created circumstances under which he was putting himself in legal jeopardy; there was no established North Carolina law excluding a statement as being considered a statement against penal interest solely because it is made to a girlfriend or other confidant or in the confines of a private setting Sharpe v. Bell, 595 F. Supp. 2d 636, 2009 U.S. Dist. LEXIS 5241 (E.D.N.C. 2009).

Declarant Must Understand Damaging Potential of Statement. — For a statement to qualify as a declaration against interest the declarant must have understood the damaging potential of his statement, and in the case of an anonymous letter, where the declarant actually believed that the anonymity of the statement shielded him or her from criminal liability, requirement of the hearsay exception had not been fulfilled. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Corroboration Insufficient. — Federal habeas petitioner's counsel was not ineffective for failing to introduce a witness's testimony that a person who died before petitioner's trial allegedly told the witness that petitioner was not involved in a murder and robbery; there was no corroboration for the testimony, and its introduction would have opened the door to other evidence implicating petitioner that counsel had succeeded in excluding. Morrow v. Harkleroad, 247 F. Supp. 2d 805, 2003 U.S. Dist. LEXIS 2771 (W.D.N.C. 2003).

Statement Held Inadmissible. — Hearsay testimony that another individual committed the murder that defendant was charged with was properly excluded because the proffered testimony did not provide the corroborating circumstances required for the admission of a statement tending to expose an unavailable declarant to criminal liability, under G.S. 8C-1, N.C. R. Evid. 804(b)(3). State v. McCail, 150 N.C. App. 643, 565 S.E.2d 96, 2002 N.C. App. LEXIS 686 (2002).

Statement Held Admissible. — Statement by defendant regarding a murder that he had committed fit within the hearsay exception in subdivision (b)(3) and within the exception for statements of a co-conspirator in Rule 801(d)(E). State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), cert. denied, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Statements by two witnesses implicating defendant, along with his brother, in the murder of the brother's wife were admissible as statements against interest or, because they were corroborated by other testimony, at any rate, their admission was not prejudicial. State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 2000 N.C. App. LEXIS 1104 (2000).

Statements Not Found to Be Against Interest. — are admissible, even though they are themselves neutral as to declarant's interest, if they are integral to a larger statement which is against declarant's interest. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Where collateral statements, inculpatory to defendant, made by murder victim-declarant were part and parcel of his disserving statement, were integral to the larger statement made by victim to deputy, and were essential to an understanding of victim's motivation in making disserving statement to deputy, the trial judge was correct in admitting this collateral material, since it actually tended to fortify the initial statement's disserving aspects. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Statements made by arrestee to defendant admitting that LSD found in a box underneath the defendant while in arrestee's car belongs to arrestee and not to defendant were not admissible as statements made against arrestee's penal interests under subdivision (b)(3) because it is simply not a crime to know that drugs do not belong to a particular individual. State v. Eggert, 110 N.C. App. 614, 430 S.E.2d 699 (1993).

In taxpayers' suit against county commissioners for entering into a contract that benefitted one of the commissioners, the trial court properly excluded the testimony of a former county manager given in another proceeding because the prior testimony was not admissible under G.S. 8C-1, N.C. R. Evid. 804(b)(3) because the manager avoided any incriminating statements against himself by repeatedly asserting his Fifth Amendment privilege, so the statements were not so contrary to his pecuniary or proprietary interest that he would not have made them unless they were true. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

VI. OTHER EXCEPTIONS.

Trial Prior to July 1, 1984. — The requirement that hearsay evidence not falling within a recognized exception to the hearsay rule and offered because of necessity and a reasonable probability of truthfulness may be resorted to only when more probative evidence on the point cannot be procured through reasonable efforts applies to hearsay evidence offered in a trial conducted prior to the effective date of the North Carolina Rules of Evidence. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986).

Petitioner's habeas petition was properly denied because admission of certain hearsay statements under G.S. 8C-1, N.C. R. Evid. 804(b)(5) was not contrary to, nor an unreasonable application of United States Supreme Court precedent. Hayes v. York, 311 F.3d 321, 2002 U.S. App. LEXIS 23956 (4th Cir. 2002), cert. denied, 538 U.S. 979, 123 S. Ct. 1803, 155 L. Ed. 2d 669 (2003).

Section 8C-1, Rule 803(24) Compared. — Subdivision (b)(5) of this rule is a verbatim copy of G.S. 8C-1, Rule 803(24), except that subdivision (b)(5) also requires that the declarant be unavailable before the hearsay may be admitted and G.S. 8C-1, Rule 803(24) does not. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

Requirements for Admission of Hearsay Under Subdivision (b)(5). — Just as in G.S. 8C-1, Rule 803(24) cases, before hearsay testimony can be admitted under subdivision (b)(5) of this rule, the trial judge must engage in the six-part inquiry prescribed in State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985). In cases under subdivision (b)(5) of this rule, though, the trial judge first must find that the declarant is unavailable before commencing the six-part inquiry. However, the requirements of State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986). For annotations covering the *Smith* case, see analysis line XIII Other Exceptions, under Rule 803, above.

Before hearsay testimony can be admitted under subdivision (b)(5) of this rule, the trial judge must first find that the declarant is unavailable, and then engage in a six-part inquiry, as follows: (1) Has proper notice been given? (2) Is the hearsay not specifically covered elsewhere? (3) Is the statement trustworthy? (4) Is the statement material? (5) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts? (6) Will the interests of justice be best served by admission? Phillips & Jordan Inv. Corp. v. Ashblue Co., 86 N.C. App. 186, 357 S.E.2d 1, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Under G.S. 8C-1, Rules 803(24) and 804(b)(5), the trial judge is required to analyze hearsay's admissibility by undertaking a six-part inquiry; specifically, the trial court must determine the following: First, that proper notice was given of the intent to offer hearsay evidence under G.S. 8C-1, Rule 803(24) or 804(b)(5); second, that the hearsay evidence is not specifically covered by any of the other hearsay exceptions; third, that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; fourth, that the evidence is material to the case at bar; fifth, that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and sixth, that admission of the evidence will best serve the interests of justice. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

While no showing of necessity or trustworthiness is required for the other firmly rooted hearsay exceptions, a showing of necessity and trustworthiness is required for statements admitted under the catch-all exception to the hearsay rule to avoid violating the constitutional right to confrontation. State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998).

While the trial court erred by not making specific findings for each step in the six-part inquiry into the admissibility of hearsay evidence, the error did not prejudice defendant because the evidence would still have been excluded. While the six-part inquiry is useful to appellate review of the admission of hearsay under this rule or under G.S. 8C-1, Rule 803(24), its utility is diminished when an appellate court reviews the exclusion of hearsay; in other words, if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary. State v. Harris, 139 N.C. App. 153, 532 S.E.2d 850, 2000 N.C. App. LEXIS 809 (2000).

Although a defendant's son, who had witnessed his father's assault on his mother, was not shown to be unavailable to testify at trial, a trial court did not err by admitting the son's hearsay evidence as an excited utterance under G.S. 8C-1, N.C. R. Evid. 803(2) without any showing that the son was unavailable and without making the findings required by G.S. 8C-1, N.C. R. Evid. 804(b)(5) for a determination of the applicability of the residual exception to the hearsay rule, G.S. 8C-1, N.C. R. Evid. 803(24). State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002).

To meet the residual hearsay exception found in G.S. 8C-1, N.C. R. Evid. 803(24), a six-part inquiry must be satisfied: (1) that proper notice was given of the intent to offer hearsay evidence under, G.S. 8C-1, N.C. R. Evid. §§ 803(24) or 804(b)(5); (2) that the hearsay evidence is not specifically covered by any of the other hearsay exceptions; (3) that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; (4) that the evidence is material to the case at bar; (5) that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and (6) that admission of the evidence will best serve the interests of justice. As in the case of the unavailability of a declarant at the summary judgment stage, while a party need not establish beyond doubt that the six-prong test is satisfied, a party must at least put forth some evidence that these six requirements will be met; otherwise, the requirement under G.S. 1A-1, N.C. R. Civ. P. 56(e), that statements not based on personal knowledge or not admissible into evidence shall not be considered by a trial court in ruling on a motion for summary judgment, could be circumvented with minimal effort. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

As the victim was unavailable under G.S. 8C-1, N.C. R. Evid. 804(a), his statements to his friends that he had a confrontation with defendant and was afraid of defendant were properly admissible under G.S. 8C-1, N.C. R. Evid. 803(24) and G.S. 8C-1, N.C. R. Evid. 804(b)(5) because the victim (1) had personal knowledge of the events the statements described, and the statements were made within two hours of the first altercation between defendant and the victim; (2) had no reason to lie to his friends, and there was no indication he would have benefitted from altering the story; (3) never recanted the statements and he died shortly after making them; and (4) was unavailable to testify, having died, so the evidence established that the statements possessed "equivalent circumstantial guarantees of trustworthiness." State v. Valentine, 357 N.C. 512, 591 S.E.2d 846, 2003 N.C. LEXIS 1266 (2003).

Availability as Crucial Consideration. — The availability of a witness to testify at trial is a crucial consideration under the residual hearsay exceptions, G.S. 8C-1, Rule 803(24) and subdivision (b)(5) of this rule. The "availability" of the declarant to testify at trial unavoidably enters into the determination of admissibility of a "hearsay" witness' testimony as to out-of-court statements made by the declarant pursuant to either residual hearsay exception. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

The availability of the witness to testify at trial is a crucial consideration under the residual hearsay exceptions of G.S. 8C-1, Rule 803(24) and subdivision (b)(5) of this rule, because usually the live testimony of the declarant will be the more probative evidence on the point for which it is offered. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

"Guarantees of Trustworthiness." — In determining whether a statement has the necessary "guarantees of trustworthiness," evidence that the declarant later recanted the statement is relevant. State v. Hollingsworth, 78 N.C. App. 578, 337 S.E.2d 674 (1985).

Threshold determination of trustworthiness is the most significant requirement of admissibility under the residual hearsay exception. Findings of fact and conclusions of law as to the trustworthiness requirement must appear in the record. State v. Moore, 87 N.C. App. 156, 360 S.E.2d 293 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 664 (1988).

Circumstances Indicating Trustworthiness. — Murder victim's statements to her attorney concerning defendant were admissible under the "catch-all" exception to hearsay; the attorney-client relationship was sufficient guaranty of trustworthiness to admit the statements. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

Trial court erroneously admitted, under the residual exception of G.S. 8C-1-804(b)(5), the hearsay statements made by the witness to the police detective; in finding that the proffered statements were trustworthy, the trial court erroneously considered the corroborative nature of the witness's statements. State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Factors in Determining Whether Statement Possesses Equivalent Guarantees of Trustworthiness. — In determining whether a hearsay statement possesses "equivalent circumstantial guarantees of trustworthiness," the trial court should consider, inter alia: (1) The declarant's relationship with both the defendant and the government; (2) the declarant's motivation; (3) the extent of the declarant's personal knowledge; (4) whether the declarant ever recanted the statement; and (5) the practical availability of the declarant at trial for cross-examination. This list is not all inclusive and other factors may be considered when appropriate. State v. McLaughlin, 316 N.C. 175, 340 S.E.2d 102 (1986), aff'd in part and rev'd in part, 321 N.C. 267, 362 S.E.2d 280 (1987).

In weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement for purposes of subdivision (b)(5) of this rule, the trial judge must consider, among other factors, (1) assurances of the declarant's personal knowledge of the underlying events; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant has ever recanted the statement; and (4) the practical availability of the declarant at trial for meaningful cross-examination. Also pertinent are factors such as the nature and character of the statement and the relationship of the parties. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

A trial judge should consider a number of factors in determining whether a hearsay statement possesses sufficient indicia of trustworthiness to be admitted under subdivision (b)(5) of this rule. Among these factors are: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of subsection (a) of this rule, for the declarant's unavailability. However, this list is not inclusive, and other factors may be considered when appropriate. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

In determining whether a statement proffered under a "catchall" exception to the hearsay rule possesses circumstantial guarantees of trustworthiness, certain factors are significant in guiding trial courts; among these factors are (1) assurance of personal knowledge of the declarant of the underlying event; (2) "the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the statement"; and (4) the reasons, within the meaning of G.S. 8C-1, Rule 804(a), for the declarant's unavailability. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

The six-part inquiry employed to evaluate hearsay is very useful when an appellate court reviews the admission of hearsay under subdivision (b)(5) of this rule or G.S. 8C-1, Rule 803(24), but its utility is diminished when the court reviews the exclusion of hearsay; if proffered evidence fails to meet the requirements of one of the inquiry steps, the trial judge's findings concerning the preceding steps are unnecessary. State v. Hardison, 143 N.C. App. 114, 545 S.E.2d 233, 2001 N.C. App. LEXIS 222 (2001).

In the rape case, the victim's statement to the police detective that she had recently undergone a hysterectomy, making sexual intercourse nearly impossible without discomfort, was properly read to the jury pursuant to subdivision (b)(5) of this rule as notice to the defense of the use of the hearsay evidence was not required due to the suddenness of the victim's refusal to testify, the statement was not covered by any of the hearsay exceptions listed in subdivisions (b)(1)-(4), the statement possessed circumstantial guarantees of trustworthiness because the victim had personal knowledge of the rape and the victim's story never changed, the statement was offered as evidence of a material fact, the statement was more probative than any other evidence produced by the State, and the general purposes of the rules of evidence were best served by allowing the statement into evidence. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

When a statement sought to be admitted under subdivision (b)(5) of this rule nearly fits an enumerated exception, it has a degree of circumstantial trustworthiness which is relevant to the ultimate determination the trial court must make. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Independent verification, while not alone sufficient to enable the trial court to admit an absent witness' statement under subdivision (b)(5) of this rule, provides a useful basis for evaluating its trustworthiness. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Findings and Conclusions. — In order for a statement to fall within the hearsay "catch-all" exception of subsection (b)(5) of this rule, the statement must not be admissible under any other exception to the hearsay rule. Detailed findings of fact are not required, but the trial judge must enter his conclusion in the record. State v. Moore, 87 N.C. App. 156, 360 S.E.2d 293 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 664 (1988).

Lack of Circumstances Indicating Statements' Trustworthiness. — Where the only evidence that the purported declarant existed was defendant's statements to that effect, the declarant was not produced at trial and no one other than defendant was produced to testify that the declarant existed or lived at defendants' residence where drugs were found, letters allegedly written by the declarant purporting to admit declarant's ownership of the contraband were properly excluded. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Trustworthiness Not To Be Based on Corroborating Evidence. — The trial court committed prejudicial error in basing its determination of statement's trustworthiness on the presence of corroborating evidence. State v. Downey, 127 N.C. App. 167, 487 S.E.2d 831 (1997).

Trustworthiness of Statement by Child. — The circumstances of each challenged hearsay statement by a child sexual abuse victim showed sufficient guarantees of trustworthiness for admission under the catch-all exception to the hearsay rule, where the child spoke with personal knowledge of the underlying events and had no motive to lie, she demonstrated how the defendant abused her by placing her finger in an anatomically correct female doll's vagina, and she never recanted her statements about the defendant. State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998).

Counselor who had examined child sexual abuse victim permitted to testify at trial as to substantive evidence based on what the victim had told him under the subdivision (5) residual exception to G.S. 8C-1, Rule 804 after the victim refused to testify. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Otherwise Inadmissible Evidence as Basis for Expert Opinion. — The well-established practice has been to admit evidence otherwise inadmissible as hearsay for the purpose of revealing the basis for expert opinion testimony. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

A testifying expert can reasonably rely on the opinion of an out-of-court expert and can testify to the content of that opinion. This accords with case law prior to adoption of the Rules of Evidence. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Out-of-Court Communication. — This rule has been interpreted to permit an expert witness to rely on an out-of-court communication as a basis for an opinion and to relate the content of that communication to the jury. State v. Jones, 322 N.C. 406, 368 S.E.2d 844 (1988).

Inability of Witness to Tell Truth from Fantasy. — Finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing guarantees of trustworthiness to be admissible at trial under the residual exception set forth in subdivision (b)(5) of this rule. State v. Stutts, 105 N.C. App. 557, 414 S.E.2d 61 (1992).

Current Inability of Witness to Tell Truth From Fantasy Not Relevant. — The trial court's conclusion that a child victim of alleged sexual abuse was incompetent to testify two years later did not invalidate her prior statements made truthfully with personal knowledge where nothing indicated that the child was incapable of telling the truth or distinguishing reality from imagination at the time of the sexual abuse. State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998).

Failure to Determine Competency of Child Victim. — In a prosecution charging defendant with first-degree rape, incest, and taking indecent liberties with his three-year-old daughter, the trial judge's adoption of counsel's stipulation in concluding that the child victim was incompetent to testify, where he never personally examined or observed the child's demeanor in responding to questions during a voir dire examination, was reversible error, where highly prejudicial testimony was erroneously admitted pursuant to G.S. 8C-1, Rule 803(24) and subdivision (b)(5) of this rule on the basis of this improperly based conclusion. State v. Fearing, 315 N.C. 167, 337 S.E.2d 551 (1985).

Statements by murder victim, not knowing of his impending death, in which he identified the defendant as the person who shot him, held admissible under this rule as other exceptions. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Necessity Shown. — In the circumstance where the State's case depended mainly on child sex abuse victim's statements and the child was incompetent to testify, the unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrated the necessity prong of this test. State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998).

Admission of Evidence Upheld. — Statements by the victim to her daughter and to a friend, describing prior attacks upon her by the defendant (her son) and her fear of the defendant, possessed the "circumstantial guarantees of trustworthiness" necessary under subdivision (b)(5) of this rule. State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986).

Absent witness' statement held to contain sufficient circumstantial guarantees of trustworthiness to be admitted under subdivision (b)(5) of this rule. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Where the victim testified that defendant stated "they are never going to take me in again alive," the statement was probative of defendant's knowledge of his guilt, and defendant made no showing that the probative value of the statement was substantially outweighed by its prejudicial effect. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Assault victim's statements to a police officer and to her neighbor were properly admitted where defendant was given notice of the State's intention to use the statements one week before trial and where the victim's testimony was the only eye-witness account of the beatings. State v. Shubert, 102 N.C. App. 419, 402 S.E.2d 642 (1991).

Where witness testified to events about which only she could have known, made statements against her penal interest regarding her use of illegal drugs and participation in prostitution, was incarcerated for much of the time between the interview and the trial, and never attempted to recant her statement which was made to a law enforcement officer, the hearsay testimony possessed sufficient guarantees of trustworthiness to be constitutionally admissible under this rule. State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994).

A victim-declarant's statements to a law enforcement officer describing (i) ill will between the defendant and herself and fear of the defendant and (ii) prior attacks by the defendant and the victim's fear are likely to possess the required guarantees. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

There was no error in admitting hearsay statements identifying defendant as the person who poured gasoline on victim and set her on fire where the statements were made to a nurse and the victim was deceased. State v. Tyler, 346 N.C. 187, 485 S.E.2d 599 (1997), cert. denied, 522 U.S. 1001, 118 S. Ct. 571, 139 L. Ed. 2d 411 (1998).

Recorded oral statement to police by co-conspirator's girlfriend, who was murdered after the statement was given, was trustworthy and properly admitted. State v. Hurst, 127 N.C. App. 54, 487 S.E.2d 846 (1997), cert. denied, 523 U.S. 1031, 118 S. Ct. 1324, 140 L. Ed. 2d 486 (1998).

A murder victim's statement possessed circumstantial guarantees of trustworthiness and was admissible in her husband's murder trial under the residual hearsay exception, where the victim told a witness that her husband had threatened to make her the next Nicole Simpson, that he had followed her to the bank, and that the victim told her husband that the money she withdrew was her "get out" money and that she was leaving him. State v. Hayes, 130 N.C. App. 154, 502 S.E.2d 853 (1998), aff'd, 350 N.C. 79, 511 S.E.2d 302 (1999).

Where victim was unavailable to testify against defendant/father, evidence and findings supported the trial court's admission of hearsay statements under this rule. State v. Pretty, 134 N.C. App. 379, 517 S.E.2d 677, 1999 N.C. App. LEXIS 803 (1999), cert. denied, appeal dismissed, 351 N.C. 117, 540 S.E.2d 745 (1999).

Admission of Evidence Held Harmless. — Failure of the trial court to determine specifically that murder victim's statement to her attorney was not covered by any explicit exception to the hearsay rule was error, but the error was harmless where the evidence of defendant's guilt was overwhelming. State v. Faucette, 326 N.C. 676, 392 S.E.2d 71 (1990).

Evidence Held Inadmissible. — Where statement made by defendant's alleged accomplice was not made under oath or under a threat of perjury, the defendant did not have the opportunity to cross-examine him as to the veracity of the statement, and he made the statement to gain favor with the police and in hopes of a favorable plea bargain, but later recanted, claiming that the police drafted the statement and that he signed it under coercion by his attorney, the totality of the circumstances surrounding the confession justified the conclusion that it lacked the required "equivalent circumstantial guarantees of trustworthiness" to be admitted under the residual exception of subdivision (b)(5) of this rule. State v. McLaughlin, 316 N.C. 175, 340 S.E.2d 102 (1986), aff'd in part and rev'd in part, 321 N.C. 267, 362 S.E.2d 280 (1987).

The trial court erred by admitting into evidence the statement given by the child witness in a sexual offense case to the investigating officer without making the specific findings of fact and conclusions of law pursuant to G.S. 8C-1, Rule 804(b)(5), as required by State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986). State v. Benefield, 91 N.C. App. 228, 371 S.E.2d 306, cert. denied, 323 N.C. 367, 323 N.C. 478, 373 S.E.2d 868, 373 S.E.2d 868 (1988).

The trial court incorrectly found that defendant failed to give the proper written notice to the prosecutor of his intent to offer hearsay evidence under G.S. 8C-1, Rules 803(24) and 804(b)(5); however, the trial court's finding that the defendant did not satisfy the requirement that "equivalent circumstantial guarantees of trustworthiness" be shown and the finding that the interests of justice would not be served by the letters' admission into evidence were proper; therefore, the trial court's exclusion of the letters was proper. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Defendant's contention that the trial court erred in not allowing him to testify that witness in the car during the killing of a State Trooper said "You don't remember killing a State Trooper?" was without merit as defendant's testimony was hearsay and not within any of the exceptions to the rule prohibiting hearsay. State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989).

Trial court properly refused to admit letter which was not a statement against penal interest because witness had already entered a guilty plea and was serving a sentence for the murder when the letter was written. State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997).

The residual hearsay exception was improperly exercised to allow the admission in a rape case of the victim-witness' statements to a police detective where the witness never definitively refused to testify, where she did not persist in a refusal to testify in the manner contemplated by Rule 804, and where, during her voir dire by the State when she was originally called as a witness, she never indicated an unequivocal persistence in refusing to testify; since the witness was improperly deemed unavailable, admission of the hearsay testimony under the residual exception was improper. State v. Finney, 358 N.C. 79, 591 S.E.2d 863, 2004 N.C. LEXIS 10 (2004).

The notice requirement of subdivision (b)(5) of this rule should be construed flexibly, in light of the express policy of providing a party with a fair opportunity to meet the proffered evidence. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

By giving defendant additional time to prepare to meet absent witness' statement, and to locate him if possible, the court ensured that notice provisions of subdivision (b)(5) of this rule were met. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Notice Held Sufficient. — Defendant held to have been provided with a fair opportunity to meet absent witness' statement, so that the notice given by the prosecutor of his intention to admit the statement was sufficient under subdivision (b)(5) of this rule. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Although the address of the declarant was not provided as required by State v. Smith, 315 N.C. at 92, 337 S.E.2d at 844 (1985), defense counsel's letter informed the prosecutor that the declarant's address was unknown; therefore, where the prosecutor did not request additional information about the purported declarant's letter or a copy of the letter prior to trial, the notice provided by defense counsel, a full month prior to trial, was sufficient to provide the prosecution with a fair opportunity to prepare to meet the hearsay statements contained in the letter. State v. Agubata, 92 N.C. App. 651, 375 S.E.2d 702 (1989).

Statement Inadmissible. — Trial court did not err in excluding the testimony of three defense witnesses that a man who died before trial had stated that he knew that the defendant did not commit the attempted robbery and murder for which defendant was charged, because the trustworthiness of the statement exposing the declarant to criminal liability was not clearly indicated by corroborating circumstances. State v. Wardrett, 145 N.C. App. 409, 551 S.E.2d 214, 2001 N.C. App. LEXIS 651 (2001).

Statements by the victim to his wife and daughter, made sever days after the robbery, were not admissible under the residual hearsay exception, since the statements gave contradicting accounts of the evidence and thus, could not be said to have sufficient indicia of reliability. State v. Blackstock, 165 N.C. App. 50, 598 S.E.2d 412, 2004 N.C. App. LEXIS 1168 (2004), cert. denied, — N.C. —, 610 S.E.2d 208 (2005), appeal dismissed, cert. denied, — N.C. —, 610 S.E.2d 208 (2005).

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 805. The Advisory Committee's Note states:

"On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurance. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611."

Rule 805 is consistent with North Carolina practice. See, e.g., *State* v. *Connley,* 295 N.C. 327 (1978).

CASE NOTES

National Transportation Safety Board Report. — Where National Transportation Safety Board (NTSB) reports contained statements by pilots, witnesses and other non-officials who were not present to testify at trial, trial court properly exercised its discretion in excluding the hearsay portions thereof; to the extent portions were admissible independent of the report, those portions were admissible. Bolick v. Sunbird Airlines, 96 N.C. App. 443, 386 S.E.2d 76 (1989), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition denied as to additional issues, 326 N.C. 363, 389 S.E.2d 811 (1990).

That an Admission of Defendant Was Contained Within a Hearsay Statement by Another Individual did not affect admissibility where both statements were admissible; officers' testimony about the notes he took during an interview with defendant were not hearsay and were properly admitted into evidence — they were also not hearsay within hearsay. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Passenger's Statement to Defendant Not Hearsay. — Defendant's statement to an officer that a passenger told him to stop the car during a police chase was not offered for its truth, and thus was properly admitted in defendant's second-degree murder trial because it was not hearsay evidence under N.C. R. Evid. 801(c), and was introduced to demonstrate malice. State v. Hazelwood, 187 N.C. App. 94, 652 S.E.2d 63, 2007 N.C. App. LEXIS 2311 (2007).

Applied in In re Rhyne, 154 N.C. App. 477, 571 S.E.2d 879, 2002 N.C. App. LEXIS 1454 (2002).

Cited in Ferguson v. Williams, 101 N.C. App. 265, 399 S.E.2d 389 (1991); State v. Hurst, 127 N.C. App. 54, 487 S.E.2d 846 (1997); Wooten v. Newcon Transp., Inc., 178 N.C. App. 698, 632 S.E.2d 525, 2006 N.C. App. LEXIS 1670 (2006).

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 806 except that the phrase "or a statement defined in 801(d)(2)(C), (D), or (E)" has been omitted from the first sentence. Fed. R. Evid. 801 treats admissions by a party-opponent as statements that are not hearsay. Since Rule 801 treats such statements as exceptions to the hearsay rule, the above phrase is superfluous.

The Advisory Committee's Note states:

"The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. ***

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a subsequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. ***

When the impeaching statement was made prior to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used, under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results."

In *Hooper* v. *Moore,* 48 N.C. 428 (1856), the court stated that in order to impeach the credibility of a declarant by showing an inconsistent statement made before the time when a deposition was taken, the declarant must be given an opportunity to explain. Professor Brandis is uncertain whether the requirement of an opportunity to explain bars proof of statements or conduct showing bias on the part of a hearsay declarant not present to testify; but in his view it should not. *Brandis on North Carolina Evidence* § 48, p. 183 (1982).

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination and is consistent with North Carolina practice. See N.C. Civ. Pro. Rule 32(c).

Legal Periodicals. — For a practice-oriented discussion of impeachment of hearsay declarants by trial judges and attorneys, see 13 Campbell L. Rev. 157 (1991).

For recent development, "The Defense Calls ... the Accuser? State v. Brigman and How the North Carolina Court of Appeals Misconstrued Crawford's Application to Available Witnesses," see 84 N.C. L. Rev. 2082 (2006).

CASE NOTES

Where the witness had formed an opinion as to the prosecuting witness' character for truth and veracity based on personal knowledge gained in the course of her position as prosecuting witness' supervisor, this threshold requirement was all that was needed in order to allow her to testify as to such opinion. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

Rebuttal Evidence Admitted. — Evidence of an out-of-court declarant's inconsistent statements was admissible under this rule to impeach his credibility, where declarant's inculpatory statements regarding his involvement in the crime and exculpating the defendant were admitted pursuant to the defendant's motion. State v. Small, 131 N.C. App. 488, 508 S.E.2d 799 (1998).

Prior Convictions of Declarant. — Trial court did not commit reversible error by allowing the State to question a defense witness as to defendant's prior conviction for forcible robbery because evidence of defendant's prior conviction was admissible to attack defendant's credibility as a hearsay declarant; the defense witness's testimony assisted in establishing an alibi for defendant and was hearsay because it was offered for the truth of the matter asserted. State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776, 2002 N.C. App. LEXIS 1274 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 440 (2003).

Trial court properly overruled defendant's objections to questions the State asked a police detective during redirect examination, about a conversation the detective had with a victim who was kidnapped, because defendant opened the door to those questions during cross-examination when he asked the detective to discuss admissions the victim made, in an attempt to attack the victim's credibility. State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 653 (2004), aff'd, — N.C. —, 611 S.E.2d 833 (2005), remanded, Forrest v. North Carolina, 126 S.C. 29777 (U.S. 2006).

Cited in State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986); State v. Adams, 90 N.C. App. 145, 367 S.E.2d 362 (1988); State v. Lovin, 339 N.C. 695, 454 S.E.2d 229 (1995); State v. White, 340 N.C. 264, 457 S.E.2d 841 (1995); State v. Lemons, 352 N.C. 87, 530 S.E.2d 542, 2000 N.C. LEXIS 431 (2000).

Article 9.

Authentication and Identification.

Rule 901. Requirement of authentication or identification.

(a) *General provision.* — The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness with Knowledge. — Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. — Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier or Expert Witness. — Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. — Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. — Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. — Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. — Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilations. — Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System. — Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute. — Any method of authentication or identification provided by statute. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 901 except that in example (10) the word "statute" is inserted in lieu of the phrase "Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority."

The Advisory Committee's Note states:

"Subdivision (a). Authentication and identification represent a special aspect of relevancy. *** Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an 'attitude of agnosticism,' McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which 'departs sharply from men's customs in ordinary affairs,' and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur."

Subdivision (a) is in accord with North Carolina practice.

With respect to subdivision (b), the Advisory Committee's Note states:

"The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer printouts. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis."

Example (1) is in accord with North Carolina practice.

The Advisory Committee's Note states:

"Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. *** Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows."

Example (2) is in accord with North Carolina practice. See *Brandis on North Carolina Evidence* § 197 (1982).

Example (3) is comparison by the trier of fact or by expert witnesses with specimens that have been authenticated. In *State* v. *LeDuc,* 306 N.C. 62 (1982), the Court permitted handwriting comparisons by the jury unaided by lay or expert testimony. G.S. 8-40, which should be repealed upon enactment of this rule, requires that the exemplar used for comparison be "proved to the satisfaction of the judge to be genuine". However, the Advisory Committee's Note states:

"The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, § 27, cautiously allowed expert or trier to use exemplars 'proved to the satisfaction of the judge to be genuine' for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury ... or by experts ... and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b).

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. ***

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him ...; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. *** Language patterns may indicate authenticity or its opposite."

Example (4) is in accord with North Carolina practice. See generally *Brandis, supra,* § 195, 236.

The Advisory Committee's Note states:

"Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), *supra.*"

Example (5) is in accord with North Carolina practice. See generally *Brandis, supra,* § 96.

The Advisory Committee's Note states:

"Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), *supra,* or voice identification, under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact."

Part (A) of Example (6) is in accord with North Carolina practice. See *Brandis, supra,* § 96. Part (B) permits identity to be established by evidence that the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. There are no North Carolina cases directly on this point.

The Advisory Committee's Note states:

"Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected."

Example (7) is in accord with North Carolina practice. See *Brandis, supra,* § 195.

The Advisory Committee's Note states:

"Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. ***

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190."

Example (8) is in accord with North Carolina practice, except that the period of 30 years is reduced to 20 years. See *Brandis, supra,* § 196.

The Advisory Committee's Note states:

"Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer.... Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system."

Example (9) is in accord with North Carolina practice.

Example (10) makes clear that methods of authentication provided by the Rules of Civil Procedure or other statutes are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and for the authentication of depositions in Civil Procedure Rule 30(f).

CASE NOTES

Every writing sought to be admitted must be properly authenticated, and must satisfy the requirements of the "best evidence rule," G.S. 8C-1, Rule 1002, or one of its exceptions, set forth in G.S. 8C-1, Rule 1003, et seq. Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by Rules 803 and 804. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Authentication under this rule is only one prerequisite to admissibility. The document still must satisfy other pertinent evidentiary standards. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Compliance with the facial requirements of subsection (a) of this rule does not mean (i) that an exhibit automatically qualifies as relevant under G.S. 8C-1, Rule 401 or (ii) if relevant, that it is admissible under G.S. 8C-1, Rule 802. State v. Patterson, 103 N.C. App. 195, 405 S.E.2d 200, aff'd, 332 N.C. 409, 420 S.E.2d 98 (1992).

Testimony of Mother Regarding Handwriting. — Where the victim's mother testified that she was familiar with her daughter's handwriting, that the letter was written in her daughter's handwriting and that she recognized the signature as that of her daughter, there was sufficient evidence of authenticity to support the trial court's admission of letter into evidence. State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), cert. denied, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996).

Post-Accident Drug Test. — Trial court did not err in admitting laboratory report of post-accident drug test as a business record. Conner v. Continental Indus. Chem., Inc., 123 N.C. App. 70, 472 S.E.2d 176 (1996).

Stipulation that a document is genuine authenticates a document. Olympic Prods. Co.

v. Roof Sys., 88 N.C. App. 315, 363 S.E.2d 367 (1988).

Identity of telephone caller may be established by direct or circumstantial evidence anytime throughout the development of the case. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

It is not necessary that proof of identification of telephone caller be made before introduction of evidence of the conversation. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

Identification of telephone caller may be established by evidence that the caller disclosed knowledge of facts known peculiarly to him. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

But Not Merely by Statement of His Name. — When there is no other evidence to authenticate the identity of speaker who placed call except that he stated his name, the evidence is inadmissible as hearsay. Santora, McKay & Ranieri v. Franklin, 79 N.C. App. 585, 339 S.E.2d 799 (1986).

However, the State's failure to properly authenticate telephone calls was not reversible error; the witnesses who testified about these phone calls did not recognize the defendant's voice but simply accepted the caller's self-identification. State v. Jones, 137 N.C. App. 221, 527 S.E2d 700, 2000 N.C. App. LEXIS 313 (2000).

Fact that defendant was the sole occupant of the residence in which documents were found was sufficient for them to be admitted into evidence; the weight given the evidence was for the jury to decide. State v. Mercer, 89 N.C. App. 714, 367 S.E.2d 9 (1988).

Jury Review of Writings. — Before handwritings may be submitted to a jury for its comparison, the trial court must satisfy itself that there is enough similarity between the genuine handwriting and the disputed handwriting such that the jury could reasonably infer that the disputed handwriting is also genuine. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

Authentication of Tape Recording. — Under this rule, testimony as to accuracy based on personal knowledge is all that is required to authenticate a tape recording, and a recording that so authenticated is admissible if it was legally obtained and contains otherwise competent evidence. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

The authentication requirements of this rule have superseded and replaced the seven-pronged test in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971), for the admission of tape-recorded evidence. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

The trial court erred by excluding a tape recording offered to impeach testimony of coconspirator based on improper foundation, where a witness had sufficient personal knowledge of coconspirator's voice to properly identify her voice from a prior relationship, and the State and defendant stipulated to the date of the tape recording. State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692, cert. denied, 335 N.C. 180, 438 S.E.2d 207 (1993).

Audiotape of an emergency call was properly authenticated by witnesses who were able to identify their own voice and the voices of each other on the tape. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Audiotape of a conversation defendant had with his wife and stepson, which the wife's relatives found 10 months after the wife and stepson were killed, was properly authenticated, and the state supreme court held that the trial court did not err when it admitted the tape for the limited purpose of showing defendant's malice, intent, and ill will towards the victims. State v. Jones, 358 N.C. 330, 595 S.E.2d 124, 2004 N.C. LEXIS 341 (2004).

Authentication of Letters. — Trial court did not err in admitting into evidence two letters from decedent to the brother, as well as the envelopes which contained those letters; the letters and envelopes were not hearsay because they were not offered for the truth of the matter, but were offered to provide a sample of decedent's handwriting so that the jury could compare it to the signature on a contract at issue, and the letters were properly authenticated by a witness familiar with decedent's handwriting. Taylor v. Abernethy, 174 N.C. App. 93, 620 S.E.2d 242, 2005 N.C. App. LEXIS 2281 (2005), appeal dismissed, — N.C. —, 630 S.E.2d 454 (2006).

Letters defendant had written to a codefendant were properly authenticated using, inter alia, defendant's return address on two letters and references to defendant and the codefendant using names only they used to refer to the other. State v. Young, 186 N.C. App. 343, 651 S.E.2d 576, 2007 N.C. App. LEXIS 2197 (2007).

Photographs Held Properly Authenticated. — Where the witness clearly indicated that the photographs accurately portrayed what he had observed, the photographs were properly authenticated for illustrative purposes. State v. Alston, 91 N.C. App. 707, 373 S.E.2d 306 (1988).

Right of Way Agreement Held Authenticated. — Copy of a right of way agreement accompanied by certification signed by the manager of the Right of Way Branch of the Department of Transportation held authenticated. DOT v. Bollinger, 121 N.C. App. 606, 468 S.E.2d 796 (1996).

Ancient Documents or Data Compilations. — Documents relating to laboratory experiments were admissible pursuant to subdivision (b)(8) of this rule, where suspicion concerning the authenticity of the documents was raised by their condition or internal consistency; their archival locations were logical for authentic documents; and they had been in existence for more than 20 years. Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991), aff'd in part, disc. rev. improvidently granted, 332 N.C. 1, 418 S.E.2d 648 (1992).

Admission of police officer's testimony concerning identification of defendant's voice heard over a radio transmitter was proper even though officer had never previously heard defendant's voice over a radio transmitter; police officer had personally known defendant for several years and had had conversations with defendant on several occasions prior to defendant's arrest. State v. Mullen, 98 N.C. App. 472, 391 S.E.2d 520 (1990).

Evidence Held Admissible. — Where witness testified concerning his familiarity with defendant's handwriting, there was sufficient evidence to support the trial court's admission of handwritten letter into evidence. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

Where victim identified paper writing as the yellow paper on which she wrote the statement for detective and testified that the handwriting on the papers was her handwriting when she was eight years old and detective testified that he gave her a blank yellow legal pad and asked her to write down what the defendant had done to her, the written statement was authenticated by the testimony of victim and detective. State v. Woody, 124 N.C. App. 296, 477 S.E.2d 462 (1996).

The trial court properly determined that the previously authenticated signature of a murder defendant was similar enough to the signature on a letter written to the murder victim to allow the letter to be admitted into evidence, even though there was no expert testimony on the similarity of the signatures. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

A 911 audiotape was properly authenticated where (1) an employee of the 911 center testified that the tape was an exact copy of the digital telephone recording made the night of the incident at issue, and that he had listened both to the original and to the copy and that they were identical, (2) the employee identified the voices of 911 emergency center employees on the tape, and (3) a witness and the defendant testified that they could identify the other voices on the tape. State v. Rourke, 143 N.C. App. 672, 548 S.E.2d 188, 2001 N.C. App. LEXIS 336 (2001).

A pornographic videotape seized from defendant's residence, which one of the victims of his sexual offense testified she and the other victim watched with him, was properly authenticated by an officer's testimony that it was the same videotape the officer had seized. State v. Williamson, 146 N.C. App. 325, 553 S.E.2d 54, 2001 N.C. App. LEXIS 945 (2001).

Pursuant to G.S. 8-97 and G.S. 8C-1-901, the trial court properly admitted the videotape evidence of defendant committing sexual acts with the victim, a minor child, and the photographs taken therefrom, because: (1) a state agent established an unbroken chain of custody from the time the tape was found in defendant's residence; (2) the state agent testified that the room depicted in the videotape shown to the jury was identical to the master bedroom in defendant's residence and that the man on the videotape was defendant; (3) the victim's mother, who had previously dated defendant, testified that defendant owned a camcorder and a tripod, which he had used to videotape them having sexual intercourse in the master bedroom of defendant's residence; (4) the victim's mother identified the room depicted in the videotape as defendant's master bedroom and the man on the videotape as defendant; (5) the victim's mother identified the young girl on the videotape as the victim, her daughter; (6) there was testimony that defendant's camcorder was in working condition; and (7) there was sufficient evidence from the testimony regarding the chain of custody to establish that the videotape had not been edited or altered, and that the same videotape seized from defendant's residence was the same videotape reviewed by the jury. State v. Prentice, 170 N.C. App. 593, 613 S.E.2d 498, 2005 N.C. App. LEXIS 1086 (2005), cert. denied, appeal dismissed, — N.C. —, 622 S.E.2d 628 (2005).

In a suit brought against a store to recover for personal injuries a customer sustained when he tripped on a stock cart in an aisle of the store, the trial court did not err in admitting the store's employee safety handbook into evidence because the testimony of the store's manager, identifying the document, stating that he obtained a copy of the handbook effective at the time of the customer's injury, and testifying that it was the same handbook required to be distributed to all store employees, was sufficient to support a finding that the document produced by the customer was a copy of the store's employee handbook in effect at the time of the customer's accident. Herring v. Food Lion, LLC, 175 N.C. App. 22, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005), aff'd, 360 N.C. 472, 628 S.E.2d 761 (2006).

Text messages were sufficiently authenticated when a manager of the Nextel branch testified that the subject messages where those that the manager retrieved as the stored incoming and outgoing messages for a specific cellular phone. State v. Taylor, 178 N.C. App. 395, 632 S.E.2d 218, 2006 N.C. App. LEXIS 1575 (2006).

Evidence Held Inadmissible. — The best evidence rule was implicated when defendants handed witness a memorandum and asked him what it said. Because witness denied receiving the memorandum, the exhibit was not authenticated; as a result, it was not admissible, and witness could not testify about its contents. Hedgecock Bldrs. Supply Co. v. White, 92 N.C. App. 535, 375 S.E.2d 164 (1989).

Where petitioners challenged a city annexation ordinances, the trial court properly ruled that their spreadsheets could not be offered to show that the city's methodology was not calculated to provide reasonably accurate results, as required by G.S. 160A-54, because they presented no expert testimony about the spreadsheets, and testimony of the city's principal planner was insufficient to establish a foundation for their admissibility. Brown v. City of Winston-Salem, 176 N.C. App. 497, 626 S.E.2d 747, 2006 N.C. App. LEXIS 531 (2006).

Failure to Object at Trial. — Defendant did not object at trial to any lack of proper authentication of incriminating photographs; therefore he could not on appeal assign error to the admissibility of the photographs on this ground. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

Because the State laid a sufficient foundation to establish the trustworthiness of the Mutual Aid Agreement between Robeson County and all police departments in the county, and because defendant neither moved to pass the agreement among the jurors nor cross-examine the police captain on its contents, defendant could not subsequently complain that the jurors never saw the detailed provisions of the agreement. State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000).

Plain Error Not Found. — It was not plain error for the trial court to admit copies of defendant's previous judgments during his habitual felon proceedings because defendant did not challenge the authenticity of the certified judgment sheets or the veracity of the convictions. State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Applied in State v. Ruiz, 77 N.C. App. 425, 335 S.E.2d 32 (1985); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993).

Cited in State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Kamtsiklis, 94 N.C. App. 250, 380 S.E.2d 400 (1989); Carolina Mills Lumber Co. v. Huffman, 96 N.C. App. 616, 386 S.E.2d 437 (1989); State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994); State v. Cox, 344 N.C. 184, 472 S.E.2d 760 (1996); State v. Spinks, 136 N.C. App. 153, 523 S.E.2d 129, 1999 N.C. App. LEXIS 1298 (1999); State v. Redd, 144 N.C. App. 248, 549 S.E.2d 875, 2001 N.C. App. LEXIS 422 (2001); State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528, 2002 N.C. App. LEXIS 273 (2002); Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002); State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007); Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007).

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. — A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. — A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. — A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and

accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. — A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(5) Official Publications. — Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. — Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. — Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged Documents. — Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. — Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Created by Law. — Any signature, document, or other matter declared by any law of the United States or of this State to be presumptively or prima facie genuine or authentic. (1983, c. 701, s. 1.)

COMMENTARY

This rule differs from Fed. R. Evid. 902 in that the phrase "or the Panama Canal Zone" has been deleted from paragraph (1). Paragraph (4) differs from the federal rule in that the phrase "any law of the United States or of this State" has been substituted in lieu of the phrase "of this Rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." Paragraph (10) differs from the federal rule in that the phrase "any law of the United States or of this State" is used in lieu of the phrase "Act of Congress".

The Advisory Committee's Note states:

"Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity."

Paragraph (1) provides that a document bearing the seal of an officer of the government and a signature purporting to be an attestation or execution does not require extrinsic evidence of authenticity as a condition precedent to admissibility. See *Brandis on North Carolina Ev-*

idence § 153, at 610 (1982). The Advisory Committee's Note states:

"The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638...."

Paragraph (2) is derived from Federal Civil Procedure Rule 44. North Carolina Civil Procedure Rule 44, which is similar, should be amended to conform to Rule 902. Paragraph (2) applies to documents as well as public records. The Advisory Committee's Note states:

"While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167 ... the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10)."

Paragraph (3) is derived from Federal Civil Procedure Rule 44(a) (2), which was amended in 1966 to provide for greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. North Carolina Civil Procedure Rule 44 should be amended to conform to Rule 902. Paragraph (3) applies to public documents rather than being limited to public records.

Paragraph (4) is confined to official records and reports, and documents authorized to be recorded or filed and actually recorded or filed. The Advisory Committee's Note states:

"The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraphs (1), (2), or (3). *** It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4)."

G.S. 1A-1, Rule 44, G.S. 8-34, G.S. 8-35, G.S. 8-18, G.S. 8-20, G.S. 47-31, and G.S. 47-34 should be amended to conform to Rule 902.

Paragraph (5) has the same effect as North Carolina Civil Procedure Rule 44(a), which should be amended to conform to Rule 902. The Advisory Committee's Note states:

"Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect."

Paragraph (6) changes North Carolina practice by providing that printed materials purporting to be newspapers or periodicals are self-authenticating. The Advisory Committee's Note states:

"The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150."

Paragraph (7) changes North Carolina practice by providing that inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin are self-authenticating. The Advisory Committee's Note states:

"Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them."

Paragraph (8) extends the exception for acknowledged title documents to include other acknowledged documents. The Advisory Committee's Note states:

"In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved."

Paragraph (9) provides that commercial paper, signatures thereon, and documents relating thereto are authenticated to the extent provided by general commercial law. The term "general commercial law" refers to the Uniform Commercial Code, except that federal commercial law will apply when federal commercial paper is involved. Pertinent provisions of the Uniform Commercial Code are §§ 25-1-202, 25-3-307, and 25-3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10) provides for the authentication of any signature, document, or other matter declared by any federal or North Carolina statute to be presumptively or prima facie genuine or authentic.

CASE NOTES

Cause of Death — Death Certificate. — In case brought by widow of insured to recover under life insurance policy, coroner's statement on death certificate that the gunshot wound which killed the insured was intentionally self-inflicted was not based on personal knowledge of the events which took place and could only be described as hearsay and conclusory. The admission of such a statement would thwart the fairness of the trial and in essence shift the burden of proof on the issue of the cause of death from defendant to plaintiff. Therefore, the exclusion of this statement on the death certificate was proper. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

Public records. — Extrinsic evidence of authenticity is not a condition precedent for the admissibility of documents bearing seal and certified copies of public records. State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Same — Medical Examiner's Report. — In case brought by widow of insured to recover under life insurance policy, statements listing suicide as the cause of death in medical examiner's report were properly excluded at trial. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

Excerpts from Publication. — The trial court did not err in allowing plaintiffs to present excerpts from a publication in opposition to the motion for summary judgment hearing where the publication was self-authenticating and could be admitted without any extrinsic showing of legitimacy pursuant to this section. Pierson v. Cumberland County Civic Ctr. Comm'n, 141 N.C. App. 628, 540 S.E.2d 810, 2000 N.C. App. LEXIS 1394 (2000).

Plain Error Not Found. — It was not plain error for the trial court to admit copies of defendant's previous judgments during his habitual felon proceedings because defendant did not challenge the authenticity of the certified judgment sheets or the veracity of the convictions. State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Cited in Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007).

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 903.

The Advisory Committee's Note states:

"The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states."

The requirement of proof by the attesting witness was abolished by G.S. 8-38, which should be repealed upon enactment of Rule 903. Rule 903 is not intended to affect the method and manner of proving instruments for registration.

ARTICLE 10.

Contents of Writings, Recordings and Photographs.

Rule 1001. Definitions.

For the purposes of this Article the following definitions are applicable:

(1) Writings and Recordings. — "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing,

magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. — "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. — An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. — A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1001 except that the word "sounds" has been added to paragraph (1) between "words" and "or numbers".

The Advisory Committee's Note states:

"Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments."

Paragraph (1) clarifies North Carolina law by providing that the best evidence rule applies to recordings and photographs. See *Brandis on North Carolina Evidence* § 190 (1982).

With respect to Paragraph (3), the Advisory Committee's Note states:

"In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as a original. Similarly, practicality and usage confer the status or original upon any computer printout."

Paragraph (3) is substantially in accord with North Carolina practice. See *Brandis, supra,* § 190; G.S. 55-37.1 [see now G.S. 55-16-01] and G.S. 55A-27.1.

With respect to Paragraph (4), the Advisory Committee's Note states:

"The definition describes 'copies' produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, infra. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate."

CASE NOTES

Certified Record. — Judgment and commitment of defendant's prior conviction for conspiracy to sell and deliver cocaine constituted a certified official record of defendant's prior conviction per the seal and signature of the deputy clerk of the superior court, and where a detective testified that the judgment and commitment was correct, the document was properly authenticated. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original

writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1002.

The rule is the familiar "best evidence rule" expanded to include explicitly writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra.* See *Brandis on North Carolina Evidence* § 190, at 100 (1982). However, the requirement for the original is overridden in many instances by other rules such as Rule 1003, which allows duplicates to be admitted.

The rule in North Carolina is consistent with Rule 1002 in that it requires the original of a writing only when its content is sought to be proved. *Id.*

The Advisory Committee's Note states:

"Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. *** Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. ***

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly as to situations in which the picture is offered as having independent probative value, *e.g.,* automatic photograph of bank robber. *** The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original.

It should be noted, however, that Rule 703, *supra,* allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule."

CASE NOTES

"Best Evidence" Rule Articulated. — The so-called "best evidence" rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself is available. United States Leasing Corp. v. Everett, Creech, Hancock & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

Every writing sought to be admitted must be properly authenticated, and must satisfy the requirements of this rule, the "best evidence rule," or one of its exceptions, set forth in G.S. 8C-1, Rule 1003, et seq. Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by G.S. 8C-1, Rules 803 and 804. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

To prove the content of a writing, the original is usually required. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

If a party elects to prove an independent fact through the content of a writing, the best evidence rule applies and if the writing cannot be introduced in evidence, the rule prohibits inquiry into its contents to establish the fact. Hedgecock Bldrs. Supply Co. v. White, 92 N.C. App. 535, 375 S.E.2d 164 (1989).

When Document Must Be Produced. — This rule, better known as the "best evidence rule," requires the production of a document only where the contents or terms of the document are in question. Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269,

cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

Best Evidence Rule Not Applicable. — Where detective was not attempting to prove the contents of the tape recording or the transcript of the recorded statement given by defendant, but used the transcript of the recorded statement to refresh his personal recollection of defendant's responses to the questions asked, the "best evidence" rule did not apply. State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994).

Best Evidence Rule Not Violated. — Where trial court admitted testimony of witness regarding papers she had found in house where she lived with defendant and where witness testified that in collecting defendant's personal belongings at request of defendant's parents she came upon folder containing papers that related to life insurance policy on victim and in which she saw defendant's name listed first as beneficiary, admission of testimony did not violate best evidence rule since contents of policy insuring life of defendant's husband were not in question and witness's testimony as to policy was collateral. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

Failure to Produce Best Evidence. — Where defendant sought not only to introduce document, but also to prove that its contents were what he claimed they were, i.e., a list of bank accounts with the names of the persons authorized to sign on them, for this purpose original signature cards clearly were the best evidence, and as no reason was given for their nonproduction, the court did not err in excluding the document. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

The "except as otherwise provided ... by statute" exception under both G.S. 8C-1, Rule 802 and this rule clearly covers written statements under G.S. 20-279.21(b)(3). Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 340 S.E.2d 127, cert. denied, 316 N.C. 731, 345 S.E.2d 387 (1986).

The order in which notes written by defendant were read and introduced as exhibits had no bearing on whether the writing itself violated the best evidence rule, and in view of the fact that the State produced the original notes in proving the contents of the notes, there was no violation of the best evidence rule. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

Applied in State v. Jones, 98 N.C. App. 342, 391 S.E.2d 52 (1990); State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996); State v. York, 347 N.C. 79, 489 S.E.2d 380 (1997).

Cited in Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1003.

Rule 1003 departs from the common law in North Carolina and other jurisdictions by providing that a duplicate is admissible to the same extent as an original unless a genuine question as to the authenticity of the original is raised or it would be unfair to admit the duplicate in the particular case. Traditionally, in North Carolina no special showing has been necessary in order to require production of the original.

The Advisory Committee's Note states:

"When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra,* a 'duplicate' possesses this character. Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."

Courts should be liberal in permitting questions of genuineness to be raised. The court should examine the quality of the duplicate, the specificity and sincerity of the challenge, the importance of the evidence to the case, and the burdens of producing the original before determining whether a genuine question of authenticity is raised.

CASE NOTES

"Best Evidence" Rule Articulated. — The so-called "best evidence" rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself is available. United States Leasing Corp. v. Everett, Creech, Hancock & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

Every writing sought to be admitted must be properly authenticated, and must satisfy the requirements of the "best evidence rule," G.S. 8C-1, Rule 1002, or one of its exceptions, set forth in this rule. Furthermore, if offered for a hearsay purpose, the writing must fall within one or more of the exceptions to the hearsay rule established by G.S. 8C-1, Rules 803 and 804. FCX, Inc. v. Caudill, 85 N.C. App. 272, 354 S.E.2d 767 (1987).

Duplicate trust agreement was admissible, where the original trust agreement had not been located despite plaintiff's attempt to issue a subpoena duces tecum to defendant. Investors Title Ins. Co. v. Herzig, 101 N.C. App. 127, 398 S.E.2d 659 (1990), rev'd on other grounds, 330 N.C. 681, 413 S.E.2d 269 (1992).

Cited in Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002).

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals Lost or Destroyed. — All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. — No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. — At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral Matters. — The writing, recording, or photograph is not closely related to a controlling issue. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1004.

The Advisory Committee's Note states:

"Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no 'degrees' of secondary evidence."

Paragraph (1) provides that loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. See McCormick § 201. This paragraph is consistent with current North Carolina practice. See *Brandis on North Carolina Evidence* § 192 (1982).

Paragraph (2) provides that when the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. The Advisory Committee's Note states that: "Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202." Extreme expense and inconvenience in obtaining the document will not constitute unavailability.

Paragraph (3) is consistent with North Carolina practice in that secondary evidence of the contents of a writing is admissible if the opponent who is in possession of the original fails, after notice, to produce it at the trial. See *Brandis on North Carolina Evidence* § 193 (1982). The Advisory Committee's Note states:

"A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203."

Under the rule, notice may be given by the pleadings. There are no North Carolina cases on this point.

Paragraph (4) is consistent with North Carolina cases in that production of the original is not required if the writing is only collaterally involved in the case. See *Brandis on North Carolina Evidence* § 191 (1982). The Advisory Committee's Note states:

"While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co.,* 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co. v. Carroll,* 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1."

CASE NOTES

"Best Evidence" Rule Articulated. — The so-called "best evidence" rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself is available. United States Leasing Corp. v. Everett, Creech, Hancock & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

Fact that an insurance policy was missing did not necessarily preclude recovery by an injured employee on a workers' compensation policy under G.S. 8C-1-1004; the employee could be permitted to offer other evidence of the contents of the insurance policy. Vaughan v. Carolina Indus. Insulation, 183 N.C. App. 25, 643 S.E.2d 613, 2007 N.C. App. LEXIS 842 (2007).

Best Evidence Rule Not Violated. — Where trial court admitted testimony of witness regarding papers she had found in house where she lived with defendant and where witness testified that in collecting defendant's personal belongings at request of defendant's parents she came upon folder containing papers that related to life insurance policy on victim and in which she saw defendant's name listed first as beneficiary, admission of testimony did not violate best evidence rule since contents of policy insuring life of defendant's husband were not in question and witness's testimony as to policy was collateral. State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989).

That jurors were unable to view a lost videotape did not, per se, result in a violation of G.S. 8C-1, Rule 403; G.S. 8C-1, Rule 1004 permits admissibility of secondary evidence where the original is lost or destroyed. State v. Thorne, 173 N.C. App. 393, 618 S.E.2d 790, 2005 N.C. App. LEXIS 2031 (2005).

Failure to Produce Best Evidence. — Where defendant sought not only to introduce document, but to prove that its contents were what he claimed they were, i.e., a list of bank accounts with the names of the persons authorized to sign on them, for this purpose original signature cards clearly were the best evidence, and as no reason was given for their nonproduction, the court did not err in excluding the document. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Duplicate trust agreement was admissible, where the original trust agreement had not been located despite plaintiff's attempt to issue a subpoena duces tecum to defendant. Investors Title Ins. Co. v. Herzig, 101 N.C. App. 127, 398 S.E.2d 659 (1990), rev'd on other grounds, 330 N.C. 681, 413 S.E.2d 269 (1992).

Applied in State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1005.

Admission of certified copies of registered instruments and official records are currently governed by G.S. 8-18, G.S. 8-34, and G.S. 1A-1, Rule 44.

The Advisory Committee's Note states:

"Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original."

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1006.

Where documents are so voluminous that it would be impracticable to produce and examine them in court, North Carolina Courts have allowed a qualified witness to testify to the results of his examination of the documents. *Brandis on North Carolina Evidence* § 192 (1982).

CASE NOTES

When Summary May Be Excluded. — A summary is properly excluded from evidence if it does not fairly represent the underlying document. Coman v. Thomas Mfg. Co., 105 N.C. App. 88, 411 S.E.2d 626, cert. denied, 331 N.C. 284, 417 S.E.2d 249 (1992).

Plaintiffs' attempt to generate an exhibit during trial while a witness was undergoing cross-examination, by extracting and charting portions of the testimony, was governed by G.S. 8C-1-611(a), not by this rule, and the trial court acted within its discretion in disallowing it as a kind of premature final argument. Marley v. Graper, 135 N.C. App. 423, 521 S.E.2d 129 (1999).

Admission in Summary Form. — Trial court did not err in admitting voluminous videotape recordings in summary form, as such an approach to the evidence was permitted under the North Carolina Rules of Civil Procedure and the jury was informed that the videos, taken for use in a private nuisance case, were edited from many hours of tape recorded over a period of several months. Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1007.

This rule is consistent with North Carolina practice in that the original writing need not be produced where the opponent admits that the copy offered in evidence is correct. See *Brandis on North Carolina Evidence* § 192, at 113 (1982). The rule clarifies North Carolina law by not allowing proof of contents by oral evidence of an oral admission. See *Norcum v. Savage,* 140 N.C. 472 (1906). The Advisory Committee's Note states:

"While the parent case, Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra.*"

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. (1983, c. 701, s. 1.)

COMMENTARY

This rule is identical to Fed. R. Evid. 1008. The Advisory Committee's Note states:

"Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra.* Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra,* is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L. Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra.*"

Although there are no North Carolina cases directly on point, Rule 1008 follows the division of function between the court and the jury with respect to competency and conditional relevancy. See *Brandis on North Carolina Evidence* § 8 (1982).

ARTICLE 11.

Miscellaneous Rules.

Rule 1101. Applicability of rules.

(a) *Proceedings generally.* — Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.

(b) *Rules inapplicable.* — The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary Questions of Fact. — The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand Jury. — Proceedings before grand juries.

(3) Miscellaneous Proceedings. — Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking proba-

tion; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. — Contempt proceedings in which the court is authorized by law to act summarily. (1983, c. 701, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 14; 1985, c. 509, s. 2.)

COMMENTARY

This rule resembles Fed. R. Evid. 1101 with appropriate modifications.

Subdivision (b)(1) restates, for convenience, the provisions of the second sentence of Rule 104(a), *supra*. See Advisory Committee's Note to that rule.

Current North Carolina practice with respect to voir dire, sentencing hearings, probation revocation hearings, and juvenile proceedings is not meant to be changed by adoption of these rules.

CASE NOTES

Admission of Speculative Evidence. — Testimony by defendant's friend tending to suggest that defendant would have a positive impact on young people visiting prison was purely speculative and therefore properly held inadmissible; evidence was not admissible to rebut the State's evidence that defendant would not be useful to society in prison and would be a danger to unarmed civilians in prison. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Rules Not Applicable to Sentencing Proceedings. — Although the North Carolina Rules of Evidence do not apply to sentencing proceedings, they may be helpful as a guide to reliability and relevance. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997); State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997), cert. denied, 522 U.S. 1078, 118 S. Ct. 858, 139 L. Ed. 2d 757 (1998).

In sentencing proceedings the Rules of Evidence do not limit the trial courts discretion over the scope of cross-examination because they do not apply. State v. Warren, 347 N.C. 309, 492 S.E.2d 609 (1997), cert. denied, 523 U.S. 1109, 118 S. Ct. 1681, 140 L. Ed. 2d 818 (1998).

The admissibility of mitigating evidence during the penalty phase is not constrained by the Rules of Evidence, although the trial judge must determine the admissibility of such evidence subject to general rules excluding evidence that is repetitive, unreliable, or lacking an adequate foundation. State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998), cert. denied, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999).

Trial court did not err, in defendant's capital sentencing hearing, in limiting defendant's opportunity to cross-examine a witness about a different murder, in furtherance of using that evidence to support aggravating circumstances of G.S. 15A-2000(e)(2), (3), because defendant had ample opportunity to cross-examine her on that issue and the Rules of Evidence did not strictly govern capital sentencing proceedings pursuant to G.S. 8C-1, N.C. R. Evid. 1101(b)(3); additionally, the issue involved prior inconsistent statements as to how many intruders were involved in that murder which was collateral to the fact of it happening and therefore, was subject to the limits imposed by the trial court's discretion. State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004).

Trial court did not err in admitting hearsay evidence of an alleged bribe offered to the witness by defendant at defendant's sentencing; further, the use of this hearsay evidence did not violate the Confrontation Clause. State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370, 2007 N.C. App. LEXIS 486 (2007), cert. denied, appeal dismissed, 361 N.C. 574, 2007 N.C. LEXIS 885 (2007).

During a capital sentencing proceeding, the State must be permitted to present any competent evidence supporting the imposition of the death penalty. State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Because the rules of evidence do not apply in capital sentencing proceedings, a trial court has great discretion to admit any evidence relevant to sentencing. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

The trial court did not violate this section in allowing the admission of testimony regarding defendant's temperament, a fight defendant had with his girlfriend at work, an alleged statement by defendant that he smoked marijuana, and a high school homework assignment that showed defendant's knowledge of drugs, as the testimony was competent, relevant evidence of defendant's character and did not violate his right to a fundamentally fair capital sentencing proceeding. State v. Davis, 353 N.C. 1, 539 S.E.2d 243, 2000 N.C. LEXIS 897 (2000), cert. denied, 534 U.S. 839, 122 S. Ct. 95, 151 L. Ed. 2d 55 (2001).

Applied in State v. Moses, 350 N.C. 741, 517 S.E.2d 853, 1999 N.C. App. LEXIS 882 (1999); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Cited in State v. Crouch, 74 N.C. App. 565, 328 S.E.2d 833 (1985); Haponski v. Constructor's Inc., 87 N.C. App. 95, 360 S.E.2d 109 (1987); State v. Williams, 343 N.C. 345, 471 S.E.2d 379 (1996); State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997); State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998); State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998); State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000); State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000); State v. Hardy, 353 N.C. 122, 540 S.E.2d 334, 2000 N.C. LEXIS 902 (2000); State v. Taylor, 354 N.C. 28, 550 S.E.2d 141, 2001 N.C. LEXIS 832 (2001).

Rule 1102. Short title.

These rules shall be known and may be cited as the "North Carolina Rules of Evidence." (1983, c. 701, s. 1.)

Chapter 9.
Jurors.

Article 1.
Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-1. Jury commission in each county; membership; selection; oath; terms; expenses of jury system.
9-2. Preparation of jury list; sources of names.
9-2.1. Alternate procedure in certain counties.
9-3. Qualifications of prospective jurors.
9-4. Preparation and custody of list.
9-5. Procedure for drawing panel of jurors; numbers drawn.
9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.
9-6.1. Requests to be excused.
9-7. Removal of names of jurors who have served from jury list; retention.
9-8, 9-9. [Repealed.]

Article 2.
Petit Jurors.

9-10. Summons to jurors.
9-11. Supplemental jurors; special venire.
9-12. Supplemental jurors from other counties.
Sec.
9-13. Penalty for disobeying summons.
9-14. Jury sworn; judge decides competency.
9-15. Questioning jurors without challenge; challenges for cause.
9-16. Exemption from civil arrest.
9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.
9-18. Alternate jurors.

Article 3.
Peremptory Challenges.

9-19. Peremptory challenges in civil cases.
9-20. Civil cases having several plaintiffs or several defendants; challenges apportioned; discretion of judge.
9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

Article 4.
Grand Jurors.

9-22 through 9-31. [Repealed.]

Article 5.
Discharge of Jurors Prohibited.

9-32. Discharge of juror unlawful.

ARTICLE 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-1. Jury commission in each county; membership; selection; oath; terms; expenses of jury system.

Not later than July 1, 1967, there shall be appointed in each county a jury commission of three members. One member of the commission shall be appointed by the senior regular resident superior court judge, one member by the clerk of superior court, and one member by the board of county commissioners. The appointees shall be qualified voters of the county, and shall serve for terms of two years. Appointees may be reappointed to successive terms. A vacancy in the commission shall be filled in the same manner as the original appointment, for the unexpired term. Each commissioner shall take an oath or affirmation that, without favor or prejudice, he will honestly perform the duties of a member of the jury commission during his term of service. The compensation of commissioners shall be fixed by the board of county commissioners, and shall be paid from the general fund of the county. All expenses necessary to carry out the provisions of this Chapter and to administer the jury system, including all data processing, document processing, supplies, postage, and other similar expenses, except as otherwise provided in this Chapter, shall be paid from the general fund of the county, except that the clerk of superior court shall furnish clerical or other personnel assistance, as the commission may reasonably require. (1967, c. 218, s. 1; 1981, c. 720, s. 3; 1991, c. 729, s. 1.)

Legal Periodicals. — For case law survey as to jury composition and unfair tribunal, see 45 N.C.L. Rev. 927 (1967).

For comment discussing the constitutionality of North Carolina's nuisance abatement statute, see 61 N.C.L. Rev. 685 (1983).

CASE NOTES

Deviations from the statutory norm do not automatically constitute reversible error absent an express statutory provision to the contrary. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

In order to justify a motion to quash an indictment upon grounds that statutory procedures were violated in the compilation of the jury list, a party must show corrupt intent, systematic discrimination in the compilation of the list, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Compilation of Jury List by Two-Person Commission. — Defendant failed to present any evidence that the two-person commission which acted when the third commissioner was killed acted with corrupt intent, or that the use of a two-person instead of three-person commission resulted in either systematic discrimination in the compilation of the jury list or irregularities which affected the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Cited in State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978); State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982); State v. Moore, 100 N.C. App. 217, 395 S.E.2d 434 (1990); Sweatt v. Wong, 145 N.C. App. 33, 549 S.E.2d 222, 2001 N.C. App. LEXIS 574 (2001).

§ 9-2. Preparation of jury list; sources of names.

(a) It shall be the duty of the jury commission on July 1 of every odd-numbered year to prepare a list of prospective jurors qualified under this Chapter to serve in the biennium beginning on January 1 of the next year. Instead of providing a list for an entire biennium, the commission may prepare a list each year if the senior regular resident superior court judge requests in writing that it do so.

(b) In preparing the list, the jury commission shall use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles pursuant to G.S. 20-43.4. The commission shall remove from the list the names of those residents of the county who are recently deceased, which shall be supplied to the commission by the State Registrar under G.S. 130A-121(a). The commission may use fewer than all the names from the list if it uses a random method of selection. The commission may use other sources of names deemed by it to be reliable.

(c), (d) Repealed by Session Laws 2003-226, s. 7(d), effective January 1, 2004.

(e) The jury commission shall merge the entire list of names of each source used and randomly select the desired number of names to form the jury list.

(f) The jury list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, or, if an annual list is being prepared as requested under subsection (a) of this section the jury list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous year but in no event shall the list include fewer than 500 names, except that in counties in which a different panel of jurors is selected for each day of the week, there is no limit to the number of names that may be placed on the jury list.

(g) Repealed by Session Laws 2003-226, s. 7(d), effective January 1, 2004.

(h) As used in this section "random" or "randomly" refers to a method of selection that results in each name on a list having an equal opportunity to be selected. (1806, c. 694, P.R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C.S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1969, c. 205, s. 1; c. 1190, s. 49½; 1973, c. 83, ss. 1, 2; 1981, c. 430, s. 1; c. 720, s. 1; 1981 (Reg. Sess., 1982), c. 1226, s. 1; 1983, c. 197, s. 2; 2003-226, s. 7(d); 2007-512, s. 1.)

Legal Periodicals. — As to racial discrimination in selection of jury, see 26 N.C.L. Rev. 185 (1948).

CASE NOTES

I. General Consideration.
II. Sources of List.
III. Proof of Discrimination.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the annotations under this section are from cases decided prior to the 1981 amendments.*

The plan in this section for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Constitutionality of Former Chapter. — See State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

Power of State to Prescribe Qualifications of Jurors. — Absent discrimination by race or other identifiable group or class, a state is at liberty to prescribe such qualifications for jurors as it deems proper without offending U.S. Const., Amend. XIV. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

The legislative intent of this section is to provide a system for objective selection of veniremen. State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

The procedure set forth in this Article is objective and systematic. State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

Technical and insubstantial violations of the statutes regulating jury selection in this Chapter are not sufficient to vitiate a jury list or afford a challenge to the array. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Deviations from the statutory norm do not automatically constitute reversible error absent an express statutory provision to the contrary. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

In order to justify a motion to quash an indictment upon grounds that statutory procedures were violated in the compilation of the jury list, a party must show corrupt intent, systematic discrimination in the compilation of the list, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Provisions of Former § 9-1 as to Jury List Directory and Not Mandatory. — See State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); State v. Bonner, 149 N.C. 519, 63 S.E. 84 (1908); State v. Brown, 233 N.C. 202, 63 S.E.2d 99, cert. denied, 341 U.S. 943, 71 S. Ct. 997, 95 L. Ed. 1369 (1951); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Special Statute Allowing Other Method. — Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for by the superior courts. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

The trial judge in a murder trial did not err in denying defendant's motion for funds to employ a statistician to review the jury venire in the county over a substantial period of time to determine whether the jury commission failed to perform its statutory duty when compiling the jury venire from which defendant's jury would be selected where defendant presented no evidence that the new jury selection process in the county was discriminatory, or that the services of a statistician would have resulted in the selection of a more favorable jury. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Applied in State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973); State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973); State v.

Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); State v. Corpening, 129 N.C. App. 60, 497 S.E.2d 303 (1998); State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799, 2000 N.C. LEXIS 528 (2000).

Cited in Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978); State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988); Armstrong v. North Carolina State Bd. of Dental Exmrs., 129 N.C. App. 153, 499 S.E.2d 462 (1998).

II. SOURCES OF LIST.

A jury commission is not limited to the sources specifically designated by this section. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Selection of Names only from Certain Letters of Alphabet. — Names for the list of grand and petit jurors were not chosen arbitrarily or nonsystematically in violation of this section where every fourth name from the tax list was taken only from the letters A, B, C, D and M rather than from the entire alphabet. However, the practice of choosing names only from certain letters of the alphabet is not approved, since this section seems to contemplate systematic selection of names from the entire alphabet. State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980).

Jury List Not Discriminatory Because Made from Tax List. — A jury list is not discriminatory merely because it is made from the tax list. The tax list is perhaps the most comprehensive list available for the names of male citizens. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964) (decided under former § 9-1).

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Even if the tax lists contained a disproportionate male-female ratio, such disproportion did not result from a systematic, arbitrary and intentionally discriminatory process on the part of the jury commission. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972); 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

But commissioners are not limited to use of tax list, and the use of other lists might result in the selection of more women jurors. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964) (decided under former § 9-1).

Failure to Use List of Names Not Appearing on Tax Lists. — The fact that the county commissioners did not also use a list of names of persons who do not appear on the tax lists does not show racial discrimination in the selection of prospective jurors. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Use of a jury box containing only the names of property owners is not per se discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly or intentionally discriminatory, will not vitiate the list or afford a basis for a challenge to the array. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972); 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

Jury Commission Need Not Ascertain Validity of Procedures Used in Compiling Lists. — To hold that a jury commission must ascertain the validity of the procedures used by independent bodies in compiling tax and voter registration lists before using such lists as sources of names of prospective jurors would be to impose an impossible burden. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972); 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

Removal of Certain Names from Lists. — Where commissioners laid aside names of several persons, otherwise qualified, because they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889) (decided under former § 9-1).

Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. State v. Dixon, 131 N.C. 808, 42 S.E. 944 (1902) (decided under former § 9-1).

Rejection of prospective jurors for want of good moral character and sufficient intelligence was available to the county commissioners as a general objection only when the jury list was being prepared, and not after the names were in the box. State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964) (decided under former § 9-1).

Compilation of List in 1981. — Commission was not required to use as a source of names the list of licensed drivers residing in the county, where in accord with subsection (a) of this section, the jury list for the county for the biennium beginning January 1, 1982, was compiled November 23 and 24, 1981, as at that time subsection (c) of this section was not in effect, even though the trial began in October 1983. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

III. PROOF OF DISCRIMINATION.

Discrimination on Account of Race. — See State v. Daniels, 134 N.C. 641, 46 S.E. 743 (1904); State v. Brown, 233 N.C. 202, 63 S.E.2d 99, cert. denied, 341 U.S. 943, 71 S. Ct. 997, 95 L. Ed. 1369 (1951); Miller v. State, 237 N.C. 29, 74 S.E.2d 513, cert. denied, 345 U.S. 930, 73 S. Ct. 792, 97 L. Ed. 1360 (1953); Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

How Prima Facie Case of Purposeful Discrimination Established. — The petitioner has the initial burden of establishing a prima facie case of purposeful discrimination. A prima facie case of jury discrimination can be established through a showing of a substantial disparity between the percentage of black residents in the county as a whole and on the jury lists, or by a showing of such disparity between the percentages of black residents on the tax rolls, from which the jury lists are drawn, and on the jury lists. Such a showing is strengthened where the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

The disparity between the percentage of black residents over 21 years of age in a county (45.5%) and on the jury list (4.5%) constituted a prima facie case of systematic exclusion of black residents from the county grand and petit jury lists. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

To establish a prima facie case of systematic racial exclusion, defendants are generally required to produce not only statistical evidence establishing that black residents were underrepresented on the jury, but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few black residents have served on the juries of the county notwithstanding a substantial black population therein, or both. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

In order to establish a prima facie case that there has been a violation of the requirement that a jury be composed of persons who represent a fair cross section of the community, defendant must document that the group alleged to have been excluded is a distinctive group; that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Distinctiveness of Excluded Group. — In determining whether a group is distinctive or cognizable for the purpose of a challenge to a jury selection plan, three factors which must be considered are whether there is some quality or attribute in existence which defines or limits the membership of the alleged group, whether there is a cohesiveness of attitudes, ideas, or experiences which serves to distinguish the purported group from the general social mileau, and whether a community of interest must be present within the alleged group which may not be represented by other segments of the populace. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

The North Carolina Supreme Court does not recognize "young people" between the ages of 18 and 29 as a distinct group for the purpose of determining whether a jury panel represents a fair cross section of the community. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Effect of State's Failure to Justify Disparity. — If a prima facie case of jury discrimination is proven, the State must justify the disparity. However, the State's failure to do so does not mean that a guilty defendant must go free. The State may indict and try him again by the procedure which conforms to constitutional requirements. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Sample of 40 Jurors Insufficient. — A small sample of 40 jurors from the master list of jurors of a county alone was insufficient to establish a systematic exclusion of blacks from the jury pool. State v. McNeill, 326 N.C. 712, 392 S.E.2d 78 (1990).

Discrimination Not Established. — There was no systematic exclusion of blacks, women and 18- through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by this section, and it appeared that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in G.S. 9-3. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Although the defendant's proof showed that during the period in question blacks made up 17.1 percent of the jury pool but 31.1 percent of the county's population, and young people between the ages of 18 and 29 made up 22.5 percent of the jury pool but 33.3 percent of the county's population, the defendant failed to show that such misrepresentation was the result of a systematic exclusion of those groups by the jury selection process, since the jury commission had fairly and reasonably selected every second name from the county tax listing and every third name from the county voter registration list. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Where the evidence showed that jury lists were compiled in strict compliance with this section, the mere fact that only 15 percent of the jury pool was black in a county in which the population was 24 percent black was insufficient to show systematic discrimination. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Where defendant failed to present evidence showing a gross discrepancy between the percentage of non-whites in a jury venire randomly selected by computer from the county voter registration list prescribed by this section as a master list, defendant's challenges under U.S. Const., Amends. VI and XIV to the grand jury and petit jury venire would be rejected. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 315 N.C. 1, 383 S.E.2d 591 (1989).

Where although the jury commissioners failed to strictly comply with this section and G.S. 9-2.1 and 9-5, all of the evidence tended to negate any corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned, and the trial judge found, on competent evidence, that the jurors were randomly selected, both from the voter list and the driver's license list, and that the selection of the master jury list was in substantial compliance with the law, there was no justification for a dismissal of the indictment or challenge to the array on grounds that statutory procedures were violated in the compilation of the jury list. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Requiring Defense Counsel to Investigate Jury Selection Procedures. — It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of black persons because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

OPINIONS OF ATTORNEY GENERAL

Use of Less Than All Names on Tax and Voter Registration Lists. — See opinion of Attorney General to Mr. Fred P. Parker, Wayne County Attorney, 40 N.C.A.G. 129 (1969).

Commission's Control of List Ceases Upon Preparation of List. — See opinion of Attorney General to Honorable Louise S. Allen, 42 N.C.A.G. 260 (1973).

§ 9-2.1. Alternate procedure in certain counties.

(a) In counties having access to electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, may be performed by this equipment, except that decisions as to mental or physical competency of prospective jurors shall continue to be made by jury commissioners. The procedure for performing these functions by electronic data processing equipment shall be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk or court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the list of prospective jurors, and the time sequence for drawing and summoning a jury panel.

(b) To facilitate random selection of jurors, all the names on the biennial jury list may be sorted into random order before the first venire is drawn. Thereafter, names may be selected sequentially from the randomized list without further randomization, except as required by G.S. 15A-1214. Public access to the jury list as required by G.S. 9-4 shall be limited to an alphabetical listing of the names. Access to the randomized list shall be prohibited. (1977, c. 220, s. 1; 1981, c. 430, s. 3; 1985, c. 368.)

CASE NOTES

Technical and insubstantial violations of the statutes regulating jury selection in this Chapter are not sufficient to vitiate a jury list or afford a challenge to the array. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

To establish a prima facie case of violation of the requirement that a jury be composed of persons who represent a fair cross-section of the community, the defendant must document (1) that the group alleged to have been excluded is a distinctive group, (2) that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community, and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. State v. Riggs, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

Noncompliance with Statutory Requirement Not Necessarily Discrimination. — Where defendant did no more than allege that the requirement in this section that the procedure for composing the jury list be available for public inspection in the clerk's office was violated, defendant did not make a prima facie case of discrimination. The mere failure to follow the statutory requirement, without a showing or allegation of how such failure affected defendant, is not a sufficient basis to quash the jury list. State v. Riggs, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

Discrimination Not Established. — Where although the jury commissioners failed to strictly comply with this section and G.S. 9-2 and 9-5, all of the evidence tended to negate any corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned, and the trial judge found, on competent evidence, that the jurors were randomly selected, both from the voter list and the driver's license list, and that the selection of the master jury list was in substantial compliance with the law, there was no justification for a dismissal of the indictment or challenge to the array on this basis that statutory procedures were violated in the compilation of the jury list. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Surgeon in a malpractice action was not prejudiced by the use of the alternative method for selecting a jury pool authorized by G.S. 9-2.1 merely because civilian employees of the county sheriff's office entered a password that commanded data processing equipment to randomly produce a list of prospective jurors. Sweatt v. Wong, 145 N.C. App. 33, 549 S.E.2d 222, 2001 N.C. App. LEXIS 574 (2001).

§ 9-3. Qualifications of prospective jurors.

All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P.R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C.S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1; 1973, c. 230, ss. 1, 2; 1977, c. 711, s. 10.)

Cross References. — For constitutional provision relating to jury service, see N.C. Const., Art. I, § 26.

CASE NOTES

The North Carolina plan which imposes a two-year lapse in preparation of new jury lists is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed,

281 N.C. 761, 191 S.E.2d 363 (1972).

Constitutionality of Excusal Based on Language. — An excusal, under this section, based on a juror's inability to understand the English language, is not a violation of N.C. Const., Article 1, § 26. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Excuse Based on Age. — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. The language of G.S. 9-6.1 and 9-6(a) gave the court considerable latitude to deal with prospective jurors and particular problems, and the trial judge, after questioning the prospective juror, genuinely exercised his judicial discretion in refusing to excuse her. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. Judge asked juror if she was able to sit and listen to the evidence, she said that she was, and the court did not abuse its discretion in not excusing her. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Inability to Understand English. — The defendant was not entitled to a mistrial after a prospective juror who responded to two of the prosecutor's questions in Spanish was excused for cause, because his subsequent English responses revealed that his inability to understand English made him unqualified to serve as a juror under this section; any arguable error in not ordering the minimal dialogue in Spanish to be translated for the record was, given the wholly proper excusal, without prejudicial effect. State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

The law guarantees the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law. It was the manifest purpose of the legislature that all those and only those citizens who possess the proper qualifications of character and intelligence should be selected to serve on juries. State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

Mere Showing of Violation of Statutory Procedures Does Not Merit Quashing Indictment. — In the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

Corrupt Intent, Discrimination or Irregularities Must Be Shown. — In order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

And even a showing that certain qualified persons were improperly disqualified would not require a dismissal of an indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

The judge is not required to make findings in the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

There was no systematic exclusion of blacks, women and 18- through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by G.S. 9-2, and it appeared that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in this section. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

In order for a defendant to preserve his exception to the court's denial of a challenge for cause, he must (1) excuse the challenged juror with a peremptory challenge, (2) exhaust his peremptory challenges before the panel is completed, and (3) thereafter seek, and be denied peremptory challenge to an additional juror. State v. Spencer, 37 N.C. App. 739, 246 S.E.2d 837 (1978).

Mere Summons Does Not Disqualify Person for Two Years. — It is actual service as a juror rather than a mere summons for jury duty which disqualifies him for service for the next two years. State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July 21, 1971, the effective date of the amendment of this section lowering the age requirement for jurors from 21 years to 18 years, and September 21, 1971, the date of defendant's trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

The petit jury which served at the trial of a 20-year-old defendant was not invalidated by the fact that the jury list had not been revised to include the names of persons under 21 years of age. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

Alienage. — Alienage is disqualification of a juror. Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928).

Juror No Longer Resident of County. — Trial court properly executed its authority under G.S. 15A-1211(b) to determine that a prospective juror failed to meet the statutory requirements to sit as a juror in a trial; the court excused the prospective juror from the jury because she was no longer a resident of the county where the trial took place. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Defendant waived any challenge to the fact that a juror was not a resident of Durham County by failing to object at trial as required by G.S. 9-3. State v. Davis, 191 N.C. App. 535, 664 S.E.2d 21, 2008 N.C. App. LEXIS 1508 (2008).

That a juror had forfeited his citizenship by reason of conviction of a criminal offense was ground for challenge of the juror for cause under former G.S. 9-1. Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953).

Challenges in Particular Actions, for Bias, etc. — Former G.S. 9-1, providing that good and lawful men, required by the Constitution to serve on juries, should be men found by the county commissioners to have paid taxes for the preceding year, of good moral character, and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

Juror Must Qualify to Be Sworn in at the Beginning of Court. — Court committed no error in excusing a juror, where the transcript revealed that at the time jury selection commenced, the juror had previously served on a federal jury within two years and was not immediately qualified to serve in the instant case; the court could not, as defendant suggested, move the juror to a later panel and then swear her in at the time she was called. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

Dismissal of Jurors Held Harmless. — The court's dismissal of six prospective jurors after unrecorded, private bench discussions was harmless where the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. State v. Cummings, 353 N.C. 281, 543 S.E.2d 844, 2001 N.C. LEXIS 279 (2001).

Waiver. — On appeal from defendant's convictions on charges of first-degree murder and robbery with a firearm, the state supreme court refused to consider defendant's argument that the trial court erred by dismissing a juror for cause after the juror informed the court that he was convicted in Texas of committing several felonies in the 1970s, because defendant did not raise the argument that the juror's citizenship rights were restored by G.S. 13-1(5), when the trial court dismissed the juror for cause. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Applied in State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); Broughton v. North Carolina, 717 F.2d 147 (4th Cir. 1983); United States v. McLean, 904 F.2d 216 (4th Cir. 1990); State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998).

OPINIONS OF ATTORNEY GENERAL

Person's Mental and Physical Competency Must Be Considered Each Time Person's Name Appears on Prospective Jury List. — See opinion of Attorney General to Mr. J.C. Taylor, 43 N.C.A.G. 292 (1973).

§ 9-4. Preparation and custody of list.

As the jury list is prepared, the name and address of each qualified person selected for the list shall be written on a separate card. The cards shall then be alphabetized and permanently numbered, the numbers running consecutively with a different number on each card. These cards shall constitute the jury list for the county. They shall be filed with the register of deeds of the county, together with a statement of the sources used and procedures followed in preparing the list. The list shall be kept under lock and key, but shall be available for public inspection during regular office hours. The register of deeds may elect to store an electronic copy of the jury list for the county. (1967, c. 218, s. 1; 1969, c. 205, s. 2; 2009-518, s. 1.)

Effect of Amendments. — Session Laws 2009-518, s. 1, effective August 26, 2009, added the last sentence.

CASE NOTES

It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of black persons because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

§ 9-5. Procedure for drawing panel of jurors; numbers drawn.

The board of county commissioners in each county shall provide the clerk of superior court with a jury box, the construction and dimensions of which shall be prescribed by the administrative officer of the courts. At least 30 days prior to January 1 of any year for which a list of prospective jurors has been prepared, a number of discs, squares, counters or markers equal to the number of names on the jury list shall be placed in the jury box. The discs, squares, counters, or markers shall be uniform in size, weight, and appearance, and may be made of any suitable material. They shall be numbered consecutively to correspond with the numbers on the jury list. The jury box shall be of sufficient size to hold the discs, squares, counters or markers so that they may be easily shaken and mixed, and the box shall have a hinged lid through which the discs, squares, counters or markers can be drawn. The lid shall have a lock, the key to which shall be kept by the clerk of superior court.

At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or his assistant or deputy shall, in public, after thoroughly shaking the box, draw therefrom the number of discs, squares, counters, or markers equal to the number of jurors required for the session or sessions scheduled. For each week of a superior court session, the senior resident superior court judge for the district or set of districts as defined in G.S. 7A-41.1(a) in which the county is located shall specify the number of jurors to be drawn. For each week of a district court jury session, the chief district judge of the district court district in which the county is located shall specify the number of jurors to be drawn. Pooling of jurors between or among concurrent sessions of various courts is authorized in the discretion of the senior regular resident superior court judge. When pooling is utilized, the senior regular resident superior court judge, after consultation with the chief district judge when a district court jury is required, shall specify the total number of jurors to be drawn for such concurrent sessions. When grand jurors are needed, nine additional numbers shall be drawn.

As the discs, squares, counters, or markers are drawn, they shall be separately stored by the clerk until a new jury list is prepared.

The clerk of superior court shall deliver the list of numbers drawn from the jury box to the register of deeds, who shall match the numbers received with the numbers on the jury list. The register of deeds shall within three days thereafter notify the sheriff to summon for jury duty the persons on the jury list whose numbers are thus matched. The persons so summoned may serve as jurors in either the superior or the district court, or both, for the week for which summoned. Jurors who serve each week shall be discharged at the close of the weekly session or sessions, unless actually engaged in the trial of a case, and then they shall not be discharged until their service in that case is completed. (1806, c. 694, P.R.; 1868-9, c. 9, ss. 5, 6; c. 175; Code, ss. 1726, 1727, 1731; 1889, c. 559; 1897, c. 117; 1901, c. 28, s. 3; c. 636; 1903, c. 11; 1905, c. 38; c. 76, s. 4; c. 285; Rev., ss. 1958, 1959; C.S., ss. 2313, 2314; 1967, c. 218, s. 1; 1969, c. 205, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 38.)

CASE NOTES

No language in this Chapter requires the clerk personally, or through an assistant or deputy clerk, to make the random drawing of names of those on the panel from the box so as to render illegal such drawing by someone else. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976).

Former § 9-3 Partly Mandatory and Partly Directory. — See State v. Watson, 104 N.C. 735, 10 S.E. 705 (1889); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); Moore v. Navassa Guano Co., 130 N.C. 229, 41 S.E. 293 (1902); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

Technical and insubstantial violations of the statutes regulating jury selection in this Chapter are not sufficient to vitiate a jury list or afford a challenge to the array. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

No Discrimination Established. — Where although the jury commissioners failed to strictly comply with this section and G.S. 9-2 and 9-2.1, all of the evidence tended to negate any corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned, and the trial judge found, on competent evidence, that the jurors were randomly selected, both from the voter list and the driver's license list, and that the selection of the master jury list was in substantial compliance with the law, there was no justification for a dismissal of the indictment or challenge to the array on the basis that statutory procedures were violated in the compilation of the jury list. State v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986).

Applicability of Notice Provision. — The thirty day notice provision in this section did not apply to the trial court's selection of supplemental jurors under G.S. 9-11. State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

(a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.

(b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he or any district court judge of his district court district designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedures shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed. In counties located in a district or set of districts as defined in G.S. 7A-41.1(a) which have a trial court administrator, the chief district judge may assign the duty of passing on applications for excuses from jury service to the administrator. In all cases concerning excuses, the clerk of court or the trial court administrator shall notify prospective jurors of the disposition of their excuses.

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a subsequent session of court. If required to serve subsequently, the juror shall be considered on such occasion the same as if he were a member of the panel regularly summoned for jury service at that time.

(d) A judge hearing applications for excuses from jury duty shall excuse any person disqualified under § 9-3.

(e) The judge shall inform the clerk of superior court of persons excused under this section, and the clerk within 10 days shall so notify the register of deeds, who shall note the excuse on the juror's card and file it separately from the jury list.

(f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section. (1967, c. 218, s. 1; 1969, c. 205, ss. 4, 5; 1971, c. 377, s. 30; 1979, 2nd Sess., c. 1207, s. 1; 1981, c. 430, s. 2; 1985, c. 609, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 47.)

Legal Periodicals. — For article, "Filling the Box: Responding to Jury Duty Avoidance," see 23 N.C. Cent. L.J. 1 (1997).

CASE NOTES

Communication which constitutes harassment of jurors is not protected speech. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Judges' Power to Excuse Jurors. — Although subsection (f) of this section provides that superior court judges have the power to excuse jurors, this power must be exercised within the constraints of constitutional requirements. State v. Cole, 331 N.C. 272, 415 S.E.2d 716 (1992).

This section places the process of juror excusals within the discretion of the district court judge, and a defendant is not entitled to a new trial for improper jury excusals in the absence of evidence of corrupt intent, discrimination, or irregularities which affected the actions of the jurors actually drawn and summoned. State v. Leary, 344 N.C. 109, 472 S.E.2d 753 (1996).

Decisions concerning the excusal of prospective jurors are matters of discretion left to the trial court. State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under

G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. The language of G.S. 9-6(a) gave the court considerable latitude to deal with prospective jurors and particular problems, and the trial judge, after questioning the prospective juror, genuinely exercised his judicial discretion in refusing to excuse her. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Excuse Based on Age. — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

Failure to Strictly Comply with Section Not Grounds for New Trial. — Although it was clear that the district court judge failed to strictly comply with the provisions of this section governing the excusal of jurors, the alleged statutory irregularities did not constitute error; defendant was not entitled to a new trial because the evidence tended to negate any corrupt intent, discrimination or irregularities which affected the action of the jurors actually drawn and summoned. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

But Compliance with Section Suggested. — Although the actions of the trial judge did not result in error, the Supreme Court would suggest that district court judges excuse jurors only in keeping with the language and the spirit of this section. State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989).

Admonishment of Juror. — It is not improper for a judge to admonish a prospective juror for taking a position solely for the purpose of being excused from jury duty. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

The selection process authorized by subsection (b) is essentially a pretrial screening process which is delegated to the district court, rather than a part of the capital trial. State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), cert denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996).

Right to Be Present at Pretrial Jury Selection. — The Supreme Court declined to extend the unwaivable right to be present at every stage of a capital trial to pretrial jury selection matters. State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), cert denied, 517 U.S. 1110, 116 S. Ct. 1332, 134 L. Ed. 2d 482 (1996).

The Dismissal of Jurors Outside of Defendant's Presence Before Trial Upheld. — The trial court did not commit error in excusing prospective jurors prior to the calling of defendant's case as the defendant had no right to be present at that time because his trial had not yet begun. Furthermore, the defendant failed to demonstrate corrupt intent or that he was prejudiced by the jury that was impaneled. State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Juror Properly Excused. — Where prospective juror had a medical history including coronary bypass surgery and an addiction to Valium and stated that thinking about the case was "bringing the problem back" and stated that the stress of being a prospective juror awakened him in the middle of the night, the trial court properly exercised its discretion in excusing a prospective juror whose health was possibly in jeopardy. State v. Neal, 346 N.C. 608, 487 S.E.2d 734 (1997), cert. denied, 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998).

Trial judge's failure to record his ex parte communication with one prospective juror as required by G.S. 15A-1241 was harmless error, where the record adequately revealed the substance of the unrecorded conversation, and the juror was properly excused under subsection (a) of this section and G.S. 9-6.1 because "he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Cited in State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969); State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996); State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996).

§ 9-6.1. Requests to be excused.

Any person summoned as a juror who is 72 years or older and who wishes to be excused, deferred, or exempted may make the request without appearing in person by filing a signed statement of the ground of the request with the chief district court judge of that district, or the district court judge or trial court administrator designated by the chief district court judge pursuant to G.S. 9-6(b), at anytime five days before the date upon which the person is summoned to appear. A person may request either a temporary or permanent exemption under this section, and the judge or trial court administrator may accept or reject either in the exercise of discretion conferred by G.S. 9-6(b), including the substitution of a temporary exemption for a requested permanent exemption. In the case of supplemental jurors summoned under G.S. 9-11, notice may be given when summoned. In case the chief district court judge, or the judge or trial court administrator designated by the chief district court judge pursuant to G.S. 9-6(b), rejects the request for exemption, the prospective juror shall be immediately notified by the trial court administrator or the clerk of court by telephone, letter, or personally. (1979, 2nd Sess., c. 1207, s. 2; 1981, c. 9, ss. 1, 2; c. 430, ss. 4, 5; 2005-149, s. 1.)

CASE NOTES

Constitutionality. — There is no constitutional infirmity in the statutory scheme as it relates to excusal of jurors over the age of 65 [now 72]. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

Juror Properly Excused. — Trial judge's failure to record his ex parte communication with one prospective juror as required by G.S. 15A-1241 was harmless error, where the record adequately revealed the substance of the unrecorded conversation, and the juror was properly excused under this section and G.S. 9-6(a) and 9-6.1 because "he was over sixty-five." State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Excuse Based on Age. — Statutory scheme allowing trial judge to exercise his discretion to excuse jurors over the age of 65 [now age 72] has a rational basis and is not constitutionally infirm. State v. Rogers, 355 N.C. 420, 562 S.E.2d 859, 2002 N.C. LEXIS 429 (2002).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve, and while such a juror had a right under G.S. 9-6.1 to request an exemption, the trial judge had discretion whether to excuse any juror. Judge asked juror if she was able to sit and listen to the evidence, she said that she was, and the court did not abuse its discretion in not excusing her. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

There was no error in defendant's murder case when a trial judge refused to disqualify a juror who was over the age of 65; a prospective juror over that age had a right under G.S. 9-3 to serve. It was also clear from the text of G.S. 9-3, 9-6(a), and 9-6.1, that whether a juror should be excused from jury service is a decision which rests in the sound discretion of the trial court, and after questioning the prospective juror as to whether or not she thought that she could sit and listen to the evidence, the trial court did not abuse its discretion in allowing her to sit as a juror. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

§ 9-7. Removal of names of jurors who have served from jury list; retention.

As persons are summoned for jury service, the cards upon which their names appear shall be withdrawn from the jury list and filed separately. The date for which each juror serves shall be noted on his card.

All cards removed from the jury list because of service, or having been excused from service, or because of disqualification, shall be retained for reference in compiling the next jury list. When the succeeding list has been prepared, the list of persons who have served shall be retained for a period of two years. (1967, c. 218, s. 1.)

§§ 9-8, 9-9: Repealed by Session Laws 1967, c. 218, s. 1.

ARTICLE 2.

Petit Jurors.

§ 9-10. Summons to jurors.

(a) The register of deeds shall, within three days after the receipt of numbers drawn, deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein. The summons shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned. Service by telephone, or by first-class mail if mailed to the correct current address of the juror on or before the fifteenth day before the day the court convenes, shall be valid and binding on the person served, and he shall be bound to appear in the same manner as if personally served. The summons shall contain information as to the time, place, and authority before whom applications for excuses from jury service may be heard.

(b) All summons served personally or by mail under this section or under G.S. 9-11 shall inform the prospective juror that persons 72 years of age or older are entitled to establish in writing exemption from jury service for good cause, shall contain a statement for claiming such exemption and stating the cause and a place for the prospective juror's signature, and shall state the mailing address of the clerk of superior court and the date by which such request for exemption must be received. (1779, c. 157, ss. 4, 6, P.R.; R.C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C.S., s. 2320; 1967, c. 218, s. 1; 1979, 2nd Sess., c. 1207, s. 3; 1985, c. 609, s. 3; 2006-226, s. 8; 2006-264, ss. 30(a), 30(c).)

Cross References. — As to penalty for disobeying summons, see G.S. 9-13.

CASE NOTES

Jury Summons Not Improper. — Where the clerk's office mailed jury summons to prospective jurors and many of the people summoned did not send back a notification of service, the fact that the clerk's office and the sheriff's department attempted to contact some of the prospective jurors did not create a suspicion of impropriety. State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997).

§ 9-11. Supplemental jurors; special venire.

(a) If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the register of deeds the names of those additional jurors who are so summoned and who report for jury service.

(b) The presiding judge may, in his discretion, at any time before or during a session direct that supplemental jurors or a special venire be selected from the jury list in the same manner as is provided for the selection of regular jurors. Jurors summoned under this subsection may be discharged by the court at any time during the session and are subject to the same challenges as regular jurors, and to no other challenges. (1779, c. 156, s. 69, P.R.; 1830, c. 27; R.C., c. 31, s. 29; c. 35, ss. 30, 31; Code, ss. 1733, 1738, 1739, 1740; 1887, c. 53; 1889, c. 441; 1897, c. 364; Rev., ss. 1967, 1968, 1973, 1974, 1975, 3265, 3602; 1911, c. 15; 1913, c. 31, ss. 1, 2; 1915, c. 210; C.S., ss. 2321, 2322, 2338, 2339, 2340, 4635; 1967, c. 218, s. 1; 1969, c. 205, s. 6.)

Cross References. — As to qualifications of jurors, see G.S. 9-3.

CASE NOTES

The language of this section is clear and unambiguous, and its provisions authorize the trial judge to order the summoning of supplemental jurors in order to ensure orderly, uninterrupted, and speedy trials. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985).

Discretion of Judge. — See State v. Brogden, 111 N.C. 656, 16 S.E. 170 (1892); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Levy, 187 N.C. 581, 122 S.E. 386 (1924); State v. Casey, 212 N.C. 352, 193 S.E. 411 (1937), overruled on other grounds, 248 N.C. 695, 104 S.E.2d 837 (1958); State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

A motion for a change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Discretion of Judge. — The section neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

Discretion of Selecting Officer. — Where an officer is empowered to select and summon talesmen he is vested with some discretion. It is his right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire impartiality. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969); State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

Sheriff Not Always Disqualified Where Deputy Testifies. — The legislature did not intend to disqualify sheriffs from summoning extra jurors in all cases in which deputy sheriffs testify. If this were so, the legislature would have designated some other official to summon extra jurors. If the sheriff were disqualified from summoning jurors in every case in which a defendant feels the sheriff is harassing him, there would be few if any sheriffs qualified to summon a juror. State v. Yancey, 58 N.C. App. 52, 293 S.E.2d 298 (1982).

Testimony by a person in the sheriff's office does not disqualify the sheriff from summoning supplemental jurors to hear the matter. State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997).

The mere fact that the sheriff and the chief deputy were testifying in case did not preclude members of the department from contacting jurors who failed to acknowledge their service of the summons. State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997).

Clerical Communications. — Where prospective jurors were contacted by the sheriff himself from a list he had received, and the sheriff merely asked the persons contacted if they had received their summons and if they intended to appear in court, the communication was pretrial and simply a clerical one assuring that the prospective jurors had been served with the summons. State v. Barnard, 346 N.C. 95, 484 S.E.2d 382 (1997).

There is no statutory or case authority prescribing the methods by which tales jurors must be selected. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplate a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as regular jurors and may be examined by both parties on voir dire. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office which he holds. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Mere Possibility of Discrimination Does Not Make Panel Objectionable. — Obviously it would be possible for a sheriff, sent out to execute an order of the court under this section to discriminate in the selection of persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where the record shows that he did not so discriminate. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Accused was not prejudiced because he was not furnished a list of persons called as supplemental jurors, where it became necessary to summon them after the court had properly excluded jurors from the original venire. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Discretion of Sheriff. — Absent proof that a sheriff violated the discretionary trust placed in him by G.S. 9-11, he should remain free to use his best judgment in carrying out the orders of the court. State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

The defendant was not prejudiced when the trial court ordered the sheriff to randomly recruit jurors in the middle of the jury selection process, in light of the fact that the defendant failed to exhaust his peremptory challenges. At this time, only one juror remained to be seated. The twelfth juror seated was one of the supplemental jurors, but the defendant still had one peremptory challenge remaining. State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985).

Special Venire Selected Without Partiality. — A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, was properly refused, the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. State v. Dixon, 215 N.C. 438, 2 S.E.2d 371 (1939).

A challenge to jury selection under G.S. 9-11 is sustainable when there is a partiality or misconduct on the sheriff's part or some irregularity in making out the list. State v. Nolen, 144 N.C. App. 172, 550 S.E.2d 783, 2001 N.C. App. LEXIS 447 (2001).

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Order Substantially a Special Writ of Venire Facias. — A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of venire facias. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Challenge for Cause. — Under this section where a special venire has been ordered by the court for the trial of a capital felony, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same challenges for cause as tales jurors. State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

Objections Made by Challenges to the Array. — Objections to the special venire based on partiality, misconduct of the sheriff, or irregularity in making out the jury list, are properly made by challenges to the array. State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

A motion challenging the array of special jurors was properly denied where the motion did not challenge the order of the court directing the sheriff to select six supplemental jurors, nor the action of the sheriff in selecting the jurors, nor contend that black persons were systematically excluded by the sheriff in his selection of the six jurors. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

Special Venire Exhausted. — When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. State v. Stanton, 118 N.C. 1182, 24 S.E. 536 (1896).

Accessory May Be Tried by Special Venire. — Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

Applicability of Notice Provision. — The thirty day notice provision in G.S. 9-5 did not apply to the trial court's selection of supplemental jurors under this section. State v. Dickens, 346 N.C. 26, 484 S.E.2d 553 (1997).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

Cited in State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996).

§ 9-12. Supplemental jurors from other counties.

(a) On motion of any party or the State, or on his own motion, any judge of the superior court, if he is of the opinion that it is necessary in order to provide a fair trial in any case, and regardless of whether he will preside over the trial of that case, may order as many jurors as he deems necessary to be summoned from any county or counties in the district or set of districts as defined in G.S. 7A-41.1(a) in which the county of trial is located or in any adjoining district or set of districts. These jurors shall be selected and shall serve in the manner provided for selection and service of supplemental jurors selected from the jury list. These jurors shall be subject to the same challenges as other jurors, except challenges for nonresidence in the county of trial.

(b) Transportation may be furnished in lieu of mileage.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1913, c. 4, ss. 1, 2; C.S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1; 1971, c. 377, s. 32; 1987 (Reg. Sess., 1988), c. 1037, s. 48.)

CASE NOTES

Editor's Note. *— Some of the cases below were decided under former G.S. 1-86.*

Discretion of Court. — The trial judge, when he refused defendant's motion to remove an action for homicide to another county, in the exercise of his sound discretion, could have had the jurors summoned from any adjoining county, or from any county in the same judicial district, or had jurors drawn from the jury box of such county. State v. Kincaid, 183 N.C. 709, 110 S.E. 612 (1922); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935), decided under former § 1-86.

The granting of a solicitor's (now district attorney's) motion that the jury be drawn from the body of another county is within the court's discretion. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, was addressed to the discretion of the trial court, and where the record disclosed that the trial judge conducted a hearing, read all the affidavits, and examined the press releases, juror selected stated that he could render a verdict uninfluenced by the publicity, and defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion was not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967), decided under former § 1-86.

The motion of the defendants that a jury be summoned from another county was addressed to the sound discretion of the presiding judge. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

A defendant's motion for a change of venue and his alternative motion for a special venire from another county were addressed to the sound legal discretion of the trial court. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

This section places the matter of ordering jurors to be summoned from another county in the sound discretion of the judge of the superior court. State v. Edwards, 286 N.C. 140, 209 S.E.2d 789 (1974).

Order Tantamount to Denial of Motion to Remove. — When the judge entered an order directing that venire of jurors be drawn from another county to serve as jurors in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962), decided under former § 1-86.

Order Justified. — Due to the prior trials and the widespread publicity, the court on motion of the State was justified in ordering the trial jury drawn from another county. State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972).

Review of Discretion. — A judge's order, entered by virtue of authority vested in him by this section, is not reviewable, unless there has been a manifest abuse of his discretion. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971), decided under former § 1-86.

A motion for change of venue or for a special venire may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable in the Court of Appeals unless gross abuse of discretion is shown. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

A defendant's motions for a change of venue or for a special venire from another county, on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, were addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

The courts have consistently held that a motion for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court, and that, absent a showing of abuse of discretion, the decision of the trial court is not reviewable. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings will not be disturbed on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976);

State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Applied in State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); Kinston City Bd. of Educ. v. Board of Comm'rs, 29 N.C. App. 544, 225 S.E.2d 145 (1976).

Cited in State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

§ 9-13. Penalty for disobeying summons.

Every person summoned to appear as a juror who has not been excused, and who fails to appear and attend until duly discharged, shall be subject to a fine of not more than fifty dollars ($50.00), to be imposed by the court, unless he renders an excuse deemed sufficient. The forfeiture so imposed if not paid forthwith shall be entered as a judgment against the defaulting juror, and the clerk of superior court shall issue an execution against his estate. (1779, c. 157, s. 4, P.R.; 1783, c. 189, P.R.; 1806, c. 694, P.R.; R.C., c. 31, s. 30; Code, ss. 405, 1734; Rev., s. 1977; C.S., s. 2323; 1967, c. 218, s. 1.)

Legal Periodicals. — For article, "Filling the Box: Responding to Jury Duty Avoidance," see 23 N.C. Cent. L.J. 1 (1997).

§ 9-14. Jury sworn; judge decides competency.

The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any juror; and if by reason of such challenge any juror is withdrawn from a jury being selected to try a case, his place on that jury shall be taken by another qualified juror. The presiding judge shall decide all questions as to the competency of jurors. (1790, c. 321, P.R.; 1822, c. 1133, s. 1, P.R.; R.C., c. 31, s. 34; Code, s. 405; Rev., s. 1966; C.S., s. 2324; 1967, c. 218, s. 1.)

Legal Periodicals. — For note on allowing challenge for cause to a prospective juror opposed to capital punishment, see 45 N.C.L. Rev. 1070 (1967).

For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

CASE NOTES

I. General Consideration.
II. Challenge to Jurors.
III. Competency of Jurors.

I. GENERAL CONSIDERATION.

Administering Oath to Prospective Jurors. — The phrase "at the beginning of court," as it applies to the swearing of prospective jurors, refers to the beginning of the term of court, as opposed to the beginning of an individual trial, which may be civil or criminal. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

The presiding judge has the duty to supervise the examination of prospective jurors. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Regulation of the manner and extent of inquiries on voir dire rests largely in the trial judge's discretion. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988); State v. Green, 336 N.C. 142, 443 S.E.2d 14, cert. denied, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994).

Administration of Oath During Voir

Dire. — The State's failure to administer an oath requiring prospective jurors to "tell the truth" during voir dire did not taint jury selection or violate defendant's right to a fair and impartial trial, where the jurors took the statutorily prescribed oath prior to trial and there was no evidence to show that the jury was unqualified to sit, or that he had been prejudiced in any way. State v. McNeill, 349 N.C. 634, 509 S.E.2d 415, 1998 N.C. App. LEXIS 853 (1998), cert. denied, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999).

The trial court was not required to ask prospective jurors to swear to tell the truth during jury voir dire State v. Hyde, 352 N.C. 37, 530 S.E.2d 281, 2000 N.C. LEXIS 443 (2000), cert. denied, 531 U.S. 1114, 121 S. Ct. 862, 148 L. Ed. 2d 775 (2001).

Juror Must Qualify to Be Sworn in at the Beginning of Court. — Court committed no error in excusing a juror, where the transcript revealed that at the time jury selection commenced, the juror had previously served on a federal jury within two years and was not immediately qualified to serve in the instant case; the court could not, as defendant suggested, move the juror to a later panel and then swear her in at the time she was called. State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 2000 N.C. LEXIS 618 (2000), cert. denied, 532 U.S. 931, 121 S. Ct. 1379, 1380, 149 L. Ed. 2d 305 (2001).

A defendant is not entitled to a jury of his selection or choice, but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn. He has no vested right to a particular juror. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Applied in State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975); State v. Fleming, 350 N.C. 109, 512 S.E.2d 720, 1999 N.C. App. LEXIS 240 (1999).

Cited in State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Moye, 12 N.C. App. 178, 182 S.E.2d 814 (1971); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979); State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Thomas, 344 N.C. 639, 477 S.E.2d 450 (1996).

II. CHALLENGE TO JURORS.

The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

It has been held in many cases that the right to challenge a juror for cause is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable him to select a jury of his own choosing. See Blevins v. Erwin Cotton Mills Co., 150 N.C. 493, 64 S.E. 428 (1909).

A party has no right to seat a particular juror, but only to reject one who is prejudiced against him. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).

Opinion of Juror. — The expression of an opinion is sometimes ground for challenge, but is not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. State v. Bailey, 179 N.C. 724, 102 S.E. 406 (1920); State v. Winder, 183 N.C. 776, 111 S.E. 530 (1922).

The challenge for this cause can be made only by that party against whom the opinion was formed and expressed. State v. Benton, 19 N.C. 196 (1836).

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to incriminate himself. State v. Benton, 19 N.C. 196 (1836); State v. Mills, 91 N.C. 581 (1884).

In an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

Relationship Between Juror and Party. — A juror, who was related to the defendant by blood or marriage within the ninth degree of kinship, was properly rejected when challenged by the State for cause on that ground. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Relationship Between Juror and Witness. — A relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for challenge for cause. Where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Relationship of Juror to District Attorney. — The trial court did not err in the denial of defendant's challenge for cause directed to the district solicitor's (now district attorney's) father-in-law being a juror, where the challenge was denied only after the juror stated, upon being questioned by the court, that he would not convict on his relationship to the solicitor (now district attorney), and after it was ascertained that the district solicitor (now district attorney) was not prosecuting defendant's case. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

As to exclusion of juror for nonresidence, see State v. Bullock, 63 N.C. 570 (1869); State v. Upton, 170 N.C. 769, 87 S.E. 328 (1915).

As to exclusion for employment by party, see Oliphant v. Atlantic C.L.R.R., 171 N.C. 303, 88 S.E. 425 (1916).

Excluding Jurors for Opposition to Capital Punishment. — Under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Judgment of the superior court sentencing defendant to death for first-degree murder had to be vacated under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), where the trial court allowed the State's challenges for cause to seven prospective jurors who stated simply a general objection to or conscientious scruples against capital punishment, notwithstanding the trial occurred prior to the Witherspoon decision, since that decision was fully retroactive. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

A trial judge should allow challenge for cause when a venireman is not willing to consider all possible penalties provided by State law and when the venireman is unalterably committed to vote against the death penalty, regardless of the evidence which might be presented at trial. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

In a capital case, if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

In a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

In a first-degree murder trial, where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Time of Challenge. — The court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. State v. Green, 95 N.C. 611 (1886).

Excusing Unchallenged Juror. — The trial judge could excuse a juror, before the jury was impaneled, although the solicitor (now district attorney) had passed him to the defendant and had not challenged him for cause. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

It is the right and duty of the court to see that a competent, fair and impartial jury is impaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. It is immaterial that this is done as the result of information voluntarily disclosed by the prospective juror without questioning. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Method of Taking Advantage of Error. — The action of a trial judge in determining the qualifications of a juryman, if erroneous, was ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant could not be allowed to take advantage of the alleged error after trial and judgment. State v. Moore, 120 N.C. 570, 26 S.E. 697 (1897).

The erroneous allowance of an improper challenge for cause did not entitle the adverse party to a new trial, so long as only those who were competent and qualified to serve were actually impaneled upon the jury which tried his case. This was especially true where the adverse party did not exhaust his peremptory challenges. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

III. COMPETENCY OF JURORS.

The question of whether a juror is competent is one for the trial judge to determine in his discretion, and his rulings thereon are not reviewable on appeal unless accompanied by some imputed error of law. State v. Blount, 4 N.C. App. 561, 167 S.E.2d 444 (1969); State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972); State v. Cameron, 17 N.C. App. 229, 193 S.E.2d 485 (1972), aff'd, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

The trial court has broad discretion in the voir dire selection of jurors, and the exercise of the party's right to examine prospective jurors should be carefully supervised by the trial court. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The competency of jurors to serve is left largely to the sound legal discretion of the trial judge, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Ruling on motion for competency of jurors is discretionary with the trial judge and will not be reviewed absent a showing of abuse of discretion or an error of law. State v. Moore, 24 N.C. App. 582, 211 S.E.2d 470 (1975).

Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Unquestionably the trial judge is vested with broad discretionary powers in determining the competency of jurors and that discretion will not ordinarily be disturbed on appeal. State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977).

The trial judge is vested with broad discretion in determining the competency of the jurors. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).

The trial judge is empowered to decide all questions regarding the competency of jurors. His decision as to a juror's competency is a matter vested in his sound discretion and will be reversed only upon a demonstration that he abused this discretion. State v. King, 311 N.C. 603, 320 S.E.2d 1 (1984).

Review of Discretion. — The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. State v. DeGraffenreid, 224 N.C. 517, 31 S.E.2d 523 (1944); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949); State v. Gibbs, 5 N.C. App. 457, 168 S.E.2d 507 (1969); State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

Where a juror in a homicide trial had sister of deceased as one of his passengers in a four-mile automobile trip, the defendant moved to set aside the verdict. The juror stated upon oath that he did not know that his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not reviewable. State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949).

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race, were conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presented no reviewable question of law. State v. Reid, 230 N.C. 561, 53 S.E.2d 849, cert. denied, 338 U.S. 876, 70 S. Ct. 138, 94 L. Ed. 537 (1949).

Defendant moved for a new trial on the ground that during the trial he discussed the case with one of the jurors before recognizing him as a juror. The court found that the defendant had not shown that he was in anywise prejudiced by the occurrence, and denied defendant's motion for a new trial. The ruling of the court was not reviewable. State v. Scott, 242 N.C. 595, 89 S.E.2d 153 (1955).

A ruling in respect to the impartiality of a juror presents no question of law for review. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Defendant seeking to establish on appeal that the exercise of judicial discretion constituted reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

§ 9-15. Questioning jurors without challenge; challenges for cause.

(a) The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(b) It shall not be a valid cause for challenge that any juror, regular or supplemental, is not a freeholder or has not paid the taxes assessed against him.

(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1806, c. 694, P.R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; 1913, c. 31, ss. 5, 6, 7; C.S., ss. 2316, 2325, 2326; 1933, c. 130; 1967, c. 218, s. 1; 1973, c. 95; 1977, c. 711, s. 11.)

CASE NOTES

I. In General.
II. Questioning Prospective Jurors.
  A. Nature and Scope of Inquiry.
  B. Concerning Capital Punishment.
III. Challenges for Cause.
IV. Disqualified Jurors.

I. IN GENERAL.

A motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

Defendant seeking to establish on appeal that the exercise of judicial discretion constituted reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

The questioning of jurors in defendant's absence erroneously deprived defendant of his right to be present at his trial, but the error was harmless where the court was satisfied here beyond a reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily. State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991).

Applied in State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992).

Cited in State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448, cert. denied, 332 N.C. 669, 424 S.E.2d 411 (1992).

II. QUESTIONING PROSPECTIVE JURORS.

A. Nature and Scope of Inquiry.

Purpose of Voir Dire. — The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: first, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974); State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976); In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978); State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

The primary purpose of the voir dire of prospective jurors is to select an impartial jury. State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977); In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978).

The voir dire examination of jurors allowed by this section serves the dual purpose of ascertaining whether grounds exist for challenge for cause to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31, cert. denied, 304 N.C. 197, 285 S.E.2d 102 (1981).

Any party to an action, whether civil or criminal, is entitled to inquire into the fitness and competency of any prospective juror. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The right of inquiry concerning a prospective juror's competency and fitness to serve may be exercised by or on behalf of the defendant as well as the State. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

Prospective jurors may be asked questions which will elicit information not per se a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976).

Questions Regarding Right to Make a Will. — In view of the possibility that many people, for one reason or another, do not agree with the statutory right of a person to make a will, propounders of a will should be allowed to question prospective jurors with respect to their feelings on that question. In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978).

Questioning of Jurors by Court or by Counsel. — Although this section assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Prohibiting Ambiguous or Confusing Questions. — Discretion over the inquiry on voir dire was properly exercised when the trial court prohibited ambiguous or confusing hypothetical questions. State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Refusal of Court to Ask Question Requested by Counsel. — If the court, when it conducted the questioning, declined to ask a question requested by the defendant's counsel, an exception should have been noted so that an appellate court could consider the propriety, pertinence and substance of such question. This procedure avoids repetitive questioning without precluding or restricting any inquiry suggested and requested by defendant's counsel, and is not violative of this section or otherwise objectionable. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Effect of District Attorney's Improper Statements During Voir Dire. — In a capital case, improper statements made by a district attorney in the presence of prospective jurors during their voir dire examination may well be as prejudicial as a similar statement made by him during argument to the jury. State v.

Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

Regulation of Voir Dire Rests in Trial Judge's Discretion. — Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision, and the regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973); State v. Bracey, 303 N.C. 112, 277 S.E.2d 390 (1981).

Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

The manner and extent of the inquiry of prospective jurors are matters committed largely to the discretion of the trial judge and are subject to his close supervision. State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Judge's Discretion Is Subject to Review. — While the regulation of the manner and extent of the inquiry on voir dire rests largely in the trial judge's discretion, his exercise of discretion is not absolute and is subject to review on appeal. In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978).

B. Concerning Capital Punishment.

Voir Dire Should Be Based on Questions Phrased in Witherspoon Language. — Since Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) has so clearly specified the ultimate questions that must be answered, the voir dire examination of prospective jurors should be based on questions phrased in Witherspoon language, because unless this course is followed, new trials will often be necessary in cases otherwise free from prejudicial error. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Propriety of Examining Jurors' Attitudes. — In order to ensure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a capital case both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be ensured a fair trial before an unbiased jury. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In many capital cases solicitors (now district attorneys) may ask prospective jurors whether they have moral or religious scruples against capital punishment, and if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

There was no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

It was not improper on voir dire for the prosecutor to determine if jurors would be willing to impose the death penalty and what their views were on the death penalty. State v. Chapman, 359 N.C. 328, 611 S.E.2d 794, 2005 N.C. LEXIS 361 (2005).

Scope of Inquiries Is Within Control and Supervision of Court. — The extent of the inquiries to prospective jurors concerning their attitudes toward capital punishment remains under the control and supervision of the trial judge. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

III. CHALLENGES FOR CAUSE.

Purpose. — The right to challenge is not given so as to allow a party to pick a jury, but so that he may obtain an impartial jury. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973).

Excluding Jurors for Opposition to Capital Punishment. — If a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Jurors who indicated they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence were properly excused for cause. State

v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

Where juror voiced general reservations about the death penalty, but made no affirmative, unequivocal statement that she was unwilling to consider the death penalty or that she was irrevocably committed to vote against it regardless of the facts and circumstances that might be revealed by the evidence, she was erroneously excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

It is settled law that a challenge for cause should be sustained where the venireman challenged states unmistakably that he would, by reason of the death penalty, automatically vote against conviction without regard to any evidence developed at trial. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

Erroneous allowance of an improper challenge for cause did not entitle the adverse party to a new trial, so long as only those who were competent and qualified to serve were actually impaneled upon the jury which tried his case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Excusal of Juror Without Challenge by Party. — In spite of the last phrase of subsection (a) of this section, it is the right and duty of the court to see that a competent, fair and impartial jury is impaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. State v. Smith, 290 N.C. 148, 226 S.E.2d 10 (1976), cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

IV. DISQUALIFIED JURORS.

Subsection (c) is designed to protect the prospective juror's adversary in his pending case rather than to protect parties to cases in which he might serve as a juror. State v. Williams, 293 N.C. 102, 235 S.E.2d 248 (1977).

Subsection (c) subjects a litigant, rather than a witness, to disqualification as a juror when he has a suit pending and at issue in the court in which he is called to serve as a juror. State v. Williams, 293 N.C. 102, 235 S.E.2d 248 (1977).

§ 9-16. Exemption from civil arrest.

No sheriff or other officer shall arrest under civil process any juror during his attendance at or going to and returning from any session of the superior or district court. Any such arrest shall be invalid, and the defendant on motion shall be discharged. (1779, c. 157, s. 10, P.R.; R.C., c. 31, s. 31; Code, s. 1735; Rev., s. 1979, C.S., s. 2328; 1967, c. 218, s. 1.)

CASE NOTES

Section Does Not Repeal Common-Law Exemption. — This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898). See Greenlief v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

A jury, impaneled to try any cause, shall be put in charge of an officer of the court and shall be furnished with such accommodations as the court may order, and the accommodations shall be paid for by the parties or by the State, as ordered by the presiding judge. When sequestration of the jury is ordered in a criminal case, however, the State shall pay for all accommodations of jurors.

The presiding judge, in his discretion, may direct any jury to be sequestered while it has a case or issue under consideration. (1876-7, c. 173; Code, s. 1736;

1889, c. 44; Rev., s. 1978, C.S., s. 2327; 1947, c. 1007, s. 2; 1967, c. 218, s. 1; 1977, c. 711, s. 12.)

CASE NOTES

No Federal Constitutional Issue Presented. — Petitioner's contention that he was denied a fair and impartial trial in that the jurors were not sequestered does not present a federal constitutional issue. It is a matter of state procedural law and does not reach constitutional proportions. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

Whether or not a jury is to be sequestered is within the discretion of the trial court. There being no showing of an obvious abuse of discretion, the matter is not subject to review. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

A motion for the sequestration of witnesses is addressed to the discretion of the court. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

Effect on Verdict of Refusal to Furnish Refreshments. — Where a jury retired at 11 A.M., to consider their verdict, which was returned at 3 P.M. such verdict could not be impeached on the grounds that the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. Gaither v. Hascall-Richards Steam Generator Co., 121 N.C. 384, 28 S.E. 546 (1897).

Applied in State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

§ 9-18. Alternate jurors.

(a) Civil Cases. Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

(b) Criminal Cases. Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1931, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1; 1977, c. 406, ss. 3-5; c. 711, s. 13; 1979, c. 711, s. 2.)

Legal Periodicals. — For comment, "An Historical Analysis of Mandatory Capital Punishment," see 7 N.C. Cent. L.J. 306 (1976).

CASE NOTES

The essential attributes of trial by jury guaranteed by former N.C. Const., Art. I, § 13 (now see N.C. Const., Art. I, § 24), are the number of jurors, their impartiality and a unanimous verdict, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of 12 good and lawful persons. State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

Requirements of this section and N.C. Const., Art. I, § 24 are mandatory. State v.

Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Defendant Cannot Assent to Trial by More Than 12 Jurors. If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations by more than 12. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Participation of Alternate Juror in Deliberation Is Error. — A decision that a deliberation by 13 jurors is error is compelled both by this section and by the appellate decisions of the State. State v. Alston, 21 N.C. App. 544, 204 S.E.2d 860 (1974).

And Alternate Juror's Presence in Jury Room Is Reversible Error Per Se. — Where the alternate juror was not discharged when the jury retired as required by this section, and although the record showed that the court corrected its mistake after only three or four minutes had elapsed, and the alternate did not participate in the deliberation and verdict of the other 12, his brief visit to the jury room was reversible error per se. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

At any time an alternate juror is in the jury room during deliberations, he participates by his presence and, whether he says little or nothing, his presence will void the trial. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

The presence of an alternate juror, either during the entire period of deliberation preceding the verdict, or his presence at any time during the deliberations of the 12 regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the fact that the defendant's counsel consented, or failed to object, to the presence of the alternate. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

The presence of an alternate juror in the jury room during the jury's deliberations violates N.C. Const., Art. I, § 24 and this section, and constitutes reversible error per se. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Inquiry into Effect of Presence of Alternate Juror. — If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Cited in State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Godwin, 95 N.C. App. 565, 383 S.E.2d 234 (1989).

ARTICLE 3.

Peremptory Challenges.

§ 9-19. Peremptory challenges in civil cases.

The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court. (1796, c. 452, s. 2, P.R.; 1812, c. 833, P.R.; R.C., c. 31, s. 35; Code, s. 406; Rev., s. 1964; C.S., s. 2331; 1935, c. 475, s. 1; 1965, c. 1182; 1967, c. 218, s. 1.)

CASE NOTES

Peremptory Challenge Defined. — A peremptory challenge is a challenge which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or being required to assign a reason therefor. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Peremptory Challenges on Basis of Race Prohibited. — N.C. Const., Art. I, § 26, proscribes peremptory challenges to jurors on the basis of race in civil cases as well as criminal cases. Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988).

Reasons for Challenge Need Not Be Given. — A party's reason for peremptorily challenging could not be inquired into. Dupree v. Virginia Home Ins. Co., 92 N.C. 417 (1885).

Not a Right to Select Jurors. — As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. Ives v. Atlantic & N.C.R.R., 142 N.C. 131, 55 S.E. 74 (1906); Medlin v. Simpson, 144 N.C. 397, 57 S.E. 24 (1907).

A litigant cannot exercise more peremptory challenges than the number allowed to him by law. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Number of Plaintiffs or Defendants Immaterial. — Whether there are one or more plaintiffs or defendants, only eight peremptory challenges to the jury on either side are allowable. Bryan v. Harrison, 76 N.C. 360 (1877); State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

In a quo warranto proceeding, the general statutory right to eight peremptory challenges devolving upon the relators as all the parties on one side of the case was not annulled or impaired by their assertion that justice lay with one of the defendants or by the latter's concurrence in that assertion. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Challenge After Acceptance. — Where a juror has been accepted it is error to permit a peremptory challenge. Dunn v. Wilmington & W.R.R., 131 N.C. 446, 42 S.E. 862 (1902).

Transcript of Jury Voir Dire Must Be Provided to Reviewing Court. — As a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire. Jackson v. Housing Auth., 321 N.C. 584, 364 S.E.2d 416 (1988).

§ 9-20. Civil cases having several plaintiffs or several defendants; challenges apportioned; discretion of judge.

(a) When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in the judge's discretion apportion among the defendants the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest.

(b) When there are two or more plaintiffs in a civil action, the presiding judge, if it appears that there are antagonistic interests between the plaintiffs, may, in the judge's discretion, apportion among the plaintiffs the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each plaintiff or class of plaintiffs representing the same interest.

(c) Whenever a judge exercises the discretion authorized by subsection (a) or (b) of this section to increase the number of challenges for either the plaintiffs or the defendants, the judge may, in the judge's discretion, increase the number of challenges for the opposing side, not to exceed the total number given to the other side. (1905, c. 357; Rev., s. 1965; C.S., s. 2332; 1967, c. 218, s. 1; 2007-210, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2007-210, s. 1, effective October 1, 2007, is applicable to actions called for trial on or after that date.

CASE NOTES

No Authority to Allot a Defendant More than Six Challenges. — Having found that the interests of the defendants were antagonistic, this section authorized the trial judge in his discretion to either apportion between them the eight peremptory challenges allotted to the defendants or to increase the peremptory challenges of each defendant up to a maximum of six; it did not authorize the judge to allot either defendant more than six peremptory challenges. Shuford v. McIntosh, 104 N.C. App. 201, 408 S.E.2d 747 (1991).

Decision of Trial Judge is Final. — This section, which creates the exception to the general rule laid down by G.S. 9-19 regarding peremptory challenges, clothes with finality the decision of the trial judge as to how many challenges the several defendants will be allowed. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P.R.; 1801, c. 592, s. 1, P.R.; 1812, c. 833, P.R.; 1826, c. 9; 1827, c. 10; R.S., c. 35, ss. 19, 21; R.C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C.S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75; 1977, c. 711, s. 14.)

Cross References. — For present provisions as to peremptory challenges in criminal cases, see G.S. 15A-1217.

CASE NOTES

Cited in State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

ARTICLE 4.

Grand Jurors.

§§ 9-22 through 9-26: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — For present provisions as to grand juries, see G.S. 15A-621 through 15A-630.

§§ 9-27 through 9-31: Repealed by Session Laws 1967, c. 218, s. 1.

ARTICLE 5.

Discharge of Jurors Prohibited.

§ 9-32. Discharge of juror unlawful.

(a) No employer may discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

(c) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1987, c. 702, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After Coman: Reaffirming Basic Rights in the Workplace," see 24 Wake Forest L. Rev. 905 (1989).

CASE NOTES

Dissent Erred In Claiming That Issue of Waiver Ex Mero Motu Could Be Addressed. — Dissent erred in raising an issue as to the waiver of sovereign immunity under G.S. 9-32 as the claim was not raised by the parties; the dissent's claim that issue of waiver ex mero motu could be addressed because the North Carolina Board of Nursing moved to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(2) was rejected as: (1) the Board only moved to dismiss a negligent infliction of emotional distress claim pursuant to Rule 12(b)(1) and 12(b)(2), (2) the Board moved to dismiss the violation of G.S. 9-32 claim pursuant to N.C. R. Civ. P. 12(b)(6), and (3) the parties stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction. Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

CASE NOTES

Dissent Erred in Claiming That Issue of Waiver Ex Mero Motu Could Be Addressed. — Dissent erred in raising an issue as to the waiver of sovereign immunity under G.S. 9-32 as the claim was not raised by the parties; the dissent's claim that issue of waiver ex mero motu could be addressed because the North Carolina Board of Nursing moved to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(1) and (2) was rejected as (1) the Board only moved to dismiss a negligent infliction of emotional distress claim pursuant to Rule 12(b)(1) and (2), (2) the Board moved to dismiss the violation of G.S. 9-32 claim pursuant to N.C. R. Civ. P. 12(b)(6), and (3) the parties stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction. Whitley v. N.C. Bd. of Nursing, [illegible] N.C. App. [illegible], [illegible] S.E.2d [illegible], [illegible] N.C. App. LEXIS [illegible] (2006).

CASE NOTES

Article 4.

Grand Jurors.

§§ 9-24 through 9-30: Repealed by Session Laws 1973, c. 1286, s. 28.

§ 9-31: Repealed by Session Laws 1967, c. 218, s. 1.

Article 5.

Discharge of Jurors Prohibited.

§ 9-32. Discharge of employee prohibited.

(a) No employer shall discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.

(b) Any employer who violates the provisions of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

(c) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54. (1977, c. 711, s. 1.)

Legal Periodicals. — For article, "North Carolina Employment Law After [illegible] Rights in the Workplace," see 24 Wake Forest L. Rev. [illegible] (1989).

Chapter 10.

Notaries.

§ 10-1: Repealed by Session Laws 1991, c. 683, s. 1.

Cross References. — For notaries, see now G.S. 10B-1 et seq.

Chapter 10A.

Notaries.

§§ 10A-1 through 10A-17: Repealed by Session Laws 2005-391, s. 3, effective December 1, 2005, and applicable to notarial acts and applications for notary commissions and recommissions made on or after that date.

Cross References. — For notaries, see now G.S. 10B-1 et seq.

Editor's Note. — Session Laws 2005-75, s. 1, effective January 1, 2006, and applicable to notary public applications filed on or after that date, amended G.S. 10A-4.

Session Laws 2005-328, s. 1, effective August 26, 2005, amended G.S. 10A-10.

Session Laws 2005-391, s. 13, provides in part: "Notary commissions issued under Chapter 10A of the General Statutes prior to December 1, 2005, shall remain valid unless otherwise revoked or suspended by the Secretary until those commissions expire as provided in Chapter 10A. G.S. 10B-35 and G.S. 10B-57 apply to offenses committed on or after December 1, 2005, without regard to whether a commission was issued under Chapter 10A or Chapter 10B of the General Statutes. Notary instructor certifications issued under G.S. 10A-7 shall remain valid until the date of expiration provided for on the certificate, and persons holding those certificates may provide instruction until their certificates expire."

Chapter 10B.

Notaries.

Article 1.

Notary Public Act.

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10B-1. Short title.
10B-2. Purposes.
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Part 2. Commissioning.

10B-5. Qualifications.
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10B-10. Commission; oath of office.
10B-11. Recommissioning.
10B-12. Notarized declaration.
10B-13. Application fee.
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10B-15 through 10B-19. [Reserved.]

Part 3. Notarial Acts, Powers, and Limitations.

10B-20. Powers and limitations.
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10B-22. False certificate; foreign language certificates.
10B-23. Improper records.
10B-24. Testimonials.
10B-25 through 10B-29. [Reserved.]

Part 4. Fees.

10B-30. Imposition and waiver of fees.
10B-31. Fees for notarial acts.
10B-32. Notice of fees.
10B-33, 10B-34. [Reserved.]

Part 5. Signature and Seal.

10B-35. Official signature.
10B-36. Official seal.
10B-37. Seal image.
10B-38, 10B-39. [Reserved.]

Part 6. Certificate Forms.

10B-40. Notarial certificates in general.
10B-41. Notarial certificate for an acknowledgment.
10B-42. Notarial certificate for a verification or of subscribing witness.
10B-42.1. Notarial certificate for a verification of nonsubscribing witness.
10B-43. Notarial certificate for an oath or affirmation.

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10B-44 through 10B-49. [Reserved.]

Part 7. Changes in Status.

10B-50. Change of address.
10B-51. Change of name.
10B-52. Change of county.
10B-53. Change of both name and county.
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10B-55. Disposition of seal; death of notary.
10B-56 through 10B-59. [Reserved.]

Part 8. Enforcement, Sanctions, and Remedies.

10B-60. Enforcement and penalties.
10B-61 through 10B-64. [Reserved.]

Part 9. Validation of Notarial Acts.

10B-65. Acts of notaries public in certain instances validated.
10B-66. Certain notarial acts validated.
10B-67. Erroneous commission expiration date cured.
10B-68. Technical defects cured.
10B-69. Official forms cured.
10B-70. Certain notarial acts for local government agencies validated.
10B-71. Certain notarial acts validated when recommissioned notary failed to again take oath.
10B-72 through 10B-98. [Reserved].
10B-99. Presumption of regularity.

Article 2.

Electronic Notary Act.

Part 1. General Provisions.

10B-100. Short title.
10B-101. Definitions.
10B-102. Scope of this Article.
10B-103, 10B-104. [Reserved.]

Part 2. Registration.

10B-105. Qualifications.
10B-106. Registration with the Secretary of State.
10B-107. Course of instruction.
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Part 3. Electronic Notarial Acts, Powers, and Limitations.

10B-115. Types of electronic notarial acts.
10B-116. Prohibitions.
10B-117. Notarial components of electronic document.

Sec.
10B-118. Maximum fees.
10B-119 through 10B-124. [Reserved.]

Part 4. Electronic Notary Records, Maintenance, and Disposition.

10B-125. Electronic signature, electronic seal.
10B-126. Security measures.
10B-127. Maintenance of electronic device.
10B-128. Disposition of records.
10B-129 through 10B-134. [Reserved.]

Part 5. Certificate Forms.

10B-135. Validity of notarial certificates.
10B-136. Form of evidence of authority of electronic notarial act.

Sec.
10B-137. Certificate of authority for electronic notarial act.
10B-138 through 10B-144. [Reserved.]

Part 6. Enforcement.

10B-145. Restriction or revocation of registration.
10B-146. Wrongful manufacture, distribution, or possession of software or hardware.

ARTICLE 1.

Notary Public Act.

Part 1. General Provisions.

§ 10B-1. Short title.

This Article is the "Notary Public Act" and may be cited by that name. (1991, c. 683, s. 2; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, ss. 3, 4, repealed former Chapter 10A, Notaries, and enacted new Chapter 10B, Notaries. Where appropriate, the historical citations in former Chapter 10A have been added to the corresponding sections in this chapter.

Session Laws 2005-391, s. 11, provides: "As soon as practicable, or within 24 months of the effective date of this act, all North Carolina registers of deeds and clerks of superior court shall submit to the Department of the Secretary of State legible and reproducible copies of the pages contained in their "Records of Notaries Public" created prior to 1991 for archiving in permanent storage. The copies shall be reproduced pursuant to standards set by the Department to ensure the legibility of the copies and the compatibility with the Department's existing systems. The Department shall be responsible for any expense incurred relating to the shipment or transfer of these records. The original permanent records shall be returned to the Register of Deeds if submitted to the Secretary for copying."

Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on December 1, 2005. Any act committed prior to December 1, 2005 which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to December 1, 2005 shall remain valid as if this act had not been enacted."

Session Laws 2005-391, s. 13, made this Chapter effective December 1, 2005, and applicable to notarial acts and applications for notary commissions and recommissions made on or after that date. Notary commissions issued under Chapter 10A of the General Statutes prior to December 1, 2005, shall remain valid unless otherwise revoked or suspended by the Secretary until those commissions expire as provided in Chapter 10A. G.S. 10B-60 and G.S. 10B-146 apply to offenses committed on or after December 1, 2005, without regard to whether a commission was issued under Chapter 10A or Chapter 10B of the General Statutes. Notary instructor certifications issued under G.S. 10A-7 shall remain valid until the date of expiration provided for on the certificate, and persons holding those certificates may provide instruction until their certificates expire.

Session Laws 2006-59, s. 32, provides: "The General Statutes Commission shall study the need for additional changes to laws relating to notaries public, the notarization of documents, and the registration of instruments notarized in other jurisdictions. The Commission shall determine whether there is a need for additional conforming changes in the law that arise from changes made by this act and recommend to the General Assembly any legislation to address the needs identified by this study. The General Statutes Commission shall report the results of its study to either the 2007 or 2009 General Assembly."

§ 10B-2. Purposes.

This Chapter shall be construed and applied to advance its underlying purposes, which are the following:

(1) To promote, serve, and protect the public interests.
(2) To simplify, clarify, and modernize the law governing notaries.
(3) To prevent fraud and forgery.
(4) To foster ethical conduct among notaries.
(5) To enhance interstate recognition of notarial acts.
(6) To integrate procedures for traditional paper and electronic notarial acts. (1991, c. 683, s. 2; 1998-228, s. 1; 2005-391, s. 4.)

§ 10B-3. Definitions.

The following definitions apply in this Chapter:

(1) Acknowledgment. — A notarial act in which a notary certifies that at a single time and place all of the following occurred:
   a. An individual appeared in person before the notary and presented a record.
   b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
   c. The individual did either of the following:
      i. Indicated to the notary that the signature on the record was the individual's signature.
      ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.
(2) Affirmation. — A notarial act which is legally equivalent to an oath and in which a notary certifies that at a single time and place all of the following occurred:
   a. An individual appeared in person before the notary.
   b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
   c. The individual made a vow of truthfulness on penalty of perjury, based on personal honor and without invoking a deity or using any form of the word "swear".
(3) Attest or attestation. — The completion of a certificate by a notary who has performed a notarial act.
(4) Commission. — The empowerment to perform notarial acts and the written evidence of authority to perform those acts.
(5) Credible witness. — An individual who is personally known to the notary and to whom all of the following also apply:
   a. The notary believes the individual to be honest and reliable for the purpose of confirming to the notary the identity of another individual.
   b. The notary believes the individual is not a party to or beneficiary of the transaction.
(6) Department. — The North Carolina Department of the Secretary of State.
(7) Director. — The Division Director for the North Carolina Department of the Secretary of State Notary Public Section.
(8) Jurat. — A notary's certificate evidencing the administration of an oath or affirmation.

(9) Moral turpitude. — Conduct contrary to expected standards of honesty, morality, or integrity.

(10) Nickname. — A descriptive, familiar, or shortened form of a proper name.

(11) Notarial act, notary act, and notarization. — The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a).

(12) Notarial certificate and certificate. — The portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

(13) Notary public and notary. — A person commissioned to perform notarial acts under this Chapter. A notary is a public officer of the State of North Carolina and shall act in full and strict compliance with this act.

(14) Oath. — A notarial act which is legally equivalent to an affirmation and in which a notary certifies that at a single time and place all of the following occurred:

a. An individual appeared in person before the notary.

b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.

c. The individual made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear".

(15) Official misconduct. —Either of the following:

a. A notary's performance of a prohibited act or failure to perform a mandated act set forth in this Chapter or any other law in connection with notarization.

b. A notary's performance of a notarial act in a manner found by the Secretary to be negligent or against the public interest.

(16) Personal appearance and appear in person before a notary. — An individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process.

(17) Personal knowledge or personally know. — Familiarity with an individual resulting from interactions with that individual over a period of time sufficient to eliminate every reasonable doubt that the individual has the identity claimed.

(18) Principal. — One of the following:

a. In the case of an acknowledgment, the individual whose identity and due execution of a record is being certified by the notary.

b. In the case of a verification or proof, the individual other than a subscribing witness, whose:

i. Identity and due execution of the record is being proven; or

ii. Signature is being identified as genuine.

c. In the case of an oath or affirmation, the individual who makes a vow of truthfulness on penalty of perjury.

(19) Record. — Information that is inscribed on a tangible medium and called a traditional or paper record.

(20) Regular place of work or business. — A location, office or other workspace, where an individual regularly spends all or part of the individual's work time.

(21) Revocation. — The cancellation of the notary's commission stated in the order of revocation.

(22) Satisfactory evidence. — Identification of an individual based on either of the following:

- a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual.
- b. The oath or affirmation of one credible witness who personally knows the individual seeking to be identified.

(23) Seal or stamp. — A device for affixing on a paper record an image containing a notary's name, the words "notary public," and other information as required in G.S. 10B-37.

(24) Secretary. — The North Carolina Secretary of State or the Secretary's designee.

(25) Repealed by Session Laws 2006-59, s. 1, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.

(26) Subscribing witness. — A person who signs a record for the purpose of being a witness to the principal's execution of the record or to the principal's acknowledgment of his or her execution of the record. A subscribing witness may give proof of the execution of the record as provided in subdivision (28) of this section.

(27) Suspension and restriction. — The termination of a notary's commission for a period of time stated in an order of restriction or suspension. The terms "restriction" or "suspension" or a combination of both terms shall be used synonymously.

(28) Verification or proof. — A notarial act in which a notary certifies that all of the following occurred:

- a. An individual appeared in person before the notary.
- b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
- c. The individual was not a party to or beneficiary of the transaction.
- d. The individual took an oath or gave an affirmation and testified to one of the following:
  - i. The individual is a subscribing witness and the principal who signed the record did so while being personally observed by the subscribing witness.
  - ii. The individual is a subscribing witness and the principal who signed the record acknowledged his or her signature to the subscribing witness.
  - iii. The individual recognized either the signature on the record of the principal or the signature on the record of the subscribing witness and the signature was genuine. (1991, c. 683, s. 2; 1998-228, s. 2; 2005-391, s. 4; 2006-59, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2006-59, s. 1, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

CASE NOTES

Signature on Custody Petition Found Inadequate. — Petitions for nonsecure custody filed by DSS did not comply with G.S. 7B-403, DSS was not an agency awarded custody of the minor children by a court of competent jurisdiction, DSS did not have standing under G.S. 7B-1103(a)(3) to file the termination of parental rights petitions, and the trial court did not have subject matter jurisdiction to enter the termination orders as: (1) the petition for adjudication with respect to child one contained a "Signature of Petitioner" as the "Director of DSS by an employee" and did not contain the signature of the director under G.S. 10B-3(25); (2) DSS filed an amended petition regarding child two with no signature in the "Signature of Petitioner" space; and (3) the orders awarding DSS custody were void ab initio. In re S.E.P., 184 N.C. App. 481, 646 S.E.2d 617, 2007 N.C. App. LEXIS 1431 (2007).

§ 10B-4: Reserved for future codification purposes.

Part 2. Commissioning.

§ 10B-5. Qualifications.

(a) Except as provided in subsection (d) of this section, the Secretary shall commission as a notary any qualified person who submits an application in accordance with this Chapter.

(b) A person qualified for a notarial commission shall meet all of the following requirements:

(1) Be at least 18 years of age or legally emancipated as defined in Article 35 of Chapter 7B of the General Statutes.

(2) Reside or have a regular place of work or business in this State.

(3) Reside legally in the United States.

(4) Speak, read, and write the English language.

(5) Possess a high school diploma or equivalent.

(6) Pass the course of instruction described in this Article, unless the person is a licensed member of the North Carolina State Bar.

(7) Purchase and keep as a reference the most recent manual approved by the Secretary that describes the duties and authority of notaries public.

(8) Submit an application containing no significant misstatement or omission of fact. The application form shall be provided by the Secretary and be available at the register of deeds office in each county. Every application shall include the signature of the applicant written with pen and ink, and the signature shall be acknowledged by the applicant before a person authorized to administer oaths.

(9) Obtain the recommendation of one publicly elected official in North Carolina and submit the recommendation with the application. The requirement of this subdivision shall not apply to any applicant who seeks to receive the oath of office from the register of deeds of a county where more than 5,250 active notaries public are on record on January 1 of the year when the application is filed.

(c) The notary shall be commissioned in his or her county of residence, unless the notary is not a North Carolina resident, in which case he or she shall be commissioned in the county of his or her employment or business.

(d) The Secretary may deny an application for commission or recommission if any of the following apply to an applicant:

(1) Submission of an incomplete application or an application containing material misstatement or omission of fact.

(2) The applicant's conviction or plea of admission or nolo contendere to a felony or any crime involving dishonesty or moral turpitude. In no case may a commission be issued to an applicant within 10 years after release from prison, probation, or parole, whichever is later.

(3) A finding or admission of liability against the applicant in a civil lawsuit based on the applicant's deceit.

(4) The revocation, suspension, restriction, or denial of a notarial commission or professional license by this or any other state or nation. In no case may a commission be issued to an applicant within five years after the completion of all conditions of any disciplinary order.

(5) A finding that the applicant has engaged in official misconduct, whether or not disciplinary action resulted.

(6) An applicant knowingly using false or misleading advertising in which the applicant as a notary represents that the applicant has powers, duties, rights, or privileges that the applicant does not possess by law.

(7) A finding by a state bar or court that the applicant has engaged in the unauthorized practice of law. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1; 1983, c. 427, ss. 1, 2; c. 713, s. 22; 1991, c. 683, s. 2; 1995, c. 226, s. 1; 1998-228, s. 3; 1999-337, s.3(a); 2001-450, s. 1; 2002-126, s. 29A.21; 2005-75, s. 1. ; 2005-391, s. 4; 2006-59, s. 2; 2009-227, s. 1.)

Cross References. — As to validation of defective acknowledgments before notaries public in certain conveyances, see G.S. 47-52, 47-53, 47-102.

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-4. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subdivision (b)(9), as amended by Session Laws 2006-59, s. 2, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

Effect of Amendments. — Session Laws 2009-227, s. 1, effective June 30, 2009, substituted "5,250" for "15,000" in the second sentence of subdivision (b)(9).

CASE NOTES

Editor's Note. *— The cases below were decided under prior law.*

Origin. — The office of notary public has long been known both to the civil and to the common law. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

In Loan Co. v. Turrell, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Modern Status of Office. — The office of notary public is in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Who Is Eligible. — It has been said that "at common law a minor is eligible to the position of notary public." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915). But see now subdivision (b)(1) of this section.

Cited in Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions below were issued under prior law.*

Oath of Office for Notary Public. — The notary public to be duly qualified should now take the oath of office before the register of deeds, not the clerk of the superior court. See opinion of Attorney General to Mrs. Susan Lobinger, Governor's Office, 40 N.C.A.G. 605 (1969).

Copy of Commissions Issued to Non-Residents. — Along with the Secretary of State maintaining a copy of the commissions issued to non-residents, the register of deeds in the county wherein the appointee either works or intends to perform his notary functions should be sent such commission. If the appointee will be working in more than one county, a copy of the commission should be sent to each county. See opinion of Attorney General to Mr. Ludelle Hatley, Notaries Public Deputy, Department of the Secretary of State, 55 N.C.A.G. 51 (1985).

Requirement of Being Registered Voter Not Constitutional. — The requirement of former G.S. 10-1.1 of being a registered voter in North Carolina in order to be a notary violated the privileges and immunity clause of U.S. Const., Art. IV, § 2. See opinion of Attorney General to Mr. Ludelle Hatley, Notaries Public Deputy, Department of the Secretary of State, 55 N.C.A.G. 51 (1985).

Under former Chapter 10, the Secretary of State had no authority to require that a notary applicant be employed in this State. See opinion of Attorney General to Mr. Ludelle Hatley, Notaries Public Deputy, Department of the Secretary of State, 55 N.C.A.G. 51 (1985).

A person who cannot read or write cannot hold a notary commission. See opinion of Attorney General to Ludelle R. Hatley, Notaries Public Deputy, Secretary of State's Office, 57 N.C.A.G 1 (1987).

§ 10B-6. Application for commission.

Every application for a notary commission shall be made on paper with original signatures, or in another form determined by the Secretary, and shall include all of the following:

(1) A statement of the applicant's personal qualifications as required by this Chapter.
(2) A certificate or signed statement by the instructor evidencing successful completion of the course of instruction as required by this Chapter.
(3) A notarized declaration of the applicant, as required by this Chapter.
(4) Any other information that the Secretary deems appropriate.
(5) The application fee required by this Chapter. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-5. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-7. Statement of personal qualification.

(a) The application for a notary commission shall include at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The applicant's date of birth.
(3) The mailing address for the applicant's residence, the street address for the applicant's residence, and the telephone number for the applicant's residence.
(4) The applicant's county of residence.
(5) The name of the applicant's employer, the street and mailing address for the applicant's employer, and telephone number for the applicant's employer.
(6) The applicant's last four digits of the applicant's social security number.
(7) The applicant's personal and business e-mail addresses.
(8) A declaration that the applicant is a citizen of the United States or proof of the applicant's legal residency in this country.
(9) A declaration that the applicant can speak, read, and writes in the English language.
(10) A complete listing of any issuances, denials, revocations, suspensions, restrictions, and resignations of a notarial commission, professional license, or public office involving the applicant in this or any other state or nation.
(11) A complete listing of any criminal convictions of the applicant, including any pleas of admission or nolo contendere, in this or any other state or nation.
(12) A complete listing of any civil findings or admissions of fault or liability regarding the applicant's activities as a notary, in this or any other state or nation.

(b) The information provided in an application that relates to subdivisions (2), (3), (6), and (7) of subsection (a) of this section shall be considered confidential information and shall not be subject to disclosure under Chapter 132 of the General Statutes. (2005-391, s. 4; 2006-59, s. 3.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-6. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (b), as amended by Session Laws 2006-59, s. 3, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-8. Course of study and examination.

(a) Every applicant for an initial notary commission shall, within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary and take a written examination approved by the Secretary. An applicant must answer at least eighty percent (80%) of the questions correctly in order to pass the exam. This subsection shall not apply to a licensed member of the North Carolina State Bar.

(b) Every applicant for recommissioning shall pass a written examination approved by and administered by or under the direction of the Secretary, unless the person is a licensed member of the North Carolina State Bar.

(c) The content of the course of instruction and the written examinations shall be notarial laws, procedures, and ethics.

(d) The Secretary may charge such fees as are reasonably necessary to pay the cost associated with developing and administering examinations permitted by this Chapter and for conducting the training of notaries and notary instructors. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-7. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-9. Length of term and jurisdiction.

A person commissioned under this Chapter may perform notarial acts in any part of this State for a term of five years, unless the commission is earlier revoked or resigned. No commissions shall be effective prior to the administration of the oath of office. Any notarial acts performed before the administration of the oath of office, either the original commissioning or recommissioning, are invalid. (1891, c. 248; Rev., s. 2351; c.s., s. 3176; 1973, c. 680, s. 1; 1991, c. 683, s. 2; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-8. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-10. Commission; oath of office.

(a) If the Secretary grants a commission to an applicant, the Secretary shall notify the appointee and shall instruct the appointee regarding the proper procedure for taking the oath at the register of deeds office in the county of the appointee's commissioning.

(b) The appointee shall appear before the register of deeds no later than 45 days after commissioning and shall be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7.

(c) After the appointee qualifies by taking the oath of office required under subsection (b) of this section, the register of deeds shall place the notary record in a book designated for that purpose, or the notary record may be recorded in the Consolidated Document Book and indexed in the Consolidated Real Property Index under the notary's name in the grantor index. The notary record may be kept in electronic format so long as the signature of the notary public may be viewed and printed. The notary record shall contain the name and the signature of the notary as commissioned, the effective date and expiration date of the commission, the date the oath was administered, and the date of any restriction, suspension, revocation, or resignation. The record shall constitute the official record of the qualification of notaries public.

(d) The register of deeds shall deliver the commission to the notary following completion of the requirements of this section and shall notify the Secretary of the delivery.

(e) If the appointee does not appear before the register of deeds within 45 days of commissioning, the register of deeds must return the commission to the Secretary, and the appointee must reapply for commissioning. If the appointee reapplies within one year of the granting of the commission, the Secretary may waive the educational requirements of this Chapter. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C.S., s. 3173; 1969,c. 912, s. 2; 1973, c. 680, s. 1; 1991, c. 683, s. 2; 2005-391, s. 4; 2006-59, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-9. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (c), as amended by Session Laws 2006-59, s. 4, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *Some of the opinions below were issued under prior law.*

Oath of Office for Notary Public. — The notary public to be duly qualified should now take the oath of office before the register of deeds, not the clerk of the superior court. See opinion of Attorney General to Mrs. Susan Lobinger, Governor's Office, 40 N.C.A.G. 605 (1969).

Notary Public Commission and Effective Date of Oath. — A notary may take the oath of office anytime within 90 days of commissioning; there is no requirement that a notary seeking recommissioning take the oath after the commission date. See opinion of Attorney General to Ms. Haley Haynes Montgomery, Deputy Secretary of State, 2004 N.C.A.G. 11 (9/23/04).

§ 10B-11. Recommissioning.

(a) A commissioned notary may apply for recommissioning no earlier than 10 weeks prior to the expiration date of the notary's commission.

(b) A notary whose commission has not expired must comply with the following requirements to be recommissioned:

(1) Submit a new application meeting the requirements of G.S. 10B-6, except for G.S. 10B-6(2).

(2) Meet all the requirements of G.S. 10B-5(b), except for G.S. 10B-5(b)(5), (6), and (9).

(3) Achieve a passing score on the written examination required under G.S. 10B-8(b). This requirement does not apply if the notary is a licensed member of the North Carolina State Bar, or if the notary has been continuously commissioned in North Carolina since July 10, 1991, and has never been disciplined by the Secretary.

(c) An individual may apply for recommissioning within one year after the expiration of the individual's commission. The individual must comply with the requirement of subsection (b) of this section. The individual must also fulfill the educational requirement under G.S. 10B-8(a), unless the Secretary waives that requirement. (1991, c. 683, s. 2; 1995, c. 226, s. 2; 2005-391, s. 4; 2006-59, s. 5.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-10. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2006-59, s. 33, makes the amendment to subsection (b)(3) of this section effective July 1, 2006. The remainder of the act is effective October 1, 2006, and except as otherwise set forth in the act, applies to notarial acts performed on or after that date.

§ 10B-12. Notarized declaration.

The application for a notary public commission shall contain the following declaration to be executed by each applicant under oath:

Declaration of Applicant

I, ______________ (name of applicant), solemnly swear or affirm under penalty of perjury that the information in this application is true, complete, and correct; that I understand the official duties and responsibilities of a notary public in this State, as described in the statutes; and that I will perform to the best of my ability all notarial acts in accordance with the law.

____
(signature of applicant)

(2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-11. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-13. Application fee.

Every applicant for a notary commission shall pay to the Secretary a nonrefundable application fee of fifty dollars ($50.00). (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-12. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-14. Instructor's certification.

(a) The course of study required by G.S. 10B-5(b) shall be taught by an instructor certified under rules adopted by the Secretary. An instructor must meet the following requirements to be certified to teach a course of study for notaries public:

(1) Complete and pass an instructor certification course of not less than six hours taught by the Director or other person approved by the Secretary.
(2) Have at least one year of active experience as a notary public.
(3) Maintain a current commission as a notary public.
(4) Possess the current notary public guidebook.
(5) Pay a nonrefundable fee of fifty dollars ($50.00).

(b) Certification to teach a course of study for notaries shall be effective for two years. A certification may be renewed by passing a recertification course taught by the Director or other person approved by the Secretary and by paying a nonrefundable fee of fifty dollars ($50.00).

(c) The following individuals may be certified to teach a course of study for notaries public without paying the fee required by this section, and they may renew their certification without paying the renewal fee, so long as they remain actively employed in the capacities named:

(1) Registers of deeds.
(2) Clerks of court.
(3) The Director and other duly authorized employees of the Secretary.

(d) Former registers of deeds and clerks of court who have been certified as notary public instructors must apply for commissioning as a notary public but are exempt from the education requirements of G.S. 10B-8 after successful completion of an examination administered by the Secretary.

(e) Assistant and deputy registers of deeds and assistant and deputy clerks of court must have a regular notary commission prior to receiving a certification or recertification as a notary public instructor.

(f) The Secretary may suspend or revoke the certification of a notary instructor for violating the provisions of this Chapter or any of the administrative rules implementing it. (1991, c. 683, s. 2; 1998-212, s. 29A.9(a); 1998-228, s. 4; 1999-337, s. 3(b); 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-13. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2005-391, s. 13, provides in part: "Notary instructor certifications issued under G.S. 10A-7 shall remain valid until the date of expiration provided for on the certificate, and persons holding those certificates may provide instruction until their certificates expire."

§§ 10B-15 through 10B-19: Reserved for future codification purposes.

Part 3. Notarial Acts, Powers, and Limitations.

§ 10B-20. Powers and limitations.

(a) A notary may perform any of the following notarial acts:

(1) Acknowledgments.

(2) Oaths and affirmations.

(3) Repealed by Session Laws 2006-59, s. 6, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.

(4) Verifications or proofs.

(b) A notarial act shall be attested by all of the following:

(1) The signature of the notary, exactly as shown on the notary's commission.

(2) The legible appearance of the notary's name exactly as shown on the notary's commission. The legible appearance of the name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(3) The clear and legible appearance of the notary's stamp or seal.

(4) A statement of the date the notary's commission expires. The statement of the date that the notary's commission expires may appear in the notary's stamp or seal or elsewhere in the notarial certificate.

(c) A notary shall not perform a notarial act if any of the following apply:

(1) The principal or subscribing witness is not in the notary's presence at the time the notarial act is performed. However, nothing in this Chapter shall require a notary to complete the notarial certificate attesting to the notarial act in the presence of the principal or subscribing witness.

(2) The principal or subscribing witness is not personally known to the notary or identified by the notary through satisfactory evidence.

(2a) The credible witness is not personally known to the notary.

(3), (4) Repealed by Session Laws 2006-59, s. 8, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.

(5) The notary is a signer of, party to, or beneficiary of the record, that is to be notarized. However, a disqualification under this subdivision shall not apply to a notary who is named in a record solely as the

trustee in a deed of trust, the drafter of the record, the person to whom a registered document should be mailed or sent after recording, or the attorney for a party to the record, so long as the notary is not also a party to the record individually or in some other representative or fiduciary capacity.

(6) The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

(d) A notary may certify the affixation of a signature by mark on a record presented for notarization if:

(1) The mark is affixed in the presence of the notary;

(2) The notary writes below the mark: "Mark affixed by (name of signer by mark) in presence of undersigned notary"; and

(3) The notary notarizes the signature by performing an acknowledgment, oath or affirmation, jurat, or verification or proof.

(e) If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:

(1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;

(2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;

(3) Both witnesses sign their own names to the record near the principal's signature;

(4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

(f) A notarial act performed in another jurisdiction in compliance with the laws of that jurisdiction is valid to the same extent as if it had been performed by a notary commissioned under this Chapter if the notarial act is performed by a notary public of that jurisdiction or by any person authorized to perform notarial acts in that jurisdiction under the laws of that jurisdiction, the laws of this State, or federal law.

(g) Persons authorized by federal law or regulation to perform notarial acts may perform the acts for persons serving in or with the United States armed forces, their spouses, and their dependents.

(h) The Secretary and register of deeds in the county in which a notary qualified may certify to the commission of the notary.

(i) A notary public who is not an attorney licensed to practice law in this State who advertises the person's services as a notary public in a language other than English, by radio, television, signs, pamphlets, newspapers, other written communication, or in any other manner, shall post or otherwise include with the advertisement the notice set forth in this subsection in English and in the language used for the advertisement. The notice shall be of conspicuous size, if in writing, and shall state: "I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW IN THE STATE OF NORTH CAROLINA, AND I MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE." If the advertisement is by radio or television, the statement may be modified but must include substantially the same message.

(j) A notary public who is not an attorney licensed to practice law in this State is prohibited from representing or advertising that the notary public is an "immigration consultant" or expert on immigration matters unless the notary public is an accredited representative of an organization recognized by the Board of Immigration Appeals pursuant to Title 8, Part 292, section 2(a-e) of the Code of Federal Regulations (8 C.F.R. § 292.2(a-e)).

(k) A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A nonattorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

(*l*) A notary public required to comply with the provisions of subsection (i) of this section shall prominently post at the notary public's place of business a schedule of fees established by law, which a notary public may charge. The fee schedule shall be written in English and in the non-English language in which the notary services were solicited and shall contain the notice required in subsection (i) of this section, unless the notice is otherwise prominently posted at the notary public's place of business.

(m) If notarial certificate wording is not provided or indicated for a record, a notary who is not also a licensed attorney shall not determine the type of notarial act or certificate to be used. This does not prohibit a notary from offering the selection of certificate forms recognized in this Chapter or as otherwise authorized by law.

(n) A notary shall not claim to have powers, qualifications, rights, or privileges that the office of notary does not provide, including the power to counsel on immigration matters.

(o) Before signing a notarial certificate and except as provided in this subsection, a notary shall cross out or mark through all blank lines or spaces in the certificate. However:

(1) Notwithstanding the provisions of this section, a notary shall not be required to complete, cross out, or mark through blank lines or spaces in the notary certificate form provided for in G.S. 47-43 indicating when and where a power of attorney is recorded if that recording information is not known to the notary at the time the notary completes and signs the certificate;

(2) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the certificate or the related record; and

(3) A notary's failure to cross out or mark through blank lines or spaces in a notarial certificate shall not be grounds for a register of deeds to refuse to accept a record for registration. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., ss. 2350, 2351a, 2352; C.S., ss. 3175, 3177, 3179; 1951, c. 1006, s. 1; 1953, c. 836; 1961, c. 733; 1967, c. 24, s. 22; c. 984; 1973, c. 680, s. 1; 1977, c. 375, s. 5; 1991, c. 683, s. 2; 1998-228, s. 5; 2001-450, s. 2; 2001-487, s. 121; 2005-391, s. 4; 2006-59, ss. 6-12; 2006-199, s. 1.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-14. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, ss. 6-12, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

Editor's Note. — *Some of the cases below were decided under prior law.*

Scope of Powers. — A notary public is recognized by the universal law of civilized and commercial nations, but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Duty in Taking Acknowledgments. — The notary was required "to take and certify the acknowledgment or proof" and this imposed upon him the duty of ascertaining (1) that the persons who presented themselves were the grantors in the deed; (2) that they acknowledged the executions of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assented thereto. Young v. Jackson, 92 N.C. 144 (1885); Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890); State ex rel. Att'y Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Acknowledgment Is a Judicial or Quasi Judicial Act. — An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial, act. Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

Protest as Evidence. — The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. Elliott v. White, 51 N.C. 98 (1858); McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Certificate as Prima Facie Evidence. — The certificate of the notary established prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. State ex rel. Owens v. Chaplin, 229 N.C. 797, 48 S.E.2d 37 (1948).

With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Notary Public Was Not Disqualified to Act because He Was Employed by Grantee. — A notary public was not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he was an employee of the grantee, without any interest in the land conveyed. Smith v. Ayden Lumber Co., 144 N.C. 47, 56 S.E. 555 (1907).

Where a notary public was interested in a deed of trust, he was disqualified to take the acknowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

Signing of documents for corporation solely in capacity as notary public. — Where defendant signed subcontractor corporation's applications for payment solely in her capacity as a notary public, she did not act in her capacity as director of the corporation or certify the documents individually; therefore, it was error to include her as named individual defendant in issues and instructions submitted to the jury in an action for fraud and gross negligence based upon representations contained in the applications. Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 374 S.E.2d 385 (1988), rehearing denied, 324 N.C. 117, 377 S.E.2d 235 (1989).

Evidence Insufficient as to Signature. — Evidence was insufficient to hold that the signature of a blind property owner's name on a lease was a valid indication of the owner's mutual assent to contract because, although the owner's wife made the owner's signature on the lease, there was no evidence the signature was witnessed by two disinterested persons distinct from a notary who witnessed the signing. Barbee v. Johnson, 190 N.C. App. 349, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Cited in State ex rel. Johnson v. Eason, — N.C. App. —, 679 S.E.2d 151, 2009 N.C. App. LEXIS 1093 (July 7, 2009).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— Some of the opinions below were issued under prior law.*

An attorney may notarize a document for a client and then represent that client in a legal matter relating to the same document. See opinion of Attorney General to Ms. Sheila Stafford Pope, General Counsel, N.C. Secretary of State, 2001 N.C. AG LEXIS 34 (8/9/01).

A person who cannot read or write cannot hold a notary commission. See opinion of Attorney General to Ludelle R. Hatley, Notaries Public Deputy, Secretary of State's Office, 57 N.C.A.G 1 (1987).

Verification by Partner of Firm Representing Client. — It is not advisable for a notary who is also a partner in a lawfirm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also "appear," and they could be prohibited under G.S. 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

Pleadings not requiring verification by one of the parties are not subject to dismissal if they are verified anyway and a partner of the firm representing that client acts as the notary. However, G.S. 47-8 would still seem to say that that partner is without power to act as notary in that situation. The signature of the attorney signing the pleadings would be adequate under G.S. 1A-1, Rule 11(a). See opinion of Attorney General to Mr. James Lee Knight, Notary Pubic, Guilford County, 58 N.C.A.G. 35 (1988).

It Is Essential That Notary Specify Expiration Date of His Commission. — See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971).

§ 10B-21. Notaries ex officio.

(a) The clerks of the superior court may act as notaries public in their several counties by virtue of their offices as clerks and may certify their notarial acts only under the seals of their respective courts. Assistant and deputy clerks of superior court, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective courts:

(1) Oaths and affirmations.
(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-5(b), assistant and deputy clerks of superior court may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective courts. A course of study attended only by assistant and deputy clerks of superior court may be taught at any mutually convenient location agreed to by the Secretary and the Administrative Office of the Courts.

(b) Registers of deeds may act as notaries public in their several counties by virtue of their offices as registers of deeds and may certify their notarial acts only under the seals of their respective offices. Assistant and deputy registers of deeds, by virtue of their offices, may perform the following notarial acts and may certify these notarial acts only under the seals of their respective offices:

(1) Oaths and affirmations.
(2) Verifications or proofs.

Upon completion of the course of study provided for in G.S. 10B-5(b), assistant and deputy registers of deeds may, by virtue of their offices, perform all other notarial acts and may certify these notarial acts only under the seals of their respective offices. A course of study attended only by assistant and deputy registers of deeds may be taught at any mutually convenient location agreed to by the Secretary and the North Carolina Association of Registers of Deeds.

(c) The Director may act as a notary public by virtue of the Director's employment in the Department of the Secretary and may certify a notarial act performed in that capacity under the seal of the Secretary.

(d) Unless otherwise provided by law, a person designated a notary public by this section may charge a fee for a notarial act performed in accordance with G.S. 10B-31. The fee authorized by this section is payable to the governmental unit or agency by whom the person is employed.

(e) Nothing in this section shall authorize a person to act as a notary public other than in the performance of the official duties of the person's office unless the person complies fully with the requirements of G.S. 10B-5. (1833, c. 7, ss. 1, 2; R.C., c. 75, s. 3; Code, s. 3306; Rev., s. 2349; C.S., s. 3174; 1973, c. 680, s. 1; 1991, c. 683, s. 2; 1998-228, s. 8.; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-15. It has been renumbered as this section at the direction of the Revisor of Statutes.

CASE NOTES

Editor's Note. — *The case below was decided under prior law.*

A clerk of the superior court is, by virtue of his office, anotary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hodges, 92 N.C. 672 (1885).

§ 10B-22. False certificate; foreign language certificates.

(a) A notary shall not execute a notarial certificate containing information known or believed by the notary to be false.

(b) A notary shall not execute a certificate that is not written in the English language. A notary may execute a certificate written in the English language that accompanies a record written in another language, which record may include a translation of the notarial certificate into the other language. In those instances, the notary shall execute only the English language certificate. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-16. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-23. Improper records.

(a) A notary shall not notarize a signature on a record without a notarial certificate indicating what type of notarial act was performed. However, a notary may administer an oath or affirmation without completing a jurat.

(b) A notary shall neither certify, notarize, nor authenticate a photograph. A notary may notarize an affidavit regarding and attached to a photograph. (2005-391, s. 4; 2006-59, s. 13.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-17. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subsection (a), as amended by Session Laws 2006-59, s. 13, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-24. Testimonials.

A notary shall not use the official notary title or seal in a manner intended to endorse, promote, denounce, or oppose any product, service, contest, candidate, or other offering. This section does not prohibit a notary public from performing a notarial act upon a record executed by another individual. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-18. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-25 through 10B-29: Reserved for future codification purposes.

Part 4. Fees.

§ 10B-30. Imposition and waiver of fees.

(a) For performing a notarial act, a notary may charge up to the maximum fee specified in this Chapter.

(b) A notary shall not discriminatorily condition the fee for a notarial act on any attribute of the principal that would constitute unlawful discrimination.

(c) Nothing in this Chapter shall compel a notary to charge a fee. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-19. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-31. Fees for notarial acts.

The maximum fees that may be charged by a notary for notarial acts are as follows:

(1) For acknowledgments, jurats, verifications or proofs, five dollars ($5.00) per principal signature.

(2) For oaths or affirmations without a signature, five dollars ($5.00) per person, except for an oath or affirmation administered to a credible witness to vouch for the identity of a principal or subscribing witness. (Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C.S., s. 3178; 1973, c. 680, s. 1; 1977, c. 429, ss. 1, 2; 1981, c. 872; 1991, c. 683, s. 2; 1998-228, s. 6; 2005-328,s. 1.; 2005-391, s. 4; 2006-59, s. 14.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-20. It has been renumbered as this section at the direction of the Revisor of Statutes.

Subdivision (2), as amended by Session Laws 2006-59, s. 14, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

CASE NOTES

***Editor's Note.** — The case below was decided under prior law.*

Fees Created by Statute. — The fees of notaries public are created and regulated by statute. Price & Luca Cider & Vinegar Co. v. Carroll, 124 N.C. 555, 32 S.E. 959 (1899).

§ 10B-32. Notice of fees.

Notaries who charge for their notarial services shall conspicuously display in their places of business, or present to each principal outside their places of business, an English-language schedule of fees for notarial acts. No part of any notarial fee schedule shall be printed in smaller than 10-point type. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-21. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-33, 10B-34: Reserved for future codification purposes.

Part 5. Signature and Seal.

§ 10B-35. Official signature.

When notarizing a paper record, a notary shall sign by hand in ink on the notarial certificate. The notary shall comply with the requirements of G.S. 10B-20(b)(1) and (b)(2). The notary shall affix the official signature only after the notarial act is performed. The notary shall not sign a paper record using the facsimile stamp or an electronic or other printing method. (2005-391, s. 4; 2006-59, s. 15.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-22. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 15, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-36. Official seal.

(a) A notary shall keep an official seal or stamp that is the exclusive property of the notary. The notary shall keep the seal in a secure location. A notary shall not allow another person to use or possess the seal, and shall not surrender the seal to the notary's employer upon termination of employment.

(b) The seal shall be affixed only after the notarial act is performed. The notary shall place the image or impression of the seal near the notary's signature on every paper record notarized. The seal and the notary's signature shall appear on the same page of a record as the text of the notarial certificate.

(c) A notary shall do the following within 10 days of discovering that the notary's seal has been lost or stolen:

(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.

(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) As soon as is reasonably practicable after resignation, revocation, or expiration of a notary commission, or death of the notary, the seal shall be delivered to the Secretary for disposal. (1973, c. 680, s. 1; 1991, c. 683, s. 2; 1998-228, s. 7; 2005-391, s. 4; 2006-59, s. 16.)

Cross References. — As to validation of certain acts of notaries public where notarial seals on documents contain certain errors, see G.S. 10A-16(b). As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see G.S. 47-102 and 47-103.

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-23. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 16, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

Courts Take Judicial Notice. — It was said in Pierce v. Indseth, 106 U.S. 546, 1 S. Ct. 418, 27 L. Ed. 254 (1882): "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." State ex rel. Att'y Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Name in Seal. — The statute authorizing a notary public to take acknowledgment of deeds did not formerly require that his name or any name be used in the notarial seal, and the seal appended to the certificate was presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public was adjudged to have been proved by such seal and certificate, it was not rebutted by the mere fact that the notary signed his name "Geo. Theo. Somner" and the seal had on it the name of "Theo. Somner." Deans v. Pate, 114 N.C. 194, 19 S.E. 146 (1894). But see now § 10B-20.

Failure to Attest by Seal. — A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. Tucker v. Inter-States Life Ass'n, 112 N.C. 796, 17 S.E. 532 (1893).

Under prior law, the acknowledgment of a deed before a notary public in due form was not defective because not attested by his notarial seal. Peel v. Corey, 196 N.C. 79, 144 S.E. 559 (1928).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was issued under prior law.*

Notarial Stamp Need Not Contain the Word "Stamp". — See opinion of Attorney General to Mr. Mark Stewart, Guilford County Register of Deeds, 40 N.C.A.G. 604 (1970).

§ 10B-37. Seal image.

(a) A notary shall affix the notary's official seal near the notary's official signature on the notarial certificate of a record.

(b) A notary's official seal shall include all of the following elements:

(1) The notary's name exactly as commissioned.

(2) The words "Notary Public".

(3) The county of commissioning, including the word "County" or the abbreviation "Co.".

(4) The words "North Carolina" or the abbreviation "NC".

(c) The notary seal may be either circular or rectangular in shape. Upon receiving a commission or a recommission on or after October 1, 2006, a notary shall not use a circular seal that is less than 1 ½ inches, nor more than 2 inches in diameter. The rectangular seal shall not be over 1 inch high and 2 ½ inches long. The perimeter of the seal shall contain a border that is visible when impressed.

(c1) Alterations to any information contained within the seal as embossed or stamped on the record are prohibited.

(d) A notarial seal, as it appears on a record, may contain the permanently imprinted, handwritten, or typed date the notary's commission expires.

(e) Any reference in the General Statutes to the seal of a notary shall include the stamp of a notary, and any reference to the stamp of a notary shall include the seal of the notary.

(f) The failure of a notarial seal to comply with the requirements of this section shall not affect the sufficiency, validity, or enforceability of the notarial certificate, but shall constitute a violation of the notary's duties. (2005-391, s. 4; 2006-59, s. 17.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-24. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 17, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§§ 10B-38, 10B-39: Reserved for future codification purposes.

Part 6. Certificate Forms.

§ 10B-40. Notarial certificates in general.

(a) A notary shall not make or give a notarial certificate unless the notary has either personal knowledge or satisfactory evidence of the identity of the principal or, if applicable, the subscribing witness.

(a1) By making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies as follows:

(1) As to an acknowledgment, all those things described in G.S. 10B-3(1).
(2) As to an affirmation, all those things described in G.S. 10B-3(2).
(3) As to an oath, all those things described in G.S. 10B-3(14).
(4) As to a verification or proof, all those things described in G.S. 10B-3(28).

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

(1) At the time the notarial act was performed and the notarial certificate was signed by the notary, the notary was lawfully commissioned, the notary's commission had neither expired nor been suspended, the notarial act was performed within the geographic limits of the notary's commission, and the notarial act was performed in accordance with the provision of this Chapter.
(2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence.
(3) The notary was not prohibited from acting under G.S. 10-20(c).

(a3) The inclusion of additional information in a notarial certificate, including the representative or fiduciary capacity in which a person signed or the means a notary used to identify a principal, shall not invalidate an otherwise sufficient notarial certificate.

(b) A notarial certificate for the acknowledgment taken by a notary of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-41, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

(1) Identifies the state and county in which the acknowledgment occurred.
(2) Names the principal who appeared in person before the notary.
(3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.
(4) Indicates that the principal appeared in person before the notary and the principal acknowledged that he or she signed the record.
(5) States the date of the acknowledgment.
(6) Contains the signature and seal or stamp of the notary who took the acknowledgment.
(7) States the notary's commission expiration date.

(c) A notarial certificate for the verification or proof of the signature of a principal by a subscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

(1) Identifies the state and county in which the verification or proof occurred.
(2) Names the subscribing witness who appeared in person before the notary.
(3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.
(4) Names the principal whose signature on the record is to be verified or proven.
(5) Indicates that the subscribing witness certified to the notary under oath or by affirmation that the subscribing witness is not a party to or beneficiary of the transaction, signed the record as a subscribing witness, and either (i) witnessed the principal sign the record, or (ii) witnessed the principal acknowledge the principal's signature on the record.
(6) States the date of the verification or proof.
(7) Contains the signature and seal or stamp of the notary who took the verification or proof.
(8) States the notary's commission expiration date.

(c1) A notarial certificate for the verification or proof of the signature of a principal or a subscribing witness by a nonsubscribing witness taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-42.1, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

(1) Identifies the state and county in which the verification or proof occurred.
(2) Names the nonsubscribing witness who appeared in person before the notary.
(3) Names the principal or subscribing witness whose signature on the record is to be verified or proven.
(4) Indicates that the nonsubscribing witness certified to the notary under oath or by affirmation that the nonsubscribing witness is not a party to or beneficiary of the transaction and that the nonsubscribing witness recognizes the signature of either the principal or the subscribing witness and that the signature is genuine.
(5) States the date of the verification or proof.
(6) Contains the signature and seal or stamp of the notary who took the verification or proof.
(7) States the notary's commission expiration date.

(d) A notarial certificate for an oath or affirmation taken by a notary is sufficient and shall be accepted in this State if it is substantially in the form set forth in G.S. 10B-43, if it is substantially in a form otherwise prescribed by the laws of this State, or if it includes all of the following:

(1) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.
(2) Names the principal who appeared in person before the notary unless the name of the principal otherwise is clear from the record itself.
(3) Repealed by Session Laws 2006-59, s. 18, effective October 1, 2006.
(4) Indicates that the principal who appeared in person before the notary signed the record in question and certified to the notary under oath or by affirmation as to the truth of the matters stated in the record.
(5) States the date of the oath or affirmation.
(6) Contains the signature and seal or stamp of the notary who took the oath or affirmation.
(7) States the notary's commission expiration date.

(e) Any notarial certificate made in another jurisdiction shall be sufficient in this State if it is made in accordance with federal law or the laws of the jurisdiction where the notarial certificate is made.

(f) On records to be filed, registered, recorded, or delivered in another state or jurisdiction of the United States, a North Carolina notary may complete any notarial certificate that may be required in that other state or jurisdiction.

(g) Nothing in this Chapter shall be deemed to authorize the use of a notarial certificate authorized by this Part in place of or as an alternative to a notarial certificate required by any other provision of the General Statutes outside of Chapter 47 of the General Statutes that prescribes the specific form or content for a notarial certificate including G.S. 31-11.6, Chapter 32A of the General Statutes, and G.S. 90-321. However, any statute that permits or requires the use of a notarial certificate contained within Chapter 47 of the General Statutes may also be satisfied by the use of a notarial certificate permitted by this Part. Any form of acknowledgment or probate authorized under Chapter 47 of the General Statutes shall be conclusively deemed in compliance with the requirements of this section.

(h) If an individual signs a record and purports to be acting in a representative or fiduciary capacity, that individual is also deemed to represent to the notary that he or she is signing the record with proper authority to do so and also is signing the record on behalf of the person or entity represented and identified therein or in the fiduciary capacity indicated therein. In performing a notarial act in relation to an individual described under this subsection, a notary is under no duty to verify whether the individual acted in a representative or fiduciary capacity or, if so, whether the individual was duly authorized so to do. A notarial certificate may include any of the following:

(1) A statement that an individual signed a record in a particular representative or fiduciary capacity.
(2) A statement that the individual who signed the record in a representative or fiduciary capacity had due authority so to do.
(3) A statement identifying the represented person or entity or the fiduciary capacity. (2005-391, s. 4; 2006-59, s. 18.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-25. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 18, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-41. Notarial certificate for an acknowledgment.

(a) When properly completed by a notary, a notarial certificate that substantially complies with the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the acknowledgment of a principal who is an individual acting in his or her own right or who is an individual acting in a representative or fiduciary capacity. The authorization of the form in this section does not preclude the use of other forms.

____________________ County, North Carolina

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: name(s) of principal(s).

Date: ________________ Official Signature of Notary
Notary's printed or typed name, Notary Public
(Official Seal) My commission expires: ____________

(b) Repealed by Session Laws 2006-59, s. 19, effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2005-391, s. 4; 2006-59, s. 19.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-26. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s 19, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-42. Notarial certificate for a verification or of subscribing witness.

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal by a subscribing witness. The authorization of the form in this section does not preclude the use of other forms.

__________________ County, North Carolina

I certify that (name of subscribing witness) personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, signed the foregoing document as a subscribing witness, and either (i) witnessed (name of principal) sign the foregoing document or (ii) witnessed (name of principal) acknowledge his or her signature on the already-signed document.

Date: _______________
Official Signature of Notary
Notary's printed or typed name, Notary Public
(Official Seal)
My commission expires: __________

(b) Repealed by Session Laws 2006-59, s. 20, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2005-391, s. 4; 2006-59, s. 20.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-27. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 20, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-42.1. Notarial certificate for a verification of nonsubscribing witness.

(a) When properly completed by a notary, a notarial certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for the verification or proof of the signature of a principal or subscribing witness by a nonsubscribing witness. The authorization of the form in this section does not preclude the use of other forms.

__________________ County, North Carolina

I certify (name of nonsubscribing witness) personally appeared before me this day and certified to me under oath or by affirmation that he or she is not a grantee or beneficiary of the transaction, that (name of nonsubscribing witness) recognizes the signature of (name of the principal or the subscribing witness) and that the signature is genuine.

Date: ____________ Official Signature of Notary
Notary's printed or typed name, Notary Public
(Official Seal) My commission expires: ________

(b) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible. (2006-59, s. 21.)

Editor's Note. — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

§ 10B-43. Notarial certificate for an oath or affirmation.

(a) When properly completed by a notary, a notarial certificate that substantially complies with either of the following forms may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for an oath or affirmation. The authorization of the forms in this section does not preclude the use of other forms.

____________ County, North Carolina

Signed and sworn to before me this day by (name of principal).

Date: ____________ Official Signature of Notary
Notary's printed or typed name, Notary Public
(Official Seal) My commission expires: ________

-OR-

____________ County, North Carolina

Sworn to and subscribed before me this day by (name of principal).

Date: ____________ Official Signature of Notary
Notary's printed or typed name, Notary Public
(Official Seal) My commission expires: ________

(b) Repealed by Session Laws 2006-59, s. 22, effective October 1, 2006, except as otherwise set forth in the act, and applicable to notarial acts performed on or after October 1, 2006.

(c) The notary's printed or typed name as shown in the form provided in subsection (a) of this section is not required if the legible appearance of the notary's name may be ascertained from the notary's typed or printed name near the notary's signature or from elsewhere in the notarial certificate or from the notary's seal if the name is legible.

(d) In either of the forms provided under subsection (a) of this section all of the following shall apply:

(1) The name of the principal may be omitted if the name of the principal is located near the jurat, and the principal who so appeared before the notary is clear from the record itself.

(2) The words "affirmed" or "sworn to or affirmed" may be substituted for the words "sworn to". (2005-391, s. 4; 2006-59, s. 22.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-29. It has been renumbered as this section at the direction of the Revisor of Statutes.

This section, as amended by Session Laws 2006-59, s. 22, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§§ 10B-44 through 10B-49: Reserved for future codification purposes.

Part 7. Changes in Status.

§ 10B-50. Change of address.

Within 45 days after the change of a notary's residence, business, or any mailing address or telephone number, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change, giving both old and new addresses or telephone numbers. (1991, c. 683, s. 2; 1995, c. 226, s. 3; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-29. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-51. Change of name.

(a) Within 45 days after the legal change of a notary's name, the notary shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice of the change. The notice shall include both the notary's former name and the notary's new name.

(b) A notary with a new name may continue to use the former name in performing notarial acts until all of the following steps have been completed:

(1) The notary receives a confirmation of Notary's Name Change from the Secretary.

(2) The notary obtains a new seal bearing the new name exactly as that name appears in the confirmation from the Secretary.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of the effective date of the change to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and to have the notary public record changed to reflect the new commissioned name.

(c) Upon completion of the requirements in subsection (b) of this section, the notary shall use the new name. (1991, c. 683, s. 2; 1995, c. 226, s. 3; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-30. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-52. Change of county.

(a) A notary who has moved to another county in North Carolina remains commissioned until the current commission expires, is not required to obtain a new seal, and may continue to notarize without changing his or her seal.

(b) When a notary who has moved applies to be recommissioned, if the commission is granted the, Secretary shall issue a notice of recommissioning. The commission applicant shall then do all of the following:

(1) Obtain a new seal bearing the new county exactly as in the notice of recommissioning.

(2) Appear before the register of deeds to which the commission was delivered within 45 days of recommissioning, to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new county and to have the notary public record changed to reflect the new county name. (1991, c. 683, s. 2; 1995, c. 226; s. 3; 2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-30. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-53. Change of both name and county.

Within 45 days after the legal change of a notary's name, and if the notary has also moved to a different county than as last commissioned, the notary shall submit to the Secretary a recommissioning application and fee pursuant to this Chapter. The notary may continue to perform notarial acts under the notary's previous name and seal until all of the following steps have been completed:

(1) The notary receives a transmittal receipt of reappointment due to name and county change from the Secretary.

(2) The notary obtains a new seal bearing the new name and county exactly as those items appear in the transmittal receipt.

(3) The notary appears before the register of deeds to which the commission was delivered within 45 days of recommissioning to be duly qualified by taking the general oath of office prescribed in G.S. 11-11 and the oath prescribed for officers in G.S. 11-7 under the new name and county and to have the notary public record changed to reflect the new name and county. (1991, c. 683, s. 2; 1995, c. 226, s. 3; 2005-391, s. 4.)

Editor's Note. — As enacted, this section contains a subsection (a), but no subsection (b). This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-32. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-54. Resignation.

(a) A notary who resigns the notary's commission shall send to the Secretary by fax, e-mail, or certified mail, return receipt requested, a signed notice indicating the effective date of resignation.

(b) Notaries who cease to reside in or to maintain a regular place of work or business in this State, or who become permanently unable to perform their notarial duties, shall resign their commissions and shall deliver their seals to the Secretary by certified mail, return receipt requested. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-33. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-55. Disposition of seal; death of notary.

(a) When a notary commission is resigned or revoked, the notary shall deliver the notary's seal to the Secretary within 45 days of the resignation or revocation. Delivery shall be accomplished by certified mail, return receipt requested. The Secretary shall destroy any seal received under this subsection.

(b) A notary whose commission has expired and whose previous commission or application was not revoked or denied by this State, is not required to deliver the seal to the Secretary as provided under subsection (a) of this section if the notary intends to apply to be recommissioned and is recommissioned within three months after the notary's commission expires.

(c) If a notary dies while commissioned or before fulfilling the disposition of seal requirements in this section, the notary's estate shall, as soon as is reasonably practicable and no later than the closing of the estate, notify the Secretary in writing of the notary's death and deliver the notary's seal to the Secretary for destruction. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-34. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-56 through 10B-59: Reserved for future codification purposes.

Part 8. Enforcement, Sanctions, and Remedies.

§ 10B-60. Enforcement and penalties.

(a) The Secretary may issue a warning to a notary or restrict, suspend, or revoke a notarial commission for a violation of this Chapter and on any ground for which an application for a commission may be denied under this Chapter. Any period of restriction, suspension, or revocation shall not extend the expiration date of a commission.

(b) Except as otherwise permitted by law, a person who commits any of the following acts is guilty of a Class 1 misdemeanor:

(1) Holding one's self out to the public as a notary if the person does not have a commission.

(2) Performing a notarial act if the person's commission has expired or been suspended or restricted.

(3) Performing a notarial act before the person had taken the oath of office.

(c) A notary shall be guilty of a Class 1 misdemeanor if the notary does any of the following:

(1) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary.

(2) Takes a verification or proof without the subscribing witness appearing in person before the notary.

(3) Takes an acknowledgment or administers an oath or affirmation without personal knowledge or satisfactory evidence of the identity of the principal.

(4) Takes a verification or proof without personal knowledge or satisfactory evidence of the identity of the subscribing witness.

(d) A notary shall be guilty of a Class I felony if the notary does any of the following:

(1) Takes an acknowledgment or a verification or a proof, or administers an oath or affirmation if the notary knows it is false or fraudulent.

(2) Takes an acknowledgment or administers an oath or affirmation without the principal appearing in person before the notary if the notary does so with the intent to commit fraud.

(3) Takes a verification or proof without the subscribing witness appearing in person before the notary if the notary does so with the intent to commit fraud.

(e) It is a Class I felony for any person to perform notarial acts in this State with the knowledge that the person is not commissioned under this Chapter.

(f) Any person who without authority obtains, uses, conceals, defaces, or destroys the seal or notarial records of a notary is guilty of a Class I felony.

(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(h) Resignation or expiration of a notarial commission does not terminate or preclude an investigation into a notary's conduct by the Secretary, who may pursue the investigation to a conclusion, whereupon it may be a matter of public record whether or not the finding would have been grounds for disciplinary action.

(i) The Secretary may seek injunctive relief against any person who violates the provisions of this Chapter. Nothing in this Chapter diminishes the authority of the North Carolina State Bar.

(j) Any person who knowingly solicits, coerces, or in any material way influences a notary to commit official misconduct, is guilty as an aider and abettor and is subject to the same level of punishment as the notary.

(k) The sanctions and remedies of this Chapter supplement other sanctions and remedies provided by law, including, but not limited to, forgery and aiding and abetting. (1991, c. 683, s. 2; 1993, c. 539, ss. 6-8, 1121; 1994 Ex. Sess., c. 24, s. 14(c); 1995, c. 226, s. 4; 2001-450, s. 3; 2005-391, s. 4; 2006-59, s. 23.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-35. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the December 1, 2005. Any act committed prior to December 1, 2005 which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to December 1, 2005 shall remain valid as if this act had not been enacted."

Session Laws 2005-391, s. 13, provides in part: "G.S. 10B-60 and G.S. 10B-146 apply to offenses committed on or after December 1, 2005, without regard to whether a commission was issued under Chapter 10A or Chapter 10B of the General Statutes."

This section, as amended by Session Laws 2006-59, s. 23, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§§ 10B-61 through 10B-64: Reserved for future codification purposes.

Part 9. Validation of Notarial Acts.

§ 10B-65. Acts of notaries public in certain instances validated.

(a) Any acknowledgment taken and any instrument notarized by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, or by a person whose notary commission has expired, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act.

(b) All documents bearing a notarial seal and which contain any of the following errors are validated and given the same legal effect as if the errors had not occurred:

(1) The date of the expiration of the notary's commission is stated, whether correctly or erroneously.

(2) The notarial seal does not contain a readable impression of the notary's name, contains an incorrect spelling of the notary's name, or does not bear the name of the notary exactly as it appears on the commission, as required under G.S. 10B-37.

(3) The notary's signature does not comport exactly with the name on the notary commission or on the notary seal, as required by G.S. 10B-20.

(4) The notarial seal contains typed, printed, drawn, or handwritten material added to the seal, fails to contain the words "North Carolina" or the abbreviation "NC", or contains correct information except that instead of the abbreviation for North Carolina contains the abbreviation for another state.

(c) All deeds of trust in which the notary was named in the document as a trustee only are validated.

(d) All notary acknowledgments performed before January 1, 1953, bearing a notarial seal are hereby validated.

(e) This section applies to notarial acts performed on or before May 1, 2008. (1945, c. 665; 1947, c. 313; 1949, c. 1; 1953, c. 702; 1961, cc. 483, 734; 1965, c. 37; 1969, c. 83; c. 716, s. 1; 1971, c. 229, s. 1; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2; c. 643, s. 1; 1981, c. 164, ss. 1, 2; 1983, c. 205, s. 1; 1985, c. 71, s. 1; 1987, c. 277, s. 9; 1989, c. 390, s. 9; 1991, c. 683, s. 2; 1997-19, s. 1; 1997-469, s. 2; 1998-228, s. 10; 1999-21, s. 2; 2001-154, s. 1; 2002-159, s. 27; 2003-38, s. 1; 2004-199, s. 6.; 2005-391, s. 4; 2008-194, s. 5.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-36. It has been renumbered as this section at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2008-194, s. 5, effective August 8, 2008, substituted "May 1, 2008" for "February 1, 2004" in subsection (e).

§ 10B-66. Certain notarial acts validated.

(a) Any acknowledgment taken and any instrument notarized by a person whose notarial commission was revoked on or before January 30, 1997, is hereby validated.

(b) This section applies to notarial acts performed on or before August 1, 1998. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-37. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-67. Erroneous commission expiration date cured.

An erroneous statement of the date that the notary's commission expires shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related record if the notary is, in fact, lawfully commissioned at the time of the notarial act. (2006-59, s. 24.)

Editor's Note. — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

§ 10B-68. Technical defects cured.

(a) Technical defects, errors, or omissions in a notarial certificate shall not affect the sufficiency, validity, or enforceability of the notarial certificate or the related instrument or document. This subsection applies to notarial certificates made on or after December 1, 2005.

(b) Defects in the commissioning or recommissioning of a notary that are approved by the Department are cured. This subsection applies to commissions and recommissions issued on or after December 1, 2005.

(c) As used in this section, a technical defect includes those cured under G.S. 10B-37(f) and G.S. 10B-67. Other technical defects include the absence of the legible appearance of the notary's name exactly as shown on the notary's commission as required in G.S. 10B-20(b). This subsection applies to notarial certificates made on or after December 1, 2005. (2006-59, s. 24; 2006-199, s. 2.)

Editor's Note. — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

Session Laws 2006-199, s. 5, provides that G.S. 10B-68(a) and (b), as enacted in Section 24 of S.L. 2006-59, and as amended in Section 2 of this act, become effective July 1, 2006.

§ 10B-69. Official forms cured.

(a) The notarial certificate contained in a form issued by a State agency prior to October 1, 2006, is deemed to be a valid certificate provided the certificate complied with the law at the time the form was issued.

(b) The notarization using a certificate under subsection (a) of this section shall be deemed valid if executed in compliance with the law at the time the form was issued. (2006-59, s. 24.)

Editor's Note. — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

§ 10B-70. Certain notarial acts for local government agencies validated.

(a) Any acknowledgment taken and any instrument notarized for a local government agency by a person prior to qualification as a notary public but after commissioning or recommissioning as a notary public, by a person whose notary commission has expired, or by a person who failed to qualify within 45 days of commissioning as required by G.S. 10B-10, is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act. This section shall apply to notarial acts performed for a local government agency on or after October 31, 2006, and before June 30, 2007.

(b) Any electronic document filed in the Mecklenburg County Register of Deeds office that purports to be notarized in the Commonwealth of Virginia and that contains the typed name of a Virginia notary together with the notary's expiration date shall be given the same legal effect as if the person performed a lawful notarization in Virginia. (2007-484, s. 27; 2008-194, s. 4.)

Editor's Note. — Session Laws 2007-484, s. 45, made this section effective August 30, 2007.

Effect of Amendments. — Session Laws 2008-194, s. 4, effective August 8, 2008, designated the previously existing provisions as subsection (a); and added subsection (b).

§ 10B-71. Certain notarial acts validated when recommissioned notary failed to again take oath.

Any acknowledgment taken and any instrument notarized by a person who after recommissioning failed to again take the oath as a notary public is hereby validated. The acknowledgment and instrument shall have the same legal effect as if the person qualified as a notary public at the time the person performed the act. This section shall apply to notarial acts performed on or after May 15, 2004, and before July 8, 2009. (2009-358, s. 1.)

Editor's Note. — Session Laws 2009-358, s. 2, made this section effective July 27, 2009.

§§ 10B-72 through 10B-98: Reserved for future codification purposes.

§ 10B-99. Presumption of regularity.

(a) In the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation of this Article by the notary, the courts shall grant a presumption of regularity to notarial acts so that those acts may be upheld, provided there has been substantial compliance with the law. Nothing in this Chapter modifies or repeals the common law doctrine of substantial compliance in effect on November 30, 2005.

(b) A notarial act performed before October 1, 2006, shall be deemed valid if it complies with the law as it existed on or before December 1, 2005. (2006-59, s. 24; 2006-199, s. 4.)

Editor's Note. — Session Laws 2006-59, s. 33, as amended by Session Laws 2006-199, s. 4, made this section effective July 3, 2006, and except as otherwise set forth in the act, applicable to notarial acts performed on or after that date.

ARTICLE 2.

Electronic Notary Act.

Part 1. General Provisions.

§ 10B-100. Short title.

This Article is the Electronic Notary Public Act and may be cited by that name. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-38. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-101. Definitions.

The following definitions apply in this Article:

(1) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) "Electronic Document" means information that is created, generated, sent, communicated, received, or stored by electronic means.

(3) "Electronic Notarial Act" and "Electronic Notarization" mean an official act by an electronic notary public that involves electronic documents.

(4) "Electronic Notary Public" and "Electronic Notary" mean a notary public who has registered with the Secretary the capability of performing electronic notarial acts in conformance with this Article.

(5) "Electronic Notary Seal" and "Electronic Seal" mean information within a notarized electronic document that includes the notary's name, jurisdiction, and commission expiration date, and generally corresponds to data in notary seals used on paper documents.

(6) "Electronic Signatures" means an electronic symbol or process attached to or logically associated with an electronic document and executed or adopted by a person with the intent to sign the document.

(7) "Notary's Electronic Signature" means those forms of electronic signature which have been approved by the Secretary as authorized in G.S. 10B-125, as an acceptable means for an electronic notary to affix the notary's official signature to an electronic record that is being notarized. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-39. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-102. Scope of this Article.

Article 1 of this Chapter applies to all acts authorized under this Article unless the provisions of Article 1 directly conflict with the provisions of this Article, in which case provisions of Article 2 shall control. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-40. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-103, 10B-104: Reserved for future codification purposes.

Part 2. Registration.

§ 10B-105. Qualifications.

(a) A person qualified for electronic notary registration shall meet all of the following requirements:

(1) Hold a valid commission as a notary public in the State of North Carolina.

(2) Except as otherwise provided, abide by all the provisions of Article 1 of this Chapter.

(3) Satisfy the requirements of G.S. 10B-107.

(4) Submit an electronic registration form containing no significant misstatement or omission of fact.

(b) The Secretary may deny a registration as an electronic notary as authorized in G.S. 10B-5(d). (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-41. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-106. Registration with the Secretary of State.

(a) Before performing notarial acts electronically, a notary shall register the capability to notarize electronically with the Secretary.

(b) The term of registration as an electronic notary shall coincide with the term of the notary's commission under Article 1 of this Chapter.

(c) An electronic notary shall reregister the capability to notarize electronically at the same time the notary applies for recommissioning under the requirements of Article 1 of this Chapter.

(d) An electronic form shall be used by an electronic notary in registering with the Secretary and it shall include, at least all of the following:

(1) The applicant's full legal name and the name to be used for commissioning, excluding nicknames.
(2) The state and county of commissioning of the registrant.
(3) The expiration date of the registrant's notary commission.
(4) Proof of successful completion of the course of instruction on electronic notarization as required by this Article.
(5) A description of the technology the registrant will use to create an electronic signature in performing official acts.
(6) If the device used to create the registrant's electronic signature was issued or registered through a licensed certification authority, the name of that authority, the source of the license, the starting and expiration dates of the device's term of registration, and any revocations, annulments, or other premature terminations of any registered device of the registrant that was due to misuse or compromise of the device, with the date, cause, and nature of each termination explained in detail.
(7) The e-mail address of the registrant.

The information provided in a registration that relates to subdivision (7) of this section shall be considered confidential information and shall not be subject to disclosure under Chapter 132 of the General Statutes, except as provided by rule.

(e) The electronic registration form for an electronic notary shall be transmitted electronically to the Secretary and shall include any decrypting instructions, codes, keys, or software that allow the registration to be read.

(f) Within 10 business days after the change of any registration information required of an electronic notary, the notary shall electronically transmit to the Secretary a notice of the change of information signed with the notary's official electronic signature. (2005-391, s. 4; 2006-59, s. 25; 2006-259, ss. 1, 3.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-42. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2006-259, s. 1, which had substituted "subdivision (7) of this subsection" for "subsection (7)," was repealed by Session Laws 2006-259, s. 3, which provided in part that "If House Bill 1432, 2005 Regular Session (2006-59), becomes law, Section 1 of this act is repealed." House Bill 1432 (2006-59) did pass.

Subsection (b), as amended by Session Laws 2009-59, s. 25, effective October 1, 2006, is applicable to notarial acts performed on or after that date.

§ 10B-107. Course of instruction.

(a) Before performing electronic notarial acts, a notary shall take a course of instruction of least three hours approved by the Secretary and pass an examination of this course, which shall be in addition to the educational requirements provided in Article 1 of this Chapter.

(b) The content of the course and the basis for the examination shall be notarial laws, procedures, technology, and ethics as they pertain to electronic notarization. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-43. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-108. Fees for registration.

The fee payable to the Secretary for registering or reregistering as an electronic notary is fifty dollars ($50.00), which shall be in addition to the fee required in G.S. 10B-13. All funds received by the Secretary under this section shall be deposited into the General Fund. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-44. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-109 through 10B-114: Reserved for future codification purposes.

Part 3. Electronic Notarial Acts, Powers, and Limitations.

§ 10B-115. Types of electronic notarial acts.

The following types of notarial acts may be performed electronically:
(1) Acknowledgments;
(2) Jurats;
(3) Verifications or proofs; and
(4) Oaths or affirmations. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-45. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-116. Prohibitions.

An electronic notarization shall not be performed if the signer of the electronic document:
(1) Is not in the presence of the electronic notary at the time of notarization; and
(2) Is not personally known to the notary or identified by the evidence in accordance with other provisions of this Chapter; or
(3) For any reason set forth in G.S. 10B-20. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-46. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-117. Notarial components of electronic document.

In performing an electronic notarial act, all of the following components shall be attached to, or logically associated with, the electronic document by the electronic notary, all of which shall be immediately perceptible and reproducible in the electronic record to which the notary's electronic signature is attached:
(1) The notary's name, state, and county of commissioning exactly as stated on the commission issued by the Secretary;
(2) The words "Electronic Notary Public";
(3) The words "State of North Carolina";
(4) The expiration date of the commission;
(5) The notary's electronic signature; and
(6) The completed wording of one of the following notarial certificates:
  a. Acknowledgment;
  b. Jurat;

c. Verification or proof; or
d. Oath or affirmation. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-47. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-118. Maximum fees.

For performing electronic notarial acts, the maximum fees that may be charged by an electronic notary are as follows:
(1) For acknowledgments, $10.00 per signature.
(2) For jurats, $10.00 per signature.
(3) For verifications or proofs, $10.00 per signature.
(4) For oaths or affirmations, $10.00 per signature. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-48. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-119 through 10B-124: Reserved for future codification purposes.

Part 4. Electronic Notary Records, Maintenance, and Disposition.

§ 10B-125. Electronic signature, electronic seal.

(a) The notary's electronic signature in combination with the electronic notary seal shall be used only for the purpose of performing electronic notarial acts.

(b) The Secretary shall adopt rules necessary to establish standards, procedures, practices, forms, and records relating to a notary's electronic signature and electronic seal. The notary's electronic seal and electronic signature shall conform to any standards adopted by the Secretary. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-49. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-126. Security measures.

(a) A notary shall safeguard the notary's electronic signature, the notary's electronic seal, and all other notarial records. Notarial records shall be maintained by the notary, and the notary shall not surrender or destroy the records except as required by a court order or as allowed under rules adopted by the Secretary.

(b) When not in use, the notary shall keep the notary's electronic signature, electronic seal, and all other notarial records secure, under the exclusive control of the notary, and shall not allow them to be used by any other notary or any other person.

(c) A notary shall do the following within 10 days of discovering that the notary's electronic seal or electronic signature has been stolen, lost, damaged, or otherwise rendered incapable of affixing a legible image:
(1) Inform the appropriate law enforcement agency in the case of theft or vandalism.
(2) Notify the appropriate register of deeds and the Secretary in writing and signed in the official name in which he or she was commissioned.

(d) The Secretary may adopt rules necessary to insure the integrity, security, and authenticity of electronic notarizations.

(e) The Secretary may require an electronic notary to create and to maintain a record, journal, or entry of each electronic notarial act. The rule-making authority contained in this subsection shall become effective 18 months after December 1, 2005.

(f) The failure of an electronic notary to produce within 10 days of the Department's request any record required by a rule adopted under this section shall result in the suspension of the electronic notary's power to act as a notary under the provision of this Chapter until the Secretary reinstates the notary's commission.

(g) Upon resignation, revocation, or expiration of an electronic notary commission, or death of the notary, all notarial records required by statute or rule shall be delivered to the Secretary. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-50. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-127. Maintenance of electronic device.

(a) An electronic notary shall take reasonable steps to ensure that any registered device used to create the notary's electronic signature is current and has not been revoked or terminated by its issuing or registering authority.

(b) If the registration of the device used to create electronic signatures either expires or is changed during the electronic notary's term of office, the notary shall cease performing electronic notarizations until:

(1) A new device is duly issued or registered to the notary; and

(2) An electronically signed notice is sent to the Secretary that shall include the starting and expiration dates of any new registration term and any other new information at variance with information in the most recently executed electronic registration form. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-51. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-128. Disposition of records.

(a) Upon compliance with G.S. 10B-127 and except as provided in subsection (b) of this section, when an electronic notary's commission expires or is resigned or revoked, or when an electronic notary dies, the notary or the notary's duly authorized representative shall erase, delete, or destroy the coding, disk, certificate, card, software, file, or program that enables electronic affixation of the notary's official electronic signature.

(b) A former electronic notary whose previous commission or application was not revoked or denied by the Secretary need not erase, delete, or destroy the coding, disk, certificate, card, software, file, or program enabling electronic affixation of the official electronic signature if he or she is recommissioned and reregistered as an electronic notary using the same electronic signature within three months after commission expiration. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-52. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-129 through 10B-134: Reserved for future codification purposes.

Part 5. Certificate Forms.

§ 10B-135. Validity of notarial certificates.

The provisions contained in Article 1, Part 6, of this Chapter, with regard to notarial certificate forms, are applicable for the purposes of this Article. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-53. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-136. Form of evidence of authority of electronic notarial act.

Electronic evidence of the authenticity of the official electronic signature and electronic seal of an electronic notary of this State, if required, shall be attached to, or logically associated with, a notarized electronic document transmitted to another state or nation and shall be in the form of an electronic certificate of authority signed by the Secretary in conformance with any current and pertinent international treaties, agreements, and conventions subscribed to by the government of the United States. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-54. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-137. Certificate of authority for electronic notarial act.

(a) An electronic certificate of authority evidencing the authenticity of the official electronic signature and electronic seal of an electronic notary of this State shall contain substantially the following words:

Certificate of Authority for an Electronic Notarial Act

I, ____________ (name, title, jurisdiction of commissioning official) certify that ____________ (name of electronic notary), the person named as an electronic notary public in the attached or associated document, was indeed registered as an electronic notary public for the State of North Carolina and authorized to act as such at the time of the document's electronic notarization.

To verify this Certificate of Authority for an Electronic Notarial Act, I have included herewith my electronic signature this ________ day of ________, 20____.

(Electronic signature (and seal) of commissioning official)

(b) The Secretary may charge ten dollars ($10.00) for issuing an electronic certificate of authority. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-55. It has been renumbered as this section at the direction of the Revisor of Statutes.

§§ 10B-138 through 10B-144: Reserved for future codification purposes.

Part 6. Enforcement.

§ 10B-145. Restriction or revocation of registration.

The Secretary or the Secretary's designee shall have the authority to warn, restrict, suspend, or revoke an electronic notary registration for a violation of this Chapter and on any ground for which electronic notary registration may be denied under this Chapter. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-56. It has been renumbered as this section at the direction of the Revisor of Statutes.

§ 10B-146. Wrongful manufacture, distribution, or possession of software or hardware.

(a) Any person who knowingly creates, manufactures, or distributes software for the purpose of allowing a person to act as an electronic notary without being commissioned and registered in accordance with this act shall be guilty of a Class G felony.

(b) Any person who wrongfully obtains, conceals, damages, or destroys the certificate, disk, coding, card, program, software, file, or hardware enabling an electronic notary to affix an official electronic signature is guilty of a Class I felony. (2005-391, s. 4.)

Editor's Note. — Session Laws 2005-391, s. 4, enacted this section as G.S. 10B-57. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on December 1, 2005. Any act committed prior to December 1, 2005 which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to December 1, 2005 shall remain valid as if this act had not been enacted."

Session Laws 2005-391, s. 13, provides in part: "G.S. 10B-60 and G.S. 10B-146 apply to offenses committed on or after December 1, 2005, without regard to whether a commission was issued under Chapter 10A or Chapter 10B of the General Statutes."

Chapter 11.

Oaths.

Article 1.

General Provisions.

Sec.
11-1. Oaths and affirmations to be administered with solemnity.
11-2. Administration of oaths.
11-3. Administration of oath with uplifted hand.
11-4. Affirmation in lieu of oath.
11-5. Oaths of corporations.
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Sec.
11-7. Oath or affirmation to support Constitutions; all officers to take.
11-7.1. Who may administer oaths of office.
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Article 2.

Forms of Official and Other Oaths.

11-11. Oaths of sundry persons; forms.

ARTICLE 1.

General Provisions.

§ 11-1. Oaths and affirmations to be administered with solemnity.

Whereas, lawful oaths for discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, and whereas, lawful affirmations for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government, therefore, such oaths and affirmations ought to be taken and administered with the utmost solemnity. (1777, c. 108, s. 2, P.R.; R.C., c. 76, s. 1; Rev., s. 2353; C.S., s. 3188; 1985, c. 756, s. 1.)

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1985 amendment to this section, which provided for affirmations.*

The "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. State v. Davis, 69 N.C. 383 (1873).

Double Sanction to Oath of Witness. — The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. Shaw v. Moore, 49 N.C. 25 (1856).

Sufficiency of Belief. — A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be punished in this world for each and every sin committed; but who believes that there will be no punishment after death, and that in another world all will be happy and equal to the angels, is competent to be sworn. Shaw v. Moore, 49 N.C. 25 (1856).

In Omychund v. Barker, 1 Atk. 19, and Wiles, 538, it was decided that a Gentoo, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and believed that he was a rewarder of those who do well, and an avenger of those who do ill, according to the common law, could be sworn in that form which was the most sacred and obligatory upon his religious sense. The case established the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. Shaw v. Moore, 49 N.C. 25 (1856).

Finding of the Judge Conclusive. — The finding of the judge as to the competency of a witness to take an oath is conclusive, and not reviewable. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Objection to Manner of Administering After Verdict. — Where a juror was sworn in the presence of the defendant, and his counsel let him acquiesce in the manner in which the oath was taken, to permit him to object after the verdict would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner would not be heard after the verdict has gone against him. State v. Ward, 9 N.C. 443 (1823); Briggs v. Byrd, 34 N.C. 377 (1851); State v. Patrick, 48 N.C. 443 (1856); State v. Boon, 82 N.C. 637 (1880); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Failure to Administer. — In State v. Gee, 92 N.C. 756 (1885), where a witness was not sworn at all, the court held that this was not ground of objection after verdict. State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Objection to Oath of Incompetent After Verdict. — Where a juror was incompetent to be sworn because he was an atheist (State v. Davis, 80 N.C. 412 (1879)) and the objection was not discovered till after verdict, setting aside the verdict rested in the discretion of the trial judge. State v. Lamber, 93 N.C. 618 (1885); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

§ 11-2. Administration of oaths.

Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party to be sworn to lay his hand upon the Holy Scriptures, in token of his engagement to speak the truth and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of that holy book and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P.R.; R.C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C.S., s. 3189; 1941, c. 11; 1971, c. 381, s. 9; 1985, c. 756, s. 2.)

CASE NOTES

Application to Witnesses. — Every witness, except as otherwise provided, must be sworn in the matter stated in this section. State v. Davis, 69 N.C. 383 (1873).

Sufficiency of Juror's Oath. — An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." State v. Paylor, 89 N.C. 539 (1883).

Ministerial Act. — The administration of an oath is a ministerial act and may be done by anyone in the presence and by the direction of the court, but is the act of the court. State v. Knight, 84 N.C. 789 (1881).

Partially Directory. — As to the form of the oath, when it is prescribed by statute, the statute is to be construed in some sense as directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury. State v. Mazon, 90 N.C. 676 (1884).

Validity of Irregular Oath. — To hold invalid an oath that did not follow the very words of the statute could prove disastrous to the public interests. State v. Mazon, 90 N.C. 676 (1884).

Swearing on the Quran. — Superior court erred in dismissing a complaint challenging G.S. 11-2 for lack of a justiciable controversy where an individual brought a declaratory judgment after her request to swear on the Quran was denied and an organization had sued after its Jewish members exhibited their intent to serve as jurors or witnesses if called. ACLU of N.C., Inc. v. State, 181 N.C. App. 430, 639 S.E.2d 136, 2007 N.C. App. LEXIS 153 (2007).

Juror's Oath in Capital Cases. — Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, it does not vitiate the oath. State v. Owen, 72 N.C. 605 (1875).

The manner of swearing is merely a form adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Presumption. — The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. State v. Mace, 86 N.C. 668 (1882).

Willful Violation. — The general rule is that a willful violation of such an oath in a material matter is perjury, and no other is. State v. Davis, 69 N.C. 383 (1873).

When Deputy Clerk May Administer. — The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. Jackson v. Buchanan, 89 N.C. 74 (1883).

A deputy sheriff is not authorized to administer oath to homestead appraisers. Oates v. Munday, 127 N.C. 439, 37 S.E. 457 (1900).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ 11-3. Administration of oath with uplifted hand.

When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be). (1777, c. 108, s. 3, P.R.; R.C., c. 76, s. 2; Code, s. 3310; Rev., s. 2355; C.S., s. 3190.)

CASE NOTES

Conscientious Scruples. — If the usual form of oaths upon the Holy Evangelists is dispensed with and an "appeal" or "affirmation" is substituted, it must appear that the person sworn had conscientious scruples, or else the "appeal" or "affirmation" is invalid. State v. Davis, 69 N.C. 383 (1873); Pearre v. Folb, 123 N.C. 239, 31 S.E. 475 (1898).

Presumption as to Witness. — When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. State v. Whisenhurst, 9 N.C. 458 (1823).

Presumption as to Manner. — Where it appeared that the registrar (now chief judge) administered the prescribed oath to electors, but that he did not swear them on the Bible, it would be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by this section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner was sufficient to meet the requirements of the election law. State ex rel. DeBerry v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ 11-4. Affirmation in lieu of oath.

When a person to be sworn shall have conscientious scruples against taking an oath in the manner prescribed by G.S. 11-2, 11-3, or 11-7, he shall be permitted to be affirmed. In all cases the words of the affirmation shall be the same as the words of the prescribed oath, except that the word "affirm" shall be substituted for the word "swear" and the words "so help me God" shall be deleted. (1777, c. 108, s. 4, P.R.; c. 115, s. 42, P.R.; 1819, c. 1019, P.R.; 1821, c. 1112, P.R.; R.C., c. 76, s. 3; Code, s. 3311; Rev., s. 2356; C.S., s. 3191; 1985, c. 756, s. 3.)

CASE NOTES

Cited in State v. Davis, 69 N.C. 383 (1873); State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ 11-5. Oaths of corporations.

In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C.S., s. 3192.)

§ 11-6: Repealed by Session Laws 1985, c. 756, s. 4.

Cross References. — As to oath to support the Constitution of the United States, see now G.S. 11-7.

§ 11-7. Oath or affirmation to support Constitutions; all officers to take.

Every member of the General Assembly and every person elected or appointed to hold any office of trust or profit in the State shall, before taking office or entering upon the execution of the office, take and subscribe to the following oath:

"I, ________, do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God." (1781, c. 342, s. 1, P.R.; R.C., c. 76, s. 4; Code, s. 3312; Rev., s. 2358; C.S., s. 3194; 1985, c. 756, s. 5.)

Cross References. — As to oaths required of public officers, see N.C. Const., Art. VI, § 7. As to penalty for failure to take oath before entering on the duties of office, see G.S. 128-5.

CASE NOTES

Oath Incidental. — The oath required of public officers is merely incidental to and constitutes no part of the office. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

Failure to Take Oath. — Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. Wiley v. Worth, 61 N.C. 171 (1867).

Duty of Attorney General. — The Attorney General of North Carolina is a constitutional officer, and he is required to take an oath which among other things binds him to support, maintain and defend the Constitution of North Carolina not inconsistent with the Constitution of the United States. It is but a small step from the language of this oath to the proposition asserted by the Attorney General that his duty includes the defense of statutes of this State against charges of unconstitutionality. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

OPINIONS OF ATTORNEY GENERAL

Notary Public Commission and Effective Date of Oath. — A notary may take the oath of office anytime within 90 days of commissioning; there is no requirement that a notary seeking recommissioning take the oath after the commission date. See opinion of Attorney General to Ms. Haley Haynes Montgomery, Deputy Secretary of State, 2004 N.C.A.G. 11 (9/23/04).

§ 11-7.1. Who may administer oaths of office.

(a) Except as otherwise specifically required by statute, an oath of office may be administered by:

(1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice, a retired justice or judge of the General Court of Justice, or any member of the federal judiciary;
(2) The Secretary of State;
(3) A notary public;
(4) A register of deeds;
(5) A mayor of any city, town, or incorporated village;
(5a) A chairman of the board of commissioners of any county;
(6) A member of the House of Representatives or Senate of the General Assembly;
(7) The clerk of any county, city, town or incorporated village.

(b) The administration of an oath by any judge of the Court of Appeals prior to March 7, 1969, is hereby validated. (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1; 1971, c. 381, s. 10; 1977, c. 344, s. 2; 1979, c. 757; 1981, c. 682, s. 2; 1983, c. 648, s. 1; 1995, c. 147, s. 1.)

Editor's Note. — Session Laws 1983, c. 648, s. 2, provided: "The administration of an oath by any county, city or town clerk prior to date of ratification is hereby validated." The act was ratified June 30, 1983.

Session Laws 1987, c. 620, s. 6 provides that any oath of office taken by a register of deeds before a person authorized to administer oaths as defined in this section and not before the board of county commissioners is validated.

§ 11-8. When deputies may administer.

In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (1836, c. 27, s. 2; R.C., c. 76, s. 7; Code, s. 3316; Rev., s. 2359; C.S., s. 3195.)

§ 11-9. Administration by certain officers.

The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (1889, c. 529; 1899, c. 89; Rev., s. 2362; C.S., s. 3196.)

CASE NOTES

Cited in Royal Cotton Mill Co. v. Textile Workers Union, 234 N.C. 545, 67 S.E.2d 755 (1951).

§ 11-10. When county surveyors may administer oaths.

The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in establishing boundaries and in surveying vacant lands under warrants. (1881, c. 144; Code, s. 3314; Rev., s. 2361; C.S., s. 3197; 1959, c. 879, s. 4.)

ARTICLE 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.

The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively, after taking the separate oath required by Article VI, Section 7 of the Constitution of North Carolina:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State District Attorneys and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of Attorney General (district attorney for the State or attorney for the State in the county of ________); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, ________, do solemnly swear that I will discharge the duties of the office of clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of ________; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of ________ without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I, ________, do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of ____ of the ________ Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of ________, in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of ____ county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Law Enforcement Officer

I, A. B., do solemnly swear (or affirm) that I will be alert and vigilant to enforce the criminal laws of this State; that I will not be influenced in any matter on account of personal bias or prejudice; that I will faithfully and impartially execute the duties of my office as a law enforcement officer according to the best of my skill, abilities, and judgment; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of ________, according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of ________, in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

Witness before a Legislative Committee or Commission

You swear (or affirm) that the testimony you shall give to the committee (or commission) shall be the truth, the whole truth, and nothing but the truth; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of ________ according to the best of my skill and ability, according to law; so help me, God. (R.C., c. 76, s. 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C.S., s. 3199; 1947, c. 71; 1959, c. 879, s. 5; 1967, c. 218, s. 2; 1969, c. 1190, ss. 50, 51; 1971, c. 381, s. 11; 1977, c. 344, s. 3; 1989 (Reg. Sess., 1990), c. 953; 1995, c. 379, s. 10; 1997-14, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 491.

CASE NOTES

Disclosures Not Prohibited by Grand Jurors' Oath. — The grand jurors' oath of secrecy does not prohibit the disclosure in court of proceedings before the grand jury whenever the ends of justice require it. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Action of the grand jury in returning two fictitious bills of indictment charging undercover agents with narcotics violations, including the undercover agent who was the principal witness against defendant, was improper, but did not necessarily taint all processes of that grand jury so as to require as a matter of law that a bill of indictment charging defendant with transportation of marijuana be quashed. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

Jury Need Not Be Resworn for Prosecution of Less Than Capital Offense. — Where, upon an indictment charging homicide, the solicitor (now district attorney) announced that he was not seeking a higher verdict than murder in the second degree, the prosecution was no longer for a capital offense, and it was not required that the jury be again sworn to try the particular prosecution, but under the provisions of this section it was sufficient that the jurors and all others summoned as jurors for the session of court were administered an oath to truly try all issues which would come before the jury during the term. State v. Smith, 268 N.C. 659, 151 S.E.2d 596 (1966), cert. denied, 386 U.S. 1032, 87 S. Ct. 1481, 18 L. Ed. 2d 593 (1967).

Duty of Judge to Determine Constitutionality of Properly Challenged Statute. — Implicit in the sworn duties of a judge is the duty to determine whether a statute is consistent with the State and federal Constitutions when the validity of that statute is properly challenged by a litigant appearing in a case before him. State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Cited in In re Will of Covington, 252 N.C. 551, 114 S.E.2d 261 (1960); State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979); Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818 (1985); Kennedy v. Haywood County, 158 N.C. App. 526, 581 S.E.2d 119, 2003 N.C. App. LEXIS 1174 (2003).

OPINIONS OF ATTORNEY GENERAL

Notary Public Commission and Effective Date of Oath. — A notary may take the oath of office anytime within 90 days of commissioning; there is no requirement that a notary seeking recommissioning take the oath after the commission date. See opinion of Attorney General to Ms. Haley Haynes Montgomery, Deputy Secretary of State, 2004 N.C.A.G. 11 (9/23/04).

Chapter 12.

Statutory Construction.

Sec.
12-1. [Repealed.]
12-2. Repeal of statute not to affect actions.
12-3. Rules for construction of statutes.
12-3.1. Fees and charges by agencies.
12-4. Construction of amended statute.

§ 12-1: Repealed by Session Laws 1957, c. 783, s. 3.

§ 12-2. Repeal of statute not to affect actions.

The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (1830, c. 44; R.C., c. 108, s. 1; 1879, c. 163; 1881, c. 48; Code, s. 3764; Rev., s. 2830; C.S., s. 3948.)

CASE NOTES

Section Not Obligatory. — As the laws of our legislature do not bind another, except insofar as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the legislature clearly and explicitly appears to the contrary. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

The general rule is that a statute will be given prospective effect only, unless the law in question clearly forbids such a construction. Corporation of Elizabeth City v. Commissioners of Pasquotank, 146 N.C. 539, 60 S.E. 416 (1908); Mann v. Allen, 171 N.C. 219, 88 S.E. 235 (1916); Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the legislature. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Maxim "Leges Posteriores Priores Contrarias Abrogant". — To give operation to the maxim, leges posteriores priores contrarias abrogant, the latter law must be in conflict with the former; therefore, when a later statute is almost in ipsissimis verbis with a former one, there is no repeal of the former. Kesler v. Smith, 66 N.C. 154 (1872).

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Action Commenced Before Repeal. — By express terms of this section, the repeal of a statute does not affect an action theretofore commenced under it. Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912).

Same — For Penalty or Forfeiture. — Under the provisions of this section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); Epps v. Smith, 121 N.C. 157, 28 S.E. 359 (1897); Lexington Grocery Co. v. Southern R.R., 136 N.C. 396, 48 S.E. 801 (1904).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. Williams v. Atlantic C.L.R.R., 153 N.C. 360, 69 S.E. 402 (1910).

Limitation of Actions. — While the legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened, a reasonable time must be given for the commencement of an action before the statute works a bar. Strickland v. Draughan, 91 N.C. 103 (1884).

Repeal After Services Rendered. — Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent repeal could invalidate it. Copple v. Commissioners, 138 N.C. 127, 50 S.E. 574 (1905).

Subject Matter Destroyed by Statute Pending Appeal. — Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the appellate court will not go into consideration of the abstract question as to which party ought to have prevailed in order to adjudicate the costs, but the judgment below as to costs will be allowed to stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Brinson v. Duplin County, 173 N.C. 137, 91 S.E. 708 (1917).

Right of Informer. — An informer had, in a certain sense, an inchoate right when he brought his suit, but he had no vested right to the penalty until judgment. Hence, until his right became vested, it could not be destroyed by the legislature. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

Action to Recover Arrearages of Taxes. — An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, was not affected by the repeal of such statute. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898).

Modes of Procedure. — Statutes which change modes of procedure may govern suits pending at the time of their enactment. Sumner v. Miller, 64 N.C. 688 (1870).

Mere Court Procedure. — The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Changing Rules of Evidence. — An act of the legislature changing the rules of evidence cannot be construed as operating retrospectively so as to affect existing rights. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

General Rule in Criminal Actions. — The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

Where a repealing statute contains a saving clause as to crimes committed prior to the repeal or as to pending prosecutions, the offender may be tried and punished under the old law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Legislative Authority to Increase Punishment. — The legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the federal Constitution, which forbids the enactment by a state of any ex post facto law, could, in either event, be invoked for the protection of the person charged. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Ramsour, 113 N.C. 642, 18 S.E. 707 (1893).

Section Inapplicable to Rate Freeze Statute. — G.S. 62-133.6(e) simply allows the legislature to preempt the North Carolina Utilities Commission's ability to compel a general rate case by freezing rates until 31 December 2007, not completely revoking that ability; therefore, G.S. 12-2 was inapplicable to rate complaint and petition seeking to initiate a general rate proceeding. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 163 N.C. App. 46, 592 S.E.2d 221, 2004 N.C. App. LEXIS 253 (2004), cert. denied, 358 N.C. 739, — S.E.2d — (2004), cert. dismissed, 358 N.C. 739, 602 S.E.2d 682 (2004).

§ 12-3. Rules for construction of statutes.

In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(1) Singular and Plural Number, Masculine Gender, etc. — Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

(2) Authority, to Three or More Exercised by Majority. — All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

(3) "Month" and "Year". — The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord." When a statute refers to a period of one or more months and the last month does not have a date corresponding to the initial date, the period shall expire on the last day of the last month.

(4) Leap Year, How Counted. — In every leap year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

(5) "Oath" and "Sworn". — The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

(6) "Person" and "Property". — The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendable to heirs at law. The word "property" shall include all property, both real and personal.

(7) "Preceding" and "Following". — The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

(8) "Seal". — In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

(9) "Will". — The term "will" shall be construed to include codicils as well as wills.

(10) "Written" and "in Writing". — The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

(11) "State" and "United States". — The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

(12) "Imprisonment for One Month," How Construed. — The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

(13) "Governor," "Senator," "Solicitor," "Elector," "Executor," "Administrator," "Collector," "Juror," and "Auditor". — The words "Governor," "Senator," "district attorney," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (21 Hen. III; R.S., c. 31, s. 113; R.C., c. 31, s. 108; c. 108; Code, s. 3765; Rev., s. 2831; C.S., s. 3949; 1921, c. 30; 1973, c. 47, s. 2; 1977, c. 446, s. 4.)

Legal Periodicals. — For article, "'Original Intention': Raoul Berger's Fake Antique," see 70 N.C.L. Rev. 1523 (1992).

CASE NOTES

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I. GENERAL CONSIDERATION.

Words Given Ordinary Meaning. — When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

Void for Vagueness. — If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. State v. Partlow, 91 N.C. 550 (1884).

Words Cannot Be Construed Away. — The court has no power or right to strike out words or to construe them away. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

The statutory inclusion of certain things implies the exclusion of others. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Specific Words Followed by General Words. — Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918).

Proviso. — As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. Traders Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

Proviso Prevails over Purview. — Where a proviso in a statute was directly contrary to the purview of the statute, the proviso was good and not the purview, because the proviso spoke the later intention of the legislature. Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913).

Particular Statute Controls over General Statute. — Where one statute deals with a subject in detail with reference to a particular situation and another statute deals with the same subject in general and comprehensive terms, the particular statute will be construed as controlling in the particular situation, unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Applied in State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766 (1982); Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985); Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000).

Cited in Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987).

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear. — It is not allowable to interpret what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Hamilton v. Rathbone, 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 219 (1899); Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning; the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

When Statute Is Ambiguous. — It is well-settled law in this state that when the language of a statute is unclear or ambiguous, a court may interpret the language of the statute in accordance with what the court presumed the legislature intended. Carolina Truck & Body Co. v. GMC, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991).

When Court May Interpolate Necessary Words. — When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. Fortune v. Buncombe County Comm'rs, 140 N.C. 322, 52 S.E. 950 (1905); Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

Where Language Is of Doubtful Meaning. — In interpreting a statute where the language is of doubtful meaning, the court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Law Existing at Time of Enactment. — To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. Kendall v. Stafford, 178 N.C. 461, 101 S.E. 15 (1919).

Objects Embraced. — The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. State v. Partlow, 91 N.C. 550 (1884).

Doctrine of the Last Antecedent. — By what is known as the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Doctrine of last antecedent is not an absolute rule, however, but merely one aid to the discovery of legislative intent. HCA Crossroads Residential Ctrs. Inc. v. North Carolina Dep't of Human Resources, 327 N.C. 573, 398 S.E.2d 466 (1990).

Misdescription or Misnomer. — The question was fully considered by the Supreme Court in Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905), and the court there said: "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

The title of a statute is no part thereof. State v. Welsh, 10 N.C. 404 (1824). But it may be construed when the meaning is doubtful. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

It cannot control the text when it is clear. Blue v. McDuffie, 44 N.C. 131 (1852); Jones v. Hartford Ins. Co., 88 N.C. 499 (1883); Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886); State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896). This is especially true as to the headings of a section in the Code. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958).

B. Legislative Intent.

Motive and Purpose of Legislature. — If the language of a statute is doubtful, and the intention of the legislature is clear, the former will be construed in the latter; but where the language is plain, the courts cannot look into the motive or purpose of the legislature in the enactment of the law. State v. Eaves, 106 N.C. 752, 11 S.E. 370 (1890).

A statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the legislature did not intend any of its provisions to be surplusage. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Where a literal reading of a statute will lead to absurd results, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Same — Understanding of Individual. — Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. State v. Boon, 1 N.C. 103, N.C. (Tayl.) 6 (1801); Drake v. Drake, 15 N.C. 110 (1833); Adams v. Turrentine, 30 N.C. 147 (1847); State v. Melton, 44 N.C. 49 (1852); Blue v. McDuffie, 44 N.C. 131 (1852); State v. Partlow, 91 N.C. 550 (1884).

Same — Affidavit of Individual Legislators. — In interpreting a statute it was not permissible to show its intent and meaning by affidavit of legislators, for such had to be gathered from the act itself. Goins v. Board of Trustees, 169 N.C. 736, 86 S.E. 629 (1915).

Indicia Bearing on Intent. — The legislative intent will be ascertained by such indicia as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. State v. White, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

When a statute is unclear in its meaning, the courts will interpret it to give effect to the legislative intent. State v. White, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

Effectuation of Purpose. — Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. State v. Partlow, 91 N.C. 550 (1884); Fortune v. Buncombe County Comm'rs, 140 N.C. 322, 52 S.E. 950 (1905).

Harmonizing Context. — It is the duty of the court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

As to Whether Statute Mandatory or Directory. — There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. Spruill v. Davenport, 178 N.C. 364, 100 S.E. 527 (1919).

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the legislature can be gathered from the context or from the general purpose and tenor of the enactment. Fortune v. Buncombe County Comm'rs, 140 N.C. 322, 52 S.E. 950 (1905).

Mistakes or Omissions. — Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look to the title and preamble as well as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Impossible Requirements. — In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act. — Words and phrases, the meaning of which in a statute have been ascertained, when read in a subsequent statute, are to be understood in the same sense. And where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county, or by that of another, that construction is to be given to the later statute. It is presumed that the legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law. Bridgers v. Taylor, 102 N.C. 86, 8 S.E. 893 (1889).

Permissible to Look at Other Statutes. — To ascertain the mischief which an act of the legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under construction. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915); In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

B. Statutes in Pari Materia.

Statutes relating to the same subject matter should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the legislature. Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

Statutes relating to the same subject should be construed in pari materia, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved. Carolina Truck & Body Co. v. GMC, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991).

Same — Apparent Conflict. — Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act. Peoples Bank v. Loven, 172 N.C. 666, 90 S.E. 948 (1916); State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

Acts of Same Session of Legislature. — All acts of the same session of the legislature upon the same subject matter are considered as one act, and must be construed together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. State ex rel. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. State ex rel. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Act Declaratory of Intent of Previous Act. — An act of the legislature declaratory of the intent of a previous act will not control the judiciary in the construction of the first act in actions prior to the declaratory act. Rodwell v. Harrison, 132 N.C. 45, 43 S.E. 540 (1903).

Private and Local Acts. — Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. State v. Womble, 112 N.C. 862, 17 S.E. 491 (1893).

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory. — Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Amended and Amending Acts Construed Together. — Where an amendment to an existing statute is enacted, the proper method of arriving at their true intent and meaning is by construing them together. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916); Township Rd. Comm'n v. Board of Comm'rs, 178 N.C. 61, 100 S.E. 122 (1919).

When Amendatory Act Refers to Wrong Section. — If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Erroneous Statement of Date. — An act of the legislature subsequent to and in amendment of a former act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended act is erroneously stated, provided it sufficiently appears beyond cavil, what prior act is referred to. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

Rules for Construing Repealing Acts. — "Upon a perusal of the authorities it appears that the courts have universally given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. State ex rel. County Trustee v. Woodside, 30 N.C. 104 (1847); Simonton v. Lanier, 71 N.C. 498 (1874). (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except insofar as the latter plainly appears to have been intended by the legislature as a substitute. State v. Custer, 65 N.C. 339 (1871). (3) Where a later or revising statute clearly covers the whole subject matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication." Winslow v. Morton, 118 N.C. 486, 24 S.E. 417 (1896).

When Acts Irreconcilably Inconsistent. — A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

Repeal of Act Giving Forfeiture. — The repeal of an act of assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. Governor v. Howard, 5 N.C. 465 (1810).

Repeal of Repealing Act. — The repeal of a statute repealing a former statute leaves the latter in force. Brinkley v. Swicegood, 65 N.C. 626 (1871).

Implied Repeal by Lessening Degree of Crime. — It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. State v. Upchurch, 31 N.C. 454 (1849).

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law. — A statute in derogation of the common law must be strictly construed. Swift & Co. v. Tempelos, 178 N.C. 487, 101 S.E. 8 (1919).

Acts Limiting Rights to Contract. — Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. W.C. Marriner & Bro. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

Acts Restricting Private Acts. — Statutes which restrict the private rights of persons or the use of property in which the public has no concern should be strictly construed. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. State v. Sullivan, 110 N.C. 513, 14 S.E. 796 (1892).

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. Skinner v. Thomas, 171 N.C. 98, 87 S.E. 976 (1916).

Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Local Lien Law. — A lien law applicable to certain counties only was local in its nature, and being contrary to the general lien laws of the State, had to be strictly construed. Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913).

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914).

B. Criminal Statutes.

Rule for Construction of Penal Statutes. — Penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They must be construed sensibly, as all other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. Coble v. Schoffner, 75 N.C. 42 (1876); State v. Godfrey, 97 N.C. 507, 1 S.E. 779 (1887); Sears v. Whitaker, 136 N.C. 37, 48 S.E. 517 (1904); Alexander v. Atlantic C.L.R.R., 144 N.C. 93, 56 S.E. 697 (1907); Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

Rule Explained. — The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Supplying Omission and Strained Constructions. — As a matter of policy it is more dangerous for the appellate court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished. State v. Massey, 103 N.C. 356, 9 S.E.2d 632 (1889).

Whether a criminal intent is a necessary element of a statutory offense is a matter

of construction to be determined from the language of the statute in view of its manifest purpose and design. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

A statute will not be construed to operate retrospectively so as to take away a penalty or condone a crime unless such intention is clearly expressed. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule. — Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the court. State v. Pool, 74 N.C. 402 (1876).

Unconstitutionality of the statute must appear clearly. State v. White, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

Construction so as to Avoid Constitutional Question. — If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question. In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

If the statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted. State v. White, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

Presumption in Favor of Validity. — Every presumption is in favor of the validity of an act of the legislature and all doubts are resolved in support of the act. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); State v. White, 58 N.C. App. 558, 294 S.E.2d 1 (1982).

Existence of Facts Preserving Constitutionality Presumed. — If the constitutionality of a statute depends on the existence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

When the constitutionality of a statute depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

Valid and Invalid Portions of Same Act. — Where there are distinct and valid provisions of a statute, with unconstitutional provisions, the two portions of the law being separate and it appearing from a perusal of the statute that the legislature intended the valid portion to be effective independently of the invalid part, the valid provisions may be enforced. Archer v. Joyner, 173 N.C. 75, 91 S.E. 699 (1917).

If the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916).

That position, however, is not allowed to prevail when the parts of the statute are so connected and dependent, the one upon the other, that to eliminate one will work substantial change to the portion which remains. If the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature did not intend, the whole statute must fall. Riggsbee v. Town of Durham, 94 N.C. 800 (1886); State ex rel. Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899); Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916). See State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Resort to Implication. — Courts may resort to an implication to sustain an act, but not to destroy it. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

B. Effect.

Liability of Public Officer Under Unconstitutional Act. — An individual officeholder is not required to be wiser than the whole people represented in their General Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act; nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

When Court Reverses Itself Decision Not Retroactive. — Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect. S.W. Fowle & Son v. Ham, 176 N.C. 12, 96 S.E. 639 (1918).

VI. DEFINITIONS.

Subdivision (1) of this section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. Von Glahn v. Harris, 73 N.C. 323 (1875).

"Person" Extends to "Persons". — The word "person" is construed to extend to "persons" under the authority of subdivision (1) of this section. State v. Wilkerson, 98 N.C. 696, 3 S.E. 683 (1887); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Authority to Three or More. — The authority granted by a statute to a board of property appraisers was not terminated by the death of one of its five members so long as three or more of them remained. Ballard v. City of Charlotte, 235 N.C. 484, 70 S.E.2d 575 (1952).

Month. — The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. State v. Upchurch, 72 N.C. 146 (1875). In this respect our statute has adopted the computation of the civil instead of the common law. Satterwhite v. Burwell, 51 N.C. 92 (1858); State v. Faust, 254 N.C. 101, 118 S.E.2d 769.

The term "thirty days" and the term "one month" are not synonymous, although where the particular calendar month is composed of exactly thirty days the number of days involved happen to be the same. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Three Calendar Months. — Plaintiff had three calendar months, not 90 days, in which to file an action; thus, the trial court erred in dismissing plaintiff's cause of action based on the statute of limitations. Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994).

The words "twelve months," in the absence of any legislative definition of the word "month" and the word "year," will be interpreted to mean twelve calendar, not lunar, months. Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Green v. Patriotic Order Sons of America, 242 N.C. 78, 87 S.E.2d 14 (1955); Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Subdivision (6) Does Not Affect Constitution. — The provisions of subdivision (6) of this section could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to them, when the meaning is manifestly otherwise than as therein provided and defined. Redmond v. Commissioners of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

"Property" Used in Limited Sense. — While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, and this is so notwithstanding the statutory provision. Redmond v. Commissioners of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

The word "estate" has a broader meaning than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section. Vaughan v. Town of Murfreesboro, 96 N.C. 317, 2 S.E. 676 (1887).

A chose in action is property, and embraced in the terms of subdivision (6) of this section. Winfree v. Bagley, 102 N.C. 515, 9 S.E. 198 (1889).

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Money. — While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the court with which the testator had evidently employed it. Patterson v. Wilson, 101 N.C. 584, 8 S.E. 229 (1888).

§ 12-3.1. Fees and charges by agencies.

(a) Authority. — Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service. Notwithstanding any other law, a rule adopted by an agency to establish or increase a fee or charge shall not go into effect until the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased. The agency shall submit a request for consultation to all members of the Commission, the Commission Assistant, and the Fiscal Research Division of the General Assembly on the same date the notice of text of the rule is published. The request for consultation shall consist of a written report stating (i) the amount of the current fee or charge, if applicable, (ii) the amount of the proposed new or increased fee or charge, (iii) the statutory authority for the fee or charge, and (iv) a detailed explanation of the need for the establishment or increase of the fee or charge.

(a1) If the Commission does not hold a meeting to hear the consultation required by subsection (a) of this section within 90 days after the notice of text of the rule has been published and the consultation request required by subsection (a) of this section has been submitted, the consultation requirement is satisfied.

(b) Definitions. — The following definitions apply in this section:

(1) Agency. — Every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government. The term does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of these subdivisions, the University of North Carolina, community colleges, hospitals, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(2) Rule. — Every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency, including rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

(c) Exceptions. — This section does not apply to any of the following:

(1) Rules establishing fees or charges to State, federal or local governmental units.

(2) A reasonable fee or charge for copying, transcripts of public hearings, State publications, or mailing a document or other item.

(3) Reasonable registration fees covering the cost of a conference or workshop.

(4) Reasonable user fees covering the cost of providing data processing services.

(d) In lieu of the requirements of subsections (a) and (a1) of this section, the North Carolina State Ports Authority shall report the establishment or increase of any fee to the Joint Legislative Commission on Governmental Operations as provided in G.S. 143B-454(a)(11). (1979, c. 559, s. 1; 1981, c. 695, ss. 1, 2; 1987, c. 564, s. 35; 1991, c. 418, s. 6; 2001-427, s. 8(a); 2002-99, s. 7(c); 2005-276, s. 6.8(b).)

Cross References. — For the definition of "public records", see G.S. 132-1. For provision regarding provisions for copies of public records and fees, see G.S. 132-6.2.

Editor's Note. — Session Laws 2007-323, s. 6.5, provides: "Notwithstanding G.S. 12-3.1, an agency is not required to consult with the Joint Legislative Commission on Governmental Operations prior to establishing or increasing a fee as authorized or anticipated in this act."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2008-107, s. 6.4, provides: "Notwithstanding G.S. 12-3.1, an agency is not required to consult with the Joint Legislative Commission on Governmental Operations prior to establishing or increasing a fee as authorized or anticipated in this act."

Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2008-2009 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2008-2009 fiscal year."

Session Laws 2008-107, s. 30.5 is a severability clause.

Session Laws 2009-451, s. 6.4(a), provides: "Notwithstanding G.S. 12-3.1, an agency is not required to consult with the Joint Legislative Commission on Governmental Operations prior to establishing or increasing a fee as authorized or anticipated in this act."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

For similar prior provisions, see Session Laws 2005-276, s. 6.8(a) and Session Laws 2006-66, s. 6.3.

Session Laws 2009-451, s. 28.5 is a severability clause.

§ 12-4. Construction of amended statute.

Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Whenever the General Assembly (i) enacts a bill which purports to amend an existing general statute by deleting, adding, or substituting specific words or figures, and (ii) such bill also purports to set out the wording of the amended statute, or a portion thereof, as it will read after the amendment is accomplished, and (iii) there is a variance between the latter and the former, then, in such case, the latter shall control and be presumed to express the amendatory intent of the General Assembly. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C.S., s. 3950; 1971, c. 115.)

Legal Periodicals. — See 12 N.C.L. Rev. 262 (1934).

CASE NOTES

Discovering Legislative Intent of Original Enactment Through Amendatory Legislation. — An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as where the act amended is ambiguous. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Amending Act Presumed Not to Repeal. — Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. Nichols v. Board of Councilmen, 125 N.C. 13, 34 S.E. 71 (1899).

Nonconflicting Portions of Original Act Remain in Force. — Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in the force with the same meaning and effect that they had before the amendment. Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); Begley v. Employment Sec.

Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981).

Bill of Indictment. — If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887).

Misdemeanor Made Punishable by Fine or Imprisonment. — A public-local law making an act a misdemeanor was not repealed by a statute making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense, the latter statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense had been committed prior to the enactment of the latter act, it was punishable under the prior law. State v. Mull, 178 N.C. 748, 101 S.E. 89 (1919).

Where amendatory legislation carries a saving clause as to prior offenses, the law as it stood at the time of the offense is applied to the prosecution and sentencing of the violator. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Reenactment Contemporaneous with Repeal. — It was held in State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895), that: "The reenactment by the legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission." State v. Sutton, 100 N.C. 474, 6 S.E. 687 (1888); State ex rel. Walser v. Bellamy, 120 N.C. 212, 27 S.E. 113 (1897); State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

Cited in State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967).

Comm'n, 50 N.C. App. 688, 274 S.E.2d 870 (1981).

Bill of Indictment. — If a statute creating an offense is amended in many important particulars, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887).

Misdemeanor Made Punishable by Fine or Imprisonment. — A public local law making an act a misdemeanor was not repealed by a statute making the same offense for the first time punishable by a fine or imprisonment in the discretion of the court, and a felony for the second offense, the latter statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense had been committed prior to the enactment of the latter act, it was punishable under the prior law. State v. Hull, 178 N.C. 749, 101 S.E. 531 (1919).

Where amendatory legislation contains a saving clause as to prior offenses, the law as it stood at the time of the offense is applied to the prosecution and punishment of the violator. State v. Williams, [illegible] N.C. [illegible], [illegible] S.E.2d [illegible] (1979).

Reenactment Contemporaneous with Repeal. — It was held in State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895), that "The reenactment by the legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission." [illegible]

Cited in State v. [illegible], [illegible] S.E.2d [illegible] (1977).

§ 12-4.1. Construction of amended statute.

Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Whenever the General Assembly enacts a bill which purports to amend an existing statute [illegible] by deleting, adding, or substituting specific words or figures, and the same bill also purports to set out the wording of the amended statute, or a portion thereof, as it will read after the amendment is accomplished, and there is any variance between the latter and the former, then, in such case, the former shall control and be presumed to express the amendatory intent of the General Assembly. [illegible]

Legal Periodicals. — [illegible]

CASE NOTES

Repeals by implication are not favored [illegible]

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. [illegible]

Nonconflicting Portions of Original Act Remain in Force. — Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in force with the same meaning and effect that they had before the amendment. [illegible]

Amending Act Passed Before Act Amended. — [illegible]

Chapter 13.
Citizenship Restored.

Sec.
13-1. Restoration of citizenship.
13-2. Issuance and filing of certificate or order of restoration.
13-3. Issuance, service and filing of warrant of unconditional pardon.
13-4. Endorsement of warrant, service and filing of conditional pardon.
13-5 through 13-10. [Repealed.]

§ 13-1. Restoration of citizenship.

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

(5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon. (1971, c. 902; 1973, c. 251; c. 1262, s. 10; 1977, c. 813, s. 1; 1991, c. 274, s. 1.)

Cross References. — As to loss of rights of citizenship for persons convicted of felonies, see N.C. Const., Art. II, § 24(1)(n) and Art. VI, § 8.

Legal Periodicals. — For note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Legislative Intent. — The 1971 General Assembly, in rewriting this Chapter, intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored. These requirements were further relaxed by the 1973 amendments to this Chapter. State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

Statute Revising This Chapter Given Retroactive Application. — Chapter 251, Session Laws of 1973, which revised this Chapter, must be given retroactive application in order to be constitutionally valid. State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973), aff'd, 284 N.C. 562, 202 S.E.2d 153 (1974).

Though the 1973 revision of this section was enacted after a defendant was indicted for felonious possession of a firearm, it was applicable. State v. Williams, 20 N.C. App. 639, 202 S.E.2d 284 (1974).

Loss of citizenship does not form a part of the judgment of the court, but follows as a consequence of such judgment. State v. Jones, 82 N.C. 685 (1880).

Restoration of rights of citizenship under subdivision (4) does not meet the requirements of 18 U.S.C. § 1203(2), which exempts certain felons from the federal prohibition against possession of firearms, unless it expressly authorizes the possession of firearms. United States v. Hardin, 696 F.2d 1078 (4th Cir. 1982).

Proof of Violation of 18 U.S.C. § 922(g)(1). — In North Carolina, to support a conviction for possession of a firearm by an ex-felon in violation of 18 U.S.C. § 922(g)(1), the government must prove, at a minimum, that the defendant possessed a firearm within five years of release from supervision resulting from the prior North Carolina felony. Otherwise, he would as a matter of law stand in the same shoes as any other person who had not been previously convicted of a felony. United States v. Essick, 935 F.2d 28 (4th Cir. 1991).

Because defendant's state felony conviction occurred within five years of a firearm offense, under North Carolina Felony Firearms Act (G.S. 14-415) the defendant's civil rights could not have been fully restored, and the government proved a firearm possession violation despite the fact that it did not independently establish that defendant's civil rights had not been restored at the time of his firearm possession. United States v. Thomas, 52 F.3d 82 (4th Cir.), cert. denied, 516 U.S. 885, 116 S. Ct. 226, 133 L. Ed. 2d 155 (1995).

Repeal of Exemption from Firearms Act. — When the Firearms Act became law in 1971, felons were not automatically restored to full citizenship immediately on their release from prison; however, those felons whose citizenship rights had been restored were exempt from the Act. Then in 1973, North Carolina amended the General Statutes to restore felons to full citizenship immediately upon their unconditional discharge under this Chapter. When it became apparent that this would make virtually all felons exempt from the Firearms Act the General Assembly repealed the exemption (former G.S. 14-415.2) for felons whose citizenship rights had been restored. United States v. McLean, 904 F.2d 216 (4th Cir. 1990), cert. denied, 498 U.S. 875, 111 S. Ct. 203, 112 L. Ed. 2d 164 (1990).

Service As a Juror. — On appeal from defendant's convictions on charges of first-degree murder and robbery with a firearm, the state supreme court refused to consider defendant's argument that the trial court erred by dismissing a juror for cause after the juror informed the court that the juror was convicted in Texas of committing several felonies in the 1970s, because defendant did not raise the argument that the juror's citizenship rights were restored by G.S. 13-1(5), when the trial court dismissed the juror for cause. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Cited in Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953); United States v. McLean, 904 F.2d 216 (4th Cir. 1990); United States v. King, 119 F.3d 290 (4th Cir. 1997).

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An ex-felon found in possession of a firearm could be prosecuted under the Felony Firearms Act, even though he may have lawfully possessed it prior to the December 1, 1995, amendment since his restoration of rights under this chapter, when read in conjunction with G.S. 14-415.1, expressly prohibits the possession of firearms regardless of the date of felony conviction; the General Assembly clearly intended G.S. 14-415.1's application to be retroactive. See opinion of Attorney General to Michael P. Martin, Assistant Chief Counsel, Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, 1997 N.C.A.G. 52 (8/21/97).

§ 13-2. Issuance and filing of certificate or order of restoration.

(a) The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of G.S. 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

The original of such certificate or order shall be promptly transmitted to the clerk of the General Court of Justice in the county where the official record of the case from which the conviction arose is filed. The clerk shall then file the certificate or order without charge with the official record of the case.

(b) In the case of a person convicted of a crime against another state or the United States, whose rights to citizenship have been restored according to G.S. 13-1, the following provisions shall apply:

(1) It shall be the duty of the clerk of the court in the county where such person resides, upon a showing by such person or his representative that the conditions of G.S. 13-1 have been met, to issue the certificate

evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship. For purposes of this subsection, the fulfillment of the conditions of G.S. 13-1 shall be considered met upon the presentation to the clerk of any paper writing from the agency of any other state or of the United States which had jurisdiction over such person, which shows that the conditions of G.S. 13-1 have been met.

(2) The certificate described in subdivision (b)(1) shall be filed by the clerk of the General Court of Justice in the county in which such person resides.

The provisions of this subsection apply equally to conditional and unconditional pardons by the governor of any other state or by the President of the United States, as well as unconditional discharges by the agency of another state or of the United States having jurisdiction over said person. (1971, c. 902; 1973, c. 251; 1977, c. 813, s. 2; 1991, c. 274, s. 2.)

Legal Periodicals. — For note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Cited in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973); United States v. McLean, 904 F.2d 216 (4th Cir. 1990); United States v. Essick, 935 F.2d 28 (4th Cir. 1991).

§ 13-3. Issuance, service and filing of warrant of unconditional pardon.

In the event the rights of citizenship are restored by an unconditional pardon as specified in G.S. 13-1(2), the Governor, under the provisions of G.S. 147-23, shall issue his warrant therefor specifying the restoration of rights of citizenship to the offender; and the officer to whom the Governor issues his warrant to effect the release of the offender shall deliver a copy of the warrant to the offender under the provisions of G.S. 147-25. The original warrant bearing the officer's return as specified in G.S. 147-25 shall be filed by the clerk of the General Court of Justice without charge in the county where the official record of the case from which the conviction arose is filed. (1971, c. 902; 1973, c. 251.)

Legal Periodicals. — For note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Cited in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973); State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

§ 13-4. Endorsement of warrant, service and filing of conditional pardon.

When the offender has satisfied all of the conditions of a conditional pardon, and his rights of citizenship have been restored under the provisions of G.S. 13-1(3), the Governor shall issue an endorsement to the original warrant which specified the conditions of the pardon. Such endorsement shall acknowledge that the offender has satisfied all of the conditions of the pardon.

The Governor shall then deliver the endorsement to the officer specified in G.S. 147-25 for service and delivery to the clerk. Service and delivery to the clerk and filing by the clerk shall be done in accordance with the provisions of G.S. 13-3 so that the endorsement reflecting satisfaction of all conditions of the pardon will be served and recorded as if it were a warrant of unconditional pardon. (1973, c. 251.)

§§ 13-5 through 13-10: Repealed by Session Laws 1971, c. 902.

Chapter 14.
Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1.
Felonies and Misdemeanors.

Sec.
14-1. Felonies and misdemeanors defined.
14-1.1 through 14-2.2. [Repealed.]
14-2.3. Forfeiture of gain acquired through criminal activity.
14-2.4. Punishment for conspiracy to commit a felony.
14-2.5. Punishment for attempt to commit a felony or misdemeanor.
14-2.6. Punishment for solicitation to commit a felony or misdemeanor.
14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.
14-3.1. Infraction defined; sanctions.
14-4. Violation of local ordinances misdemeanor.

Article 2.
Principals and Accessories.

14-5, 14-5.1. [Repealed.]
14-5.2. Accessory before fact punishable as principal felon.
14-6. [Repealed.]
14-7. Accessories after the fact; trial and punishment.

Article 2A.
Habitual Felons.

14-7.1. Persons defined as habitual felons.
14-7.2. Punishment.
14-7.3. Charge of habitual felon.
14-7.4. Evidence of prior convictions of felony offenses.
14-7.5. Verdict and judgment.
14-7.6. Sentencing of habitual felons.

Article 2B.
Violent Habitual Felons.

14-7.7. Persons defined as violent habitual felons.
14-7.8. Punishment.
14-7.9. Charge of violent habitual felon.
14-7.10. Evidence of prior convictions of violent felonies.
14-7.11. Verdict and judgment.

Sec.
14-7.12. Sentencing of violent habitual felons.
14-7.13 through 14-7.19. [Reserved.]

Article 2C.
Continuing Criminal Enterprise.

14-7.20. Continuing criminal enterprise.

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

Article 3.
Rebellion.

14-8. Rebellion against the State.
14-9. [Repealed.]
14-10. Secret political and military organizations forbidden.

Article 4.
Subversive Activities.

14-11. Activities aimed at overthrow of government; use of public buildings.
14-12. Punishment for violations.
14-12.1. Certain subversive activities made unlawful.

Article 4A.
Prohibited Secret Societies and Activities.

14-12.2. Definitions.
14-12.3. Certain secret societies prohibited.
14-12.4. Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes.
14-12.5. Permitting, etc., meetings or demonstrations of prohibited secret societies.
14-12.6. Meeting places and meetings of secret societies regulated.
14-12.7. Wearing of masks, hoods, etc., on public ways.
14-12.8. Wearing of masks, hoods, etc., on public property.
14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.
14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.
14-12.11. Exemptions from provisions of Article.
14-12.12. Placing burning or flaming cross on property of another or on public

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street or highway or on any public place.

14-12.13. Placing exhibit with intention of intimidating, etc., another.

14-12.14. Placing exhibit while wearing mask, hood, or other disguise.

14-12.15. Punishment for violation of Article.

Article 5.

Counterfeiting and Issuing Monetary Substitutes.

14-13. Counterfeiting coin and uttering coin that is counterfeit.

14-14. Possessing tools for counterfeiting.

14-15. Issuing substitutes for money without authority.

14-16. Receiving or passing unauthorized substitutes for money.

14-16.1 through 14-16.5. [Reserved.]

Article 5A.

Endangering Executive, Legislative, and Court Officers.

14-16.6. Assault on executive, legislative, or court officer.

14-16.7. Threats against executive, legislative, or court officers.

14-16.8. No requirement of receipt of the threat.

14-16.9. Officers-elect to be covered.

14-16.10. Definitions.

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

14-17. Murder in the first and second degree defined; punishment.

14-17.1. Crime of suicide abolished.

14-18. Punishment for manslaughter.

14-18.1. [Repealed.]

14-18.2. Injury to pregnant woman.

14-19 through 14-23. [Repealed.]

Article 7.

Rape and Kindred Offenses.

14-24 through 14-27. [Repealed.]

Article 7A.

Rape and Other Sex Offenses.

14-27.1. Definitions.

14-27.2. First-degree rape.

14-27.2A. Rape of a child; adult offender.

14-27.3. Second-degree rape.

14-27.4. First-degree sexual offense.

14-27.4A. Sexual offense with a child; adult offender.

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14-27.5. Second-degree sexual offense.

14-27.5A. Sexual battery.

14-27.6. [Repealed.]

14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

14-27.8. No defense that victim is spouse of person committing act.

14-27.9. No presumption as to incapacity.

14-27.10. Evidence required in prosecutions under this Article.

Article 8.

Assaults.

14-28. Malicious castration.

14-29. Castration or other maiming without malice aforethought.

14-30. Malicious maiming.

14-30.1. Malicious throwing of corrosive acid or alkali.

14-31. Maliciously assaulting in a secret manner.

14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

14-32.1. Assaults on handicapped persons; punishments.

14-32.2. Patient abuse and neglect; punishments.

14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.

14-32.4. Assault inflicting serious bodily injury; strangulation; penalties.

14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

14-33.1. Evidence of former threats upon plea of self-defense.

14-33.2. Habitual misdemeanor assault.

14-34. Assaulting by pointing gun.

14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.

14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

14-34.4. Adulterated or misbranded food, drugs, or cosmetics; intent to cause serious injury or death; intent to extort.

14-34.5. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

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14-34.6. Assault or affray on a firefighter, an emergency medical technician, medical responder, emergency department nurse, or emergency department physician.
14-34.7. Assault inflicting serious injury on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.
14-34.8. Criminal use of laser device.
14-34.9. Discharging a firearm from within an enclosure.

Article 9.

Hazing.

14-35. Hazing; definition and punishment.
14-36, 14-37. [Repealed.]
14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.

Article 10.

Kidnapping and Abduction.

14-39. Kidnapping.
14-40. Enticing minors out of the State for the purpose of employment.
14-41. Abduction of children.
14-42, 14-43. [Repealed.]
14-43.1. Unlawful arrest by officers from other states.
14-43.2. [Repealed.]
14-43.3. Felonious restraint.
14-43.4 through 14-43.9. [Reserved.]

Article 10A.

Human Trafficking.

14-43.10. Definitions.
14-43.11. Human trafficking.
14-43.12. Involuntary servitude.
14-43.13. Sexual servitude.

Article 11.

Abortion and Kindred Offenses.

14-44. Using drugs or instruments to destroy unborn child.
14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.
14-45.1. When abortion not unlawful.
14-46. Concealing birth of child.

Article 12.

Libel and Slander.

14-47. Communicating libelous matter to newspapers.
14-48. [Repealed.]

Article 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

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14-49. Malicious use of explosive or incendiary; punishment.
14-49.1. Malicious damage of occupied property by use of explosive or incendiary; punishment.
14-50. [Repealed.]
14-50.1. Explosive or incendiary device or material defined.
14-50.2 through 14-50.14. [Reserved.]

Article 13A.

North Carolina Street Gang Suppression Act.

14-50.15. Short title.
14-50.16. Pattern of criminal street gang activity.
14-50.17. Soliciting; encouraging participation.
14-50.18. Soliciting; encouraging participation; minor.
14-50.19. Threats to deter from gang withdrawal.
14-50.20. Threats of punishment or retaliation.
14-50.21. Separate offense.
14-50.22. Enhanced offense for criminal gang activity.
14-50.23. Contraband, seizure, and forfeiture.
14-50.24. Real property used by criminal street gangs declared a public nuisance; abatement.
14-50.25. Reports of disposition; criminal street gang activity.
14-50.26. Matters proved in criminal trial court.
14-50.27. Local ordinances not preempted by State law.
14-50.27A. Dissemination of criminal intelligence information.
14-50.28. Applicability to juveniles under the age of 16.
14-50.29. Conditional discharge for first offenders under the age of 18.
14-50.30. (See Editor's Note) Expunction of records.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

Article 14.

Burglary and Other Housebreakings.

14-51. First and second degree burglary.
14-51.1. Use of deadly physical force against an intruder.

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14-52. Punishment for burglary.
14-53. Breaking out of dwelling house burglary.
14-54. Breaking or entering buildings generally.
14-54.1. Breaking or entering a building that is a place of religious worship.
14-55. Preparation to commit burglary or other housebreakings.
14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.
14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.
14-56.2. Damaging or destroying coin- or currency-operated machines.
14-56.3. Breaking into paper currency machines.
14-56.4. Preparation to commit breaking or entering into motor vehicles.
14-57. Burglary with explosives.

Article 15.

Arson and Other Burnings.

14-58. Punishment for arson.
14-58.1. Definition of "house" and "building."
14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.
14-59. Burning of certain public buildings.
14-60. Burning of schoolhouses or buildings of educational institutions.
14-61. Burning of certain bridges and buildings.
14-62. Burning of certain buildings.
14-62.1. Burning of building or structure in process of construction.
14-62.2. Burning of churches and certain other religious buildings.
14-63. Burning of boats and barges.
14-64. Burning of ginhouses and tobacco houses.
14-65. Fraudulently setting fire to dwelling houses.
14-66. Burning of personal property.
14-67. [Repealed.]
14-67.1. Burning other buildings.
14-68. Failure of owner of property to comply with orders of public authorities.
14-69. Failure of officers to investigate incendiary fires.
14-69.1. Making a false report concerning destructive device.
14-69.2. Perpetrating hoax by use of false bomb or other device.
14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter or emergency medical technician.

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

Sec.
14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.
14-71. Receiving stolen goods; receiving or possessing goods represented as stolen.
14-71.1. Possessing stolen goods.
14-72. Larceny of property; receiving stolen goods or possessing stolen goods.
14-72.1. Concealment of merchandise in mercantile establishments.
14-72.2. Unauthorized use of a motor-propelled conveyance.
14-72.3. Removal of shopping cart from shopping premises.
14-72.4. Unauthorized taking or sale of labeled dairy milk cases or milk crates bearing the name or label of owner.
14-72.5. Larceny of motor fuel.
14-72.6. Felonious larceny, possession, or receiving of stolen goods from a permitted construction site.
14-72.7. Chop shop activity.
14-72.8. Felony larceny of motor vehicle parts.
14-72.9, 14-72.10. [Reserved.]
14-72.11. Larceny from a merchant.
14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.
14-73.1. Petty misdemeanors.
14-74. Larceny by servants and other employees.
14-75. Larceny of chose in action.
14-75.1. Larceny of secret technical processes.
14-76. Larceny, mutilation, or destruction of public records and papers.
14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives.
14-77. Larceny, concealment or destruction of wills.
14-78. Larceny of ungathered crops.
14-78.1. [Repealed.]
14-79. Larceny of ginseng.
14-79.1. Larceny of pine needles or pine straw.
14-80. [Repealed.]
14-81. Larceny of horses, mules, swine, cattle, or dogs.
14-82. Taking horses, mules, or dogs for temporary purposes.
14-83. [Repealed.]
14-83.1. Fixtures subject to larceny.
14-84. Animals subject to larceny.
14-85. Pursuing or injuring livestock with intent to steal.

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14-86. [Repealed.]
14-86.1. Seizure and forfeiture of conveyances used in committing larceny and similar crimes.
14-86.2. Larceny, destruction, defacement, or vandalism of portable toilets or pumper trucks.
14-86.3, 14-86.4. [Reserved].

Article 16A.

Organized Retail Theft.

14-86.5. Definitions.
14-86.6. Organized retail theft.

Article 17.

Robbery.

14-87. Robbery with firearms or other dangerous weapons.
14-87.1. Punishment for common-law robbery.
14-88. Train robbery.
14-89. [Repealed.]
14-89.1. Safecracking.

Article 18.

Embezzlement.

14-90. Embezzlement of property received by virtue of office or employment.
14-91. Embezzlement of State property by public officers and employees.
14-92. Embezzlement of funds by public officers and trustees.
14-93. Embezzlement by treasurers of charitable and religious organizations.
14-94. Embezzlement by officers of railroad companies.
14-95 through 14-96.1. [Repealed.]
14-97. Appropriation of partnership funds by partner to personal use.
14-98. Embezzlement by surviving partner.
14-99. Embezzlement of taxes by officers.

Article 19.

False Pretenses and Cheats.

14-100. Obtaining property by false pretenses.
14-100.1. Possession or manufacture of certain fraudulent forms of identification.
14-101. Obtaining signatures by false pretenses.
14-102. Obtaining property by false representation of pedigree of animals.
14-103. Obtaining certificate of registration of animals by false representation.
14-104. Obtaining advances under promise to work and pay for same.
14-105. Obtaining advances under written promise to pay therefor out of designated property.

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14-106. Obtaining property in return for worthless check, draft or order.
14-107. Worthless checks.
14-107.1. Prima facie evidence in worthless check cases.
14-107.2. Program for collection in worthless check cases.
14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.
14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.
14-110. Defrauding innkeeper or campground owner.
14-111. [Repealed.]
14-111.1. Obtaining ambulance services without intending to pay therefor — Buncombe, Haywood and Madison Counties.
14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.
14-111.3. Making unneeded ambulance request in certain counties.
14-111.4. Misuse of 911 system.
14-112. Obtaining merchandise on approval.
14-112.1. [Repealed.]
14-112.2. Exploitation of an elder adult or disabled adult.
14-113. Obtaining money by false representation of physical defect.

Article 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation.
14-113.2. Notice defined; prima facie evidence of receipt of notice.
14-113.3. Use of credit device as prima facie evidence of knowledge.
14-113.4. Avoiding or attempting to avoid payment for telecommunication services.
14-113.5. Making, distributing, possessing, transferring, or programming device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.
14-113.6. Penalties for violation; civil action.
14-113.6A. Venue of offenses.
14-113.7. Article not construed as repealing § 14-100.

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14-113.7A. Application of Article to credit cards.

Article 19B.

Financial Transaction Card Crime Act.

14-113.8. Definitions.
14-113.9. Financial transaction card theft.
14-113.10. Prima facie evidence of theft.
14-113.11. Forgery of financial transaction card.
14-113.12. Prima facie evidence of forgery.
14-113.13. Financial transaction card fraud.
14-113.14. Criminal possession of financial transaction card forgery devices.
14-113.15. Criminal receipt of goods and services fraudulently obtained.
14-113.15A. Criminal factoring of financial transaction card records.
14-113.16. Presumption of criminal receipt of goods and services fraudulently obtained.
14-113.17. Punishment and penalties.
14-113.18, 14-113.19. [Reserved.]

Article 19C.

Identity Theft.

14-113.20. Identity theft.
14-113.20A. Trafficking in stolen identities.
14-113.21. Venue of offenses.
14-113.21A. Investigation of offenses.
14-113.22. Punishment and liability.
14-113.23. Authority of the Attorney General.
14-113.24. Credit, charge, or debit card numbers on receipts.
14-113.25. Sale of certain cash registers and other receipt printing machines.
14-113.26 through 14-113.29. [Reserved.]

Article 19D.

Telephone Records Privacy Protection Act.

14-113.30. Definitions.
14-113.31. Prohibition of falsely obtaining, selling, or soliciting telephone records.
14-113.32. Exceptions.
14-113.33. Punishment; liability.

Article 20.

Frauds.

14-114. Fraudulent disposal of personal property on which there is a security interest.
14-115. Secreting property to hinder enforcement of lien or security interest.
14-116. [Repealed.]
14-117. Fraudulent and deceptive advertising.
14-117.1. [Repealed.]

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14-117.2. Gasoline price advertisements.
14-118. Blackmailing.
14-118.1. Simulation of court process in connection with collection of claim, demand or account.
14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.
14-118.3. Acquisition and use of information obtained from patients in hospitals for fraudulent purposes.
14-118.4. Extortion.
14-118.5. Theft of cable television service.
14-118.6 through 14-118.9. [Reserved.]

Article 20A.

Residential Mortgage Fraud Act.

14-118.10. Title.
14-118.11. Definitions.
14-118.12. Residential mortgage fraud.
14-118.13. Venue.
14-118.14. Authority to investigate and prosecute.
14-118.15. Penalty for violation of Article.
14-118.16. Forfeiture.
14-118.17. Liability for reporting suspected mortgage fraud.

Article 21.

Forgery.

14-119. Forgery of notes, checks, and other securities; counterfeiting of instruments.
14-120. Uttering forged paper or instrument containing a forged endorsement.
14-121. Selling of certain forged securities.
14-122. Forgery of deeds, wills and certain other instruments.
14-122.1. Falsifying documents issued by a secondary school, postsecondary educational institution, or governmental agency.
14-123. Forging names to petitions and uttering forged petitions.
14-124. Forging certificate of corporate stock and uttering forged certificates.
14-125. Forgery of bank notes and other instruments by connecting genuine parts.

SUBCHAPTER VI. CRIMINAL TRESPASS.

Article 22.

Damages and Other Offenses to Land and Fixtures.

14-126. [Repealed.]
14-127. Willful and wanton injury to real property.
14-128. Injury to trees, crops, lands, etc., of another.
14-128.1. [Repealed.]

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14-129. Taking, etc., of certain wild plants from land of another.

14-129.1. [Repealed.]

14-129.2. Unlawful to take sea oats.

14-130. Trespass on public lands.

14-131. Trespass on land under option by the federal government.

14-132. Disorderly conduct in and injuries to public buildings and facilities.

14-132.1. [Repealed.]

14-132.2. Willfully trespassing upon, damaging, or impeding the progress of a public school bus.

14-133 through 14-134.1. [Repealed.]

14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so.

14-134.3. Domestic criminal trespass.

14-135. Cutting, injuring, or removing another's timber.

14-136. Setting fire to grass and brushlands and woodlands.

14-137. Willfully or negligently setting fire to woods and fields.

14-138. [Repealed.]

14-138.1. Setting fire to grassland, brushland, or woodland.

14-139, 14-140. [Repealed.]

14-140.1. Certain fire to be guarded by watchman.

14-141. Burning or otherwise destroying crops in the field.

14-142. Injuries to dams and water channels of mills and factories.

14-143. [Repealed.]

14-144. Injuring houses, churches, fences and walls.

14-145. Unlawful posting of advertisements.

14-146. Injuring bridges.

14-147. Removing, altering or defacing landmarks.

14-148. Defacing or desecrating grave sites.

14-149. Desecrating, plowing over or covering up graves; desecrating human remains.

14-150, 15-150.1. [Repealed.]

14-151. Interfering with gas, electric and steam appliances.

14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; unlawful reconnection of electricity, gas, or water; civil liability.

14-152. Injuring fixtures and other property of gas companies; civil liability.

14-153. Tampering with engines and boilers.

14-154. Injuring wires and other fixtures of telephone, telegraph, and electric-power companies.

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14-155. Unauthorized connections with telephone or telegraph.

14-156. Injuring fixtures and other property of electric-power companies.

14-157. Felling trees on telephone and electric-power wires.

14-158. Interfering with telephone lines.

14-159. Injuring buildings or fences; taking possession of house without consent.

14-159.1. Contaminating a public water system.

14-159.2. Interference with animal research.

14-159.3. Trespass to land on motorized all terrain vehicle.

14-159.4, 14-159.5. [Reserved.]

Article 22A.

Trespassing upon "Posted" Property to Hunt, Fish, Trap, or Remove Pine Needles/Straw.

14-159.6. Trespass for purposes of hunting, etc., without written consent a misdemeanor.

14-159.7. Regulations as to posting of property.

14-159.8. Mutilation, etc., of "posted" signs; posting signs without consent of owner or agent.

14-159.9. Entrance on navigable waters, etc., for purpose of fishing, hunting or trapping not prohibited.

14-159.10. Enforcement of Article by peace officers; wildlife protectors authorized to execute process.

Article 22B.

First and Second Degree Trespass.

14-159.11. Definition.

14-159.12. First degree trespass.

14-159.13. Second degree trespass.

14-159.14. Lesser included offenses.

14-159.15 through 14-159.19. [Reserved.]

Article 22C.

Cave Protection Act.

14-159.20. Definitions.

14-159.21. Vandalism; penalties.

14-159.22. Sale of speleothems unlawful; penalties.

14-159.23. Limitation of liability of owners and agents.

Article 23.

Trespasses to Personal Property.

14-160. Willful and wanton injury to personal property; punishments.

14-160.1. Alteration, destruction or removal of

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permanent identification marks from personal property.

14-160.2. Alteration, destruction, or removal of serial number from firearm; possession of firearm with serial number removed.

14-161. [Repealed.]

14-162. Removing boats.

14-163. Poisoning livestock.

14-163.1. Assaulting a law enforcement agency animal, an assistance animal, or a search and rescue animal.

14-164. [Repealed.]

Article 24.

Vehicles and Draft Animals — Protection of Bailor against Acts of Bailee.

14-165. Malicious or willful injury to hired personal property.

14-166. Subletting of hired property.

14-167. Failure to return hired property.

14-168. Hiring with intent to defraud.

14-168.1. Conversion by bailee, lessee, tenant or attorney-in-fact.

14-168.2. Definitions.

14-168.3. Prima facie evidence of intent to convert property.

14-168.4. Failing to return rented property on which there is purchase option.

14-168.5. Prima facie evidence of intent to convert a truck, automobile, or other motor vehicle; demand for return or payment.

14-169. Violation made misdemeanor.

Article 25.

Regulating the Leasing of Storage Batteries.

14-170 through 14-176. [Repealed.]

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

Article 26.

Offenses Against Public Morality and Decency.

14-177. Crime against nature.

14-178. Incest.

14-179 through 14-182. [Repealed.]

14-183. Bigamy.

14-184. Fornication and adultery.

14-185. [Repealed.]

14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.

14-187. [Repealed.]

14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

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14-189 through 14-190. [Repealed.]

14-190.1. Obscene literature and exhibitions.

14-190.2, 14-190.3. [Repealed.]

14-190.4. Coercing acceptance of obscene articles or publications.

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SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

A felony is a crime which:
(1) Was a felony at common law;
(2) Is or may be punishable by death;
(3) Is or may be punishable by imprisonment in the State's prison; or
(4) Is denominated as a felony by statute.

Any other crime is a misdemeanor. (1891, c. 205, s. 1; Rev., s. 3291; C.S., s. 4171; 1967, c. 1251, s. 1.)

Cross References. — As to statute of limitations for misdemeanors, see G.S. 15-1.

Legal Periodicals. — For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205 (1939).

For brief comparison of criminal law sanctions in two civil rights cases, see 43 N.C.L. Rev. 667 (1965).

For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

For essay on how judges can contribute to legal professionalism, see 32 Wake Forest L. Rev. 621 (1997).

CASE NOTES

Constitutionality. — This section was held to be constitutional in State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905).

Common-Law Provisions. — Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910). See State v. Hill, 91 N.C. 561 (1884).

Punishment Determines Classification of Offenses. — By this section, North Carolina adopted the rule, then almost universally prevalent, by which the nature of the punishment determined the classification of offenses; those which could be punished capitally or by imprisonment in the penitentiary were felonies (as to which there was no statute of limitations), and all others were misdemeanors, as to which prosecutions in this State were barred by two years. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913); Jones v. Brinkley, 174 N.C. 23, 93 S.E. 372 (1917).

Offense Need Not Be Specified. — It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Defective Indictment. — Where an indictment did not use the word "feloniously" or state the statute showing a charge was felony, it was fatally defective and the charge was vacated. State v. Blakney, 156 N.C. App. 671, 577 S.E.2d 387, cert. denied, 357 N.C. 252, 582 S.E.2d 611 (2003).

Penitentiary Unknown to Common Law. — The penitentiary, being a modern device, was unknown to the common law; therefore, punishment in the penitentiary could not be imposed by the common law. State v. McNeill, 75 N.C. 15 (1876).

The use of the word "penitentiary" in prescribing the punishment for one convicted under a criminal statute has the same legal significance as the words "State's prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Concurrence of General and Local Laws. — This State's general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provided that they would not have the effect of repealing local or special statutes upon the subject, but they would continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable made the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder was guilty of a felony, by this section, and the two-year statute of limitations was not a bar to the prosecution. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Conspiracy. — A conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941), holding that a conspiracy to interfere with election officials in the discharge of their duties was a misdemeanor.

An assault with intent to commit rape is a felony. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Suicide. — At common law suicide was a felony, and attempted suicide was a misdemeanor, punishable by fine and imprisonment. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

An attempt to commit suicide is an indictable misdemeanor in North Carolina. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Attempt to commit a felony is a misdemeanor, absent statutory provisions to the contrary. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Fair Sentencing Act. — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Applied in State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947); State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953); State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

Cited in State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Glidden, 76 N.C. App. 653, 334

S.E.2d 101 (1985); State v. Reaves, 142 N.C. App. 629, 544 S.E.2d 253, 2001 N.C. App. LEXIS 170 (2001).

§ 14-1.1: Repealed by Session Laws 1993, c. 538, s. 2.

Cross References. — As to structured sentencing of persons convicted of crimes, see G.S. 15A-1340.10 et seq.

§ 14-2: Repealed by Session Laws 1993, c. 538, s. 2.1.

Cross References. — As to structured sentencing of persons convicted of crimes, see G.S. 15A-1340.10 et seq.

§ 14-2.1: Repealed by Session Laws 1993, c. 538, s. 3.

Cross References. — As to structured sentencing of persons convicted of crimes, see G.S. 15A-1340.10 et seq.

§ 14-2.2: Repealed by Session Laws 2003-0378, s. 1, effective August 1, 2003.

Cross References. — As to persons convicted who used, displayed, or threatened to use or display a firearm during the commission of a felony, see G.S. 15A-1340.16A.

§ 14-2.3. Forfeiture of gain acquired through criminal activity.

(a) Except as is otherwise provided in Article 3 of Chapter 31A, in the case of any violation of Article 13A of Chapter 14, or a general statute constituting a felony other than a nonwillful homicide, any money or other property or interest in property acquired thereby shall be forfeited to the State of North Carolina, including any profits, gain, remuneration, or compensation directly or indirectly collected by or accruing to any offender.

(b) An action to recover such property shall be brought by either a District Attorney or the Attorney General pursuant to G.S. 1-532. The action must be brought within three years from the date of the conviction for the offense.

(c) Nothing in this section shall be construed to require forfeiture of any money or property recovered by law-enforcement officers pursuant to the investigation of an offense when the money or property is readily identifiable by the owner or guardian of the property or is traceable to him. (1981, c. 840, s. 1; 2008-214, s. 1.)

Effect of Amendments. — Session Laws 2008-214, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "criminal activity" for "felonies" in the section heading; in subsection (a), inserted "Article 13A of Chapter 14, or" and substituted "offender" for "felon" at the end; substituted "offense" for "felony" at the end of subsection (b); and substituted "an offense" for "a felony" in subsection (c).

CASE NOTES

This section describes a category of contraband which is not per se illegal to possess at all times but is only derivatively subject to seizure due to its connection with illegal acts. State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

For a comparison of contraband per se and derivative contraband, see State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

This section authorizes the forfeiture of property characterized not by its use in a particular crime but as the acquired result of a crime. State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-2.4. Punishment for conspiracy to commit a felony.

(a) Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a felony is guilty of a felony that is one class lower than the felony he or she conspired to commit, except that a conspiracy to commit a Class A or Class B1 felony is a Class B2 felony, a conspiracy to commit a Class B2 felony is a Class C felony, and a conspiracy to commit a Class I felony is a Class 1 misdemeanor.

(b) Unless a different classification is expressly stated, a person who is convicted of a conspiracy to commit a misdemeanor is guilty of a misdemeanor that is one class lower than the misdemeanor he or she conspired to commit, except that a conspiracy to commit a Class 3 misdemeanor is a Class 3 misdemeanor. (1983, c. 451, s. 1; 1993, c. 538, s. 5; 1994, Ex. Sess., c. 22, s. 12; c. 24, s. 14(b).)

CASE NOTES

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. State v. Massey, 76 N.C. App. 660, 334 S.E.2d 71, supersedeas allowed, 314 N.C. 672, 335 S.E.2d 325 (1985).

In order for a defendant to be found guilty of a conspiracy, it must be established by competent evidence that the defendant entered into an unlawful confederation for the criminal purposes alleged. State v. Massey, 76 N.C. App. 660, 334 S.E.2d 71, supersedeas allowed, 314 N.C. 672, 335 S.E.2d 325 (1985).

Proof of Conspiracy. — While a conspiracy may be established from circumstantial evidence, there must be evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. State v. Massey, 76 N.C. App. 660, 334 S.E.2d 71, supersedeas allowed, 314 N.C. 672, 335 S.E.2d 325 (1985).

If a conspiracy is to be proved by inferences drawn from the evidence, such evidence must point unerringly to the existence of a conspiracy. State v. Massey, 76 N.C. App. 660, 334 S.E.2d 71, supersedeas allowed, 314 N.C. 672, 335 S.E.2d 325 (1985).

For case where proof of conspiracy to commit murder was held sufficient, see State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), overruled in part.

Trial court did not err in denying defendants' motions to dismiss conspiracy charge because substantial evidence existed, in that: (1) a codefendant testified that defendants had agreed to distribute marijuana, were engaged in distributing marijuana, and stored marijuana in the house where defendants lived and sold marijuana from an apartment; (2) defendants each had access to the marijuana found in a garage; (3) one defendant was at the apartment when a law enforcement agent made a controlled delivery of a package containing marijuana; (4) marijuana, scales, packaging materials, and weapons were found at both the apartment and in the bedrooms and public areas of the house. State v. Harrington, 171 N.C. App. 17, 614 S.E.2d 337, 2005 N.C. App. LEXIS 1189 (2005), cert. denied, sub nom. State v. Rattis, 360 N.C. 70, 623 S.E.2d 36 (2005).

Proof of conspiracy held insufficient where the State's evidence indicated that the defendant wished her ex-husband dead, that they disagreed about custody, that she was present when her brother and husband discussed a plan for "taking care" of the victim, that someone made a long-distance phone call to the victim the night before his murder, that defendant borrowed ten dollars to take the kids camping on the day of the murder, that defendant participated in efforts to hide the victim's body and personal belongings, and initially attempted to deceive law enforcement officers regarding his disappearance. State v. Merrill, 138 N.C. App. 215, 530 S.E.2d 608, 2000 N.C. App. LEXIS 597 (2000).

Court reversed defendant's convictions of conspiracy to commit first-degree murder and conspiracy to commit shooting into occupied property because the cell phone call between defendant and another supported inferences about a possible agreement to resolve a money problem, but there was no mention of shooting, killing, or violence of any kind, and the evidence did not point unerringly toward conspiracies to commit murder or shoot into occupied property and was insufficient to support those charges. State v. Benardello, 164 N.C. App. 708, 596 S.E.2d 358, 2004 N.C. App. LEXIS 974 (2004).

The presumptive term for conspiracy is three years. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Conspiracy and accessory before the fact are separate crimes which do not merge, because accessory before the fact requires actual commission of the contemplated felony, while conspiracy does not, and conspiracy requires an agreement, while an accessory need not agree to anything. State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986), rev'd on other grounds, 320 N.C. 626, 359 S.E.2d 774 (1987).

Acting in Concert. — In order to convict a defendant under a theory of acting in concert, it is not necessary that the defendant personally commit all the acts required to constitute the crime charged. When two or more persons act together with the common purpose to commit robbery, each is held responsible for the acts of the other done in the commission of the robbery. State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991).

Evidence held to show a single conspiracy to feloniously break or enter various Durham retail stores within a four month period, and not 10 separate conspiracies to break or enter on 10 separate occasions. State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987).

Convictions of both felonious conspiracy to commit felonious breaking and entering and felonious conspiracy to commit felonious larceny could not both be allowed to stand where there was evidence of only one agreement. State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Evidence supported the existence of multiple separate conspiracies because gang members first abducted and robbed a woman, then the members decided to kill the woman for her car; then, later that night the members decided to abduct, rob, and kill two other women for their car. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Sufficient evidence existed to allow a jury to decide whether the defendant engaged in two conspiracies instead of one where the State presented evidence about the abandonment of the first attack, the time interval between the assaults, and the different motivations for the crimes. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

Conviction for Conspiracy and Substantive Offense. — It is a fundamental principle of substantive criminal law that a defendant may properly be convicted of, and punished for, both conspiracy and the substantive offense which the defendant conspired to commit. Therefore, defendant was properly convicted of, and punished for, both conspiracy to commit murder and first degree murder. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

Conspiracy to Commit Murder. — Defendant took advantage of position of trust or confidence where victim of conspiracy to commit murder was defendant's husband. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

Defendant was properly charged and convicted of conspiracy to commit first-degree murder under the felony murder rule because the instruction that was given requiring the jury to find an agreement and specific intent to kill eliminated the possibility that an unintentional felony murder formed the basis for the specific intent underlying the conspiracy of which the jury convicted defendant. State v. Curry, 171 N.C. App. 568, 615 S.E.2d 327, 2005 N.C. App. LEXIS 1312 (2005).

Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy to commit murder. State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Conviction for conspiracy to commit first degree murder was supported by sufficient evidence because, inter alia, defendant admitted to (1) knowing what was going to happen and to having remorse about thinking up such a thing and not stopping it, (2) conceiving of and agreeing to the plan to kill defendant's mother, and (3) assisting the shooter in making it look like a break in and cleaning up the scene. State v.

Crowe, 188 N.C. App. 765, 656 S.E.2d 688, 2008 N.C. App. LEXIS 261 (2008), review granted as to additional issues, 362 N.C. 359, 664 S.E.2d 308 (2008).

Proof Showed Conspiracy to Commit Larceny Rather Than Embezzlement. — Lawful possession or control element of the crime of embezzlement was not satisfied when defendant's wife, an administrative employee, took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer; such evidence supported a finding of larceny rather than embezzlement, and thus, conspiracy to commit larceny rather than embezzlement. State v. Weaver, 359 N.C. 246, 607 S.E.2d 599, 2005 N.C. LEXIS 30 (2005).

Dismissal of Charges as to One Coconspirator. — Dismissal of charges pursuant to a plea agreement does not constitute an acquittal at law; therefore, in the absence of inconsistent verdicts for the same conspiracy (i.e., where all but one of the accused in the conspiracy has received an acquittal), the conviction of the sole remaining conspirator would not be set aside. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993).

Jury Instructions. — Finding of "an agreement to kill" is equivalent to a finding of an agreement to commit an intentional murder, even in the absence of an instruction requiring the latter finding, and the finding of an agreement to kill is equivalent to the finding of an agreement to premeditate and deliberate. State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Trial court committed plain error in failing to instruct the jury on conspiracy to commit common law robbery as the jury was properly instructed on robbery with a dangerous weapon and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake; the same conflicting evidence directly pertained to defendant's charge of conspiracy to commit common law robbery as there was conflicting evidence as to whether the agreement was that the person who committed the robbery would use a real or a fake gun. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

Sufficient Evidence to Go to Jury on Conspiracy to Commit Robbery with Dangerous Weapon. — Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

Applied in In re DRH, — N.C. App. —, 668 S.E.2d 919, 2008 N.C. App. LEXIS 2207 (2008).

Cited in State v. Clark, 324 N.C. 146, 377 S.E.2d 54 (1989); State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990); State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

§ 14-2.5. Punishment for attempt to commit a felony or misdemeanor.

Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor. (1993, c. 538, s. 6; 1994, Ex. Sess., c. 22, s. 11; c. 24, s. 14(b).)

CASE NOTES

Sentence aggravation. — Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. State v. Hanton, 175 N.C. App. 250, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

By also making attempted computer solicitation a felony under amended G.S. 14-202.3, the legislature merely increased the severity of the crime; it did not create the new crime of attempt. State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

Applied in State v. Bennett, 132 N.C. App. 187, 510 S.E.2d 698 (1999).

Cited in State v. Clark, 137 N.C. App. 90, 527 S.E.2d 319 (2000).

§ 14-2.6. Punishment for solicitation to commit a felony or misdemeanor.

(a) Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor.

(b) Unless a different classification is expressly stated, a person who solicits another person to commit a misdemeanor is guilty of a Class 3 misdemeanor. (1993, c. 538, s. 6.1; 1994, Ex. Sess., c. 22, s. 13; c. 24, s. 14(b).)

CASE NOTES

Solicitation conviction affirmed, no plain error. — It was not plain error for the trial court to admit testimony about defendant's alleged threats to kill and engage in a swap of drugs for stolen goods with a detective because given the strength of the other evidence that defendant solicited the shooting, the admission was not fundamental error, and the admission of other testimony from the detective was offered to provide background to the meeting between the detective, defendant, and defendant's friend and was not so prejudicial that it resulted in a miscarriage of justice. State v. Benardello, 164 N.C. App. 708, 596 S.E.2d 358, 2004 N.C. App. LEXIS 974 (2004).

Cited in R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003).

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice, or with deceit and intent to defraud, or with ethnic animosity.

(a) Except as provided in subsections (b) and (c), every person who shall be convicted of any misdemeanor for which no specific classification and no specific punishment is prescribed by statute shall be punishable as a Class 1 misdemeanor. Any misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly pursuant to law is classified as follows, based on the maximum punishment allowed by law for the offense as it existed on the effective date of Article 81B of Chapter 15A of the General Statutes:

(1) If that maximum punishment is more than six months imprisonment, it is a Class 1 misdemeanor;

(2) If that maximum punishment is more than 30 days but not more than six months imprisonment, it is a Class 2 misdemeanor; and

(3) If that maximum punishment is 30 days or less imprisonment or only a fine, it is a Class 3 misdemeanor.

Misdemeanors that have punishments for one or more counties or cities pursuant to a local act of the General Assembly that are different from the generally applicable punishment are classified pursuant to this subsection if not otherwise specifically classified.

(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony.

(c) If any Class 2 or Class 3 misdemeanor is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class 1 misdemeanor. If any Class A1 or Class 1 misdemeanor offense is committed because of the victim's race, color, religion, nationality, or country of origin, the offender shall be guilty of a Class H felony. (R.C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C.S., s. 4173; 1927, c. 1; 1967, c. 1251, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 2, 47, 48; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 702, s. 2; 1993, c. 538, s. 7; 1994, Ex. Sess., c. 14, s. 2; c. 24, s. 14(b); 1995 (Reg. Sess., 1996), c. 742, s. 6; 2008-197, s. 4.1.)

Cross References. — As to uttering worthless checks, see G.S. 14-106 and 14-107. As to statute of limitations for misdemeanors, see G.S. 15-1.

Effect of Amendments. — Session Laws 2008-197, s. 4.1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H" for "Class I" in subsection (c).

Legal Periodicals. — As to lack of clear test as to what constitutes infamous offense, see 28 N.C.L. Rev. 103 (1950).

For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note, "North Carolina County Jail Inmates' Right of Access to Courts," see 66 N.C.L. Rev. 583 (1988).

Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Clarifying North Carolina's Ethnic Intimidation Statute and Penalty Enhancement for Bias Crimes, 78 N.C.L. Rev. 2003 (2000).

CASE NOTES

I. General Consideration.
II. Infamous Offenses, etc., Generally.
III. Particular Offenses.

I. GENERAL CONSIDERATION.

Constitutionality. — The punishment provisions of subsection (a) of this section are not unconstitutional. State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

Section Places Ceiling on Court's Power to Punish. — The maximum provided in this section and G.S. 14-2 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

This section has reference to misdemeanors other than those created by Article 3 of Chapter 20 of the General Statutes, which relates to motor vehicles. State v. Massey, 265 N.C. 579, 144 S.E.2d 649 (1965).

This section does not mean that the court may not place offenders on probation, or make use of other State facilities and services in proper cases. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Common-Law Offenses. — Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. State v. McNeill, 75 N.C. 15 (1876); State v. Powell, 94 N.C. 920 (1886); State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no punishment is prescribed in the statute. State v. Bloodworth, 94 N.C. 918 (1886).

Discretion of Trial Judge. — Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Willer, 94 N.C. 904 (1886); State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971).

Punishment "in the discretion of the court" is not specific punishment and, hence, is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in this section and G.S. 14-2. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

Punishment Provisions of This Section and § 14-277. — While G.S. 14-277(d) provides in pertinent part that a violation of both subsections (a) and (b) of G.S. 14-277 is a misdemeanor, it also provides that a violation of G.S. 14-277(a) is punishable under subsection (a) of this section and a violation of G.S. 14-277(b) is punishable under G.S. 14-277(d). The punishment provisions of subsection (a) of this section and G.S. 14-277(d) vary. State v. Chisholm, 90 N.C. App. 526, 369 S.E.2d 375 (1988).

Where Felony and Misdemeanor Counts Are Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed was in excess of that permissible upon conviction of the misdemeanor was immaterial and was not prejudicial where it did not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where Statute Is Repealed Before Judgment. — Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. State v. Cress, 49 N.C. 421 (1857); State v. Nutt, 61 N.C. 20 (1866); State v. Long, 78 N.C. 571 (1878); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889); State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891); State v. Perkins, 141 N.C. 797, 53 S.E. 735 (1906).

Excessive Punishment. — The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887).

A sentence of imprisonment for five years in the county jail and a recognizance of $500.00 to keep the peace for five years after the expiration thereof upon a defendant convicted of assault and battery is excessive and therefore unconstitutional. State v. Driver, 78 N.C. 423 (1878).

The maximum punishment for a general misdemeanor is two years. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

A misdemeanor punishable in the discretion of the court means a maximum of two years. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Same — Not Cruel or Unusual. — It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. State v. Driver, 78 N.C. 423 (1878); State v. Miller, 94 N.C. 904 (1886); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906).

Where Common-Law Offense Is Altered by Statute. — Where the grade of a common-law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. State v. Lawrence, 81 N.C. 522 (1879).

Effect of Consent of Defendant. — No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. In re Schenck, 74 N.C. 607 (1876).

Failure to Instruct on Lesser-Included Offense. — Where there was substantial evidence which would have supported a reasonable finding that defendant committed the lesser-included offense of attempted murder, the trial court erred in failing to instruct the jury on the lesser-included offense of attempted murder. State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993).

Jurisdiction. — The superior court did not have jurisdiction where the indictment failed to allege the elements of a felony. State v. Bell, 121 N.C. App. 700, 468 S.E.2d 484 (1996).

Applied in State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946); State v. Thompson, 3 N.C. App. 231, 164 S.E.2d 391 (1968); State v. Batiste, 5 N.C. App. 511, 168 S.E.2d 510 (1969); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971); State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714 (1972); State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972); State v. Toler, 18 N.C. App. 149, 196 S.E.2d 295 (1973); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973); State v. Puryear, 30 N.C. App. 719, 228 S.E.2d 536 (1976); State v. Preston, 73 N.C. App. 174, 325 S.E.2d 686 (1985); State v. Lee, 88 N.C. App. 478, 363 S.E.2d 656 (1988); State v. Gregory, 154 N.C. App. 718, 572 S.E.2d 838, 2002 N.C. App. LEXIS 1534 (2002).

Cited in State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975); State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981); State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981); State v. Hageman, 56 N.C. App. 274, 289 S.E.2d 89 (1982); State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604 (1982); United States v. Ward, 676 F.2d 94 (4th Cir. 1982); State v. Green, 310 N.C. 466, 312 S.E.2d 434 (1984); State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913 (1984); State v. Polite, 79 N.C. App. 752, 340 S.E.2d 762 (1986); United States v. Kendrick, 636 F. Supp. 189 (E.D.N.C. 1986); Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989); State v. Clemmons, 100 N.C. App. 286, 396 S.E.2d 616 (1990); State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990); State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993).

II. INFAMOUS OFFENSES, ETC., GENERALLY.

Intent of Subsection (b). — When the legislature used the words "done in secrecy and malice, or with deceit and intent to defraud," its manifest purpose was to describe offenses in which either secrecy and malice, or the employment of deceit with intent to defraud, are elements necessary to their criminality as defined by law. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Subsection (b) and the reported cases leave some lack of certainty as to what crimes may be designated and punished as infamous. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

"Infamous" Refers to Nature of Offense. — A statute which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949); State v. Mann, 77 N.C. App. 654, 335 S.E.2d 772 (1985), modified on other grounds, 317 N.C. 164, 345 S.E.2d 365 (1986).

Meaning of "infamous" must be determined with reference to the degrading nature of the offense and not the measure of punishment. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

In determining whether an offense is "infamous" and shall be punished as a felony for that reason under subsection (b) of this section, the courts look to the nature of the offense. State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

What Is an "Infamous" Crime. — A crime is "infamous" within the meaning of the statute if it is an act of depravity, involves moral turpitude, and reveals a heart devoid of social duty and a mind fatally bent on mischief. State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

In determining whether a misdemeanor is an offense "done in secrecy and malice," the courts must apply a definitional test and determine whether both "secrecy and malice" are necessary or inherent elements of the offense. State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

Fact That Misdemeanor Is Infamous Affects Only Punishment. — Under North Carolina law a determination that a misdemeanor is infamous affects only the punishment. United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982).

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Anonymous or Threatening Letters. — Subsection (b) of this section and G.S. 14-394, relating to anonymous or threatening letters, set up different punishment levels for the same criminal act without discriminating against any class of defendants, and do not violate equal protection. State v. Glidden, 76 N.C. App. 653, 334 S.E.2d 101 (1985), rev'd on other grounds, 317 N.C. 557, 346 S.E.2d 470 (1986).

III. PARTICULAR OFFENSES.

Attempting to receive stolen property is not a crime of the same degree as attempted robbery, attempted burglary and an attempt to commit a crime against nature. Nor does the crime of attempted receipt of stolen property include secrecy, malice, deceit or intent to defraud as necessary elements. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Assaults. — Upon the ruling in State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900), overruled on other grounds, State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), G.S. 14-33, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation of this section. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

Conspiracy to Charge with Infanticide. — A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. State v. Jackson, 82 N.C. 565 (1880).

Conspiracy to violate the liquor law is a misdemeanor and punishable as at common law, that is, by fine or imprisonment, or both. State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

Larceny. — The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where an indictment charged larceny of property of the value of $200.00 (now $400.00) or less, but contained no allegation the larceny was from a building by breaking and entering, the crime charged was a misdemeanor for which the maximum prison sentence was two years, notwithstanding all the evidence tended to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Attempt to Obtain Property by False Pretense. — Any attempt to obtain property by false pretense necessarily is done with intent to deceive. By its plain language subsection (b) of this section makes any attempt to obtain property by false pretenses a felony. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

Destruction of Public Records. — A plea of guilty to an indictment charging defendant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Secretary of Revenue, was a confession of a felony under this section, although G.S. 14-76 designates such offense as a misdemeanor. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

An attempt to break and enter is a misdemeanor punishable under subsection (a) of this section. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Attempted Robbery. — An attempt to commit common-law robbery is an infamous crime. State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956); State v. Mann, 77 N.C. App. 654, 335 S.E.2d 772 (1985), modified on other grounds, 317 N.C. 164, 345 S.E.2d 365 (1986).

An attempt to commit robbery with firearms is an infamous offense. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964), overruled on other grounds, 320 N.C. 589, 359 S.E.2d 776 (1987).

While at common law an attempt to commit a felony was a misdemeanor, the Supreme Court has held that an attempt to commit the offense of common-law robbery is an infamous crime, and by virtue of subsection (b) has been converted into a felony. State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

An attempt to commit robbery is an infamous crime. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971).

Common-Law Robbery. — Common-law robbery is an infamous crime which consists of the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear. State v. Mann, 77 N.C. App. 654, 335 S.E.2d 772 (1985), modified on other grounds, 317 N.C. 164, 345 S.E.2d 365 (1986).

Solicitation to commit common-law robbery is an infamous crime within the meaning of this section. State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

Solicitation to Commit Murder. — Since it appears to be settled that conspiracy to murder is an infamous offense and punishable as a felony, and that solicitation to commit murder is but one step away from conspiracy to murder, sentence of not less than five nor more than 10 years was authorized by law. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

Solicitation to commit murder constitutes an "infamous" offense. United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982).

An attempt to commit murder is an infamous misdemeanor specifically elevated by subsection (b) to the status of a Class H felony. State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993).

Assault upon Female Child. — In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was 34 years of age, and also, that the assault was aggravated, shocking and outrageous, the accepted plea was for a misdemeanor under G.S. 14-33 and not for an "infamous offense" punishable as a felony, and judgment that the defendant be confined to the State's prison for not less than eight nor more than 10 years, was a violation of this section.

State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

Attempt to Commit Crime Against Nature. — While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the State's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the State's prison as a felony within the definition of this section. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1955).

An attempt to commit the crime against nature is an infamous act within the meaning of this section and is punishable as a felony. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature; solicitation to commit a crime against nature is therefore not an "infamous misdemeanor" under this section; and the superior court therefore did not have original jurisdiction of such a charge. State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980), cert. denied, 302 N.C. 633, 280 S.E.2d 451 (1981); State v. Mann, 77 N.C. App. 654, 335 S.E.2d 772 (1985), modified on other grounds, 317 N.C. 164, 345 S.E.2d 365 (1986).

Driving While License Permanently Revoked. — A maximum term of 18 months and a minimum term of 12 months does not exceed the statutory maximum for the crime of driving while license permanently revoked. Since only the minimum punishment of not less than one year is specified in G.S. 20-28(b), this statute must be read together with this section, applicable to motor vehicle misdemeanors contained in sections other than Article 3 of Chapter 20, to find the maximum term of imprisonment. State v. Wells, 59 N.C. App. 682, 298 S.E.2d 73 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

Transmitting Unsigned Threatening Letter. — The misdemeanor of transmitting an unsigned threatening letter in violation of G.S. 14-394 does not fall within any of the classes of misdemeanors made felonious by subsection (b) of this section. State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

Attempted Kidnapping. — To elevate the misdemeanor offense of attempted second degree kidnapping to a Class H felony under subsection (b), the indictment must specifically state that the offense was infamous, or done in secrecy and malice, or done with deceit and intent to defraud. State v. Bell, 121 N.C. App. 700, 468 S.E.2d 484 (1996).

§ 14-3.1. Infraction defined; sanctions.

(a) An infraction is a noncriminal violation of law not punishable by imprisonment. Unless otherwise provided by law, the sanction for a person found responsible for an infraction is a penalty of not more than one hundred dollars ($100.00). The proceeds of penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools.

(b) The procedure for disposition of infractions is as provided in Article 66 of Chapter 15A of the General Statutes. (1985, c. 764, s. 1; 1985 (Reg. Sess., 1986), c. 852, s. 17.)

CASE NOTES

Applied in Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000); N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003); McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004).

Cited in Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985); State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993).

§ 14-4. Violation of local ordinances misdemeanor.

(a) Except as provided in subsection (b), if any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor and shall be fined not more than five hundred dollars ($500.00). No fine shall exceed fifty dollars ($50.00) unless the ordinance expressly states that the maximum fine is greater than fifty dollars ($50.00).

(b) If any person shall violate an ordinance of a county, city, or town regulating the operation or parking of vehicles, he shall be responsible for an infraction and shall be required to pay a penalty of not more than fifty dollars ($50.00). (1871-2, c. 195, s. 2; Code, s. 3820; Rev., s. 3702; C.S., s. 4174; 1969, c. 36, s. 2; 1985, c. 764, s. 2; 1985 (Reg. Sess., 1986), c. 852, s. 17; 1991, c. 415, s. 1; c. 446, s. 1; 1993, c. 538, s. 8; c. 539, s. 9; 1994, Ex. Sess., c. 24, ss. 14(b), 14(c); 1995, c. 509, s. 133.1.)

Local Modification. — Jacksonville: 1979, c. 511; Mecklenburg: 1983, c. 118; Onslow: 1979, c. 511, s. 2; 1991, c. 245; city of Greensboro: 1987, c. 772; town of North Topsail Beach: 1979, c. 511, s. 2; 1991, c. 245.

Legal Periodicals. — For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

In General. — While the town or city government has no right to make criminal law, the legislature has made the violation of ordinances a criminal offense. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900); State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900), overruled on other grounds, Small v. Councilmen of Edenton, 146 N.C. 527, 60 S.E. 413 (1908); State v. Barrett, 243 N.C. 686, 91 S.E.2d 917 (1956).

Section makes violation of a municipal ordinance a criminal offense. Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964).

The violation of a valid municipal ordinance is a misdemeanor. Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964).

The legislature in enacting this section made criminal what would otherwise be civil penalties for violations of ordinances. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Prior to Section Violation Not Punishable. — Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. State v. Parker, 75 N.C. 249 (1876); School Dirs. v. City of Asheville, 137 N.C. 503, 50 S.E. 279 (1905).

Jurisdiction. — The superior court has no original jurisdiction to try indictments for violation of town ordinances. State v. White, 76 N.C. 15 (1877); State v. Threadgill, 76 N.C. 17 (1877).

Costs of Prosecutions. — The criminal offenses created by the violation of town ordinances under this section are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900)), overruled on other grounds, Small v. Councilmen of Edenton, 146 N.C. 527, 60 S.E. 413 (1908), and the city cannot be charged with the costs of such prosecutions. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900).

Ordinance Must Conform to State Law. — It is uniformly held that a town ordinance in violation of a valid State statute appertaining to the question is void. Shaw v. Kennedy, 4 N.C. 591 (1817); State v. Austin, 114 N.C. 855, 19 S.E. 919 (1894); State v. Beacham, 125 N.C. 652, 34 S.E. 447 (1899); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

And Violation of an Invalid Ordinance Is No Offense. — The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890), overruled on other grounds, State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Acting contrary to the provisions of a municipal ordinance is made a misdemeanor by this section. Notwithstanding the all-inclusive language of the statute, guilt must rest on the violation of a valid ordinance. If the ordinance is not valid, there can be no guilt. State v. McGraw, 249 N.C. 205, 105 S.E.2d 659 (1958).

Same — Burden on State. — Where the State failed to show that the original act of incorporation authorized the enactment of an ordinance, it failed to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. State v. Threadgill, 76 N.C. 17 (1877).

Upon the prosecution of a criminal action for the violation of a city ordinance under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890), overruled on other grounds, State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Failure to Prescribe Penalty. — The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. State v. Razook, 179 N.C.

708, 103 S.E. 67 (1920).

Where Fine Is Provided It Must Be Certain. — An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. State v. Irvin, 126 N.C. 989, 35 S.E. 430 (1900).

Provision for Arrest Void. — When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined $25.00 upon conviction thereof," it was held that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. State v. Earhardt, 107 N.C. 789, 12 S.E. 426 (1890).

Conviction for Fighting Held No Bar to Prosecution for Assault. — A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting was not a bar to a prosecution by the State for an assault. State v. Taylor, 133 N.C. 755, 46 S.E. 5 (1903).

Personal Notice to Offender Sufficient. — The requirement of the charter of a city or town that its ordinances shall be printed and published, was to bring such ordinances to the attention of the public, and where personal notice was given to an offender thereunder who afterwards committed the offense prohibited, the requirement of publication, etc., was not necessary for a conviction. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1920).

Defects in Warrant May Be Waived. — Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Form of Indictment. — It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. State v. Merritt, 83 N.C. 677 (1881); State v. Cainan, 94 N.C. 880 (1886).

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. State v. Cainan, 94 N.C. 880 (1886).

Fines Used to Maintain Public Schools. — All the fines collected upon prosecutions for violations of the criminal laws of the State, whether for violations of ordinances made criminal by this section, or by other criminal statutes belong to the common school fund of the county; they are thus appropriated by the North Carolina Constitution, and cannot be diverted or withheld from this fund without violating the State Constitution. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Same — Parking Violations. — Moneys voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine collected for breach of a State penal law and should be used exclusively for maintaining free public schools in the county pursuant to N.C. Const., Art. IX, § 7, since violation of a city ordinance is also a violation of this section, which makes the violation of a local ordinance a misdemeanor. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Applied in State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975); McCormick v. Hanson Aggregates Southeast, Inc., 164 N.C. App. 459, 596 S.E.2d 431 (2004); Shavitz v. City of High Point, 177 N.C. App. 465, 630 S.E.2d 4, 2006 N.C. App. LEXIS 1080 (2006).

Cited in State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951); Eastern Carolina Tastee Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962); State v. Fox, 262 N.C. 193, 136 S.E.2d 761 (1964); Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966); United Steelworkers of Am. v. Bagwell, 383 F.2d 492 (4th Cir. 1967); Bell v. Page, 271 N.C. 396, 156 S.E.2d 711 (1967); Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970); Clarke v. Kerchner, 11 N.C. App. 454, 181 S.E.2d 787 (1971); State v. Clemmons, 17 N.C. App. 112, 193 S.E.2d 290 (1972); Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980); Cauble v. City of Asheville, 66 N.C. App. 537, 311 S.E.2d 889 (1984); Cauble v. City of Asheville, 314 N.C. 598, 336 S.E.2d 59 (1985); Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000); Shavitz v. City of High Point, 270 F. Supp. 2d 702, 2003 U.S. Dist. LEXIS 11839 (M.D.N.C. 2003).

ARTICLE 2.

Principals and Accessories.

§§ 14-5, 14-5.1: Repealed by Session Laws 1981, c. 686, s. 2.

Cross References. — For present provisions as to punishment of accessories before the fact, see G.S. 14-5.2.

§ 14-5.2. Accessory before fact punishable as principal felon.

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B2 felony. (1981, c. 686, s. 1; 1994, Ex. Sess., c. 22, s. 6.)

Legal Periodicals. — For note on presence as a factor in aiding and abetting, see 35 N.C.L. Rev. 284 (1957).

For survey of 1980 criminal law in general, see 59 N.C.L. Rev. 1123 (1981).

For comment clarifying the law of parties in North Carolina by punishing accessories before the fact as principals, see 17 Wake Forest L. Rev. 599 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Practice and Procedure.
  A. In General.
  B. Indictment.
  C. Evidence.
  D. Instructions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the cases below were decided under former G.S. 14-5 and prior statutory provisions.*

Legislative Intent. — The North Carolina legislature abolished all distinctions between accessories before the fact and principals in the commission of felonies by enacting this section. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997).

Underlying Principle. — It is a well-established principle that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. State v. Simmons, 51 N.C. 21 (1858).

What Constitutes One a Party to an Offense. — A person is a party to an offense if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

History of Offense at Common Law. — Accessory before the fact was a common-law offense. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

At common law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or after the principal had been tried, convicted and sentenced. State v. Duncan, 28 N.C. 98 (1845); State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

At common law an accessory before the fact could only be convicted when tried at the same time as the principal, or after trial and conviction of the principal. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

In enacting G.S. 14-5, North Carolina recognized accessory before the fact as a substantive felony, making it no longer necessary to first convict the principal in order to convict an accessory. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967); State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976), decided under provisions of former § 14-5.

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. State v. Jarrell, 140 N.C. 391, 53 S.E. 137 (1906).

At common law, one who encouraged or aided another in committing a crime, but who was not himself present at the commission of the crime, was classified as an accessory before the fact, a separate offense. State v. Walden, 75 N.C. App. 79, 330 S.E.2d 271 (1985).

An Accessory Is Guilty of Natural or Probable Consequences. — An accessory is guilty of any other crimes committed by the principal which are the natural or probable consequence of the common purpose. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

Accessories before the fact, who do not actually commit the crime, and may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting. State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996), reh'g denied, 345 N.C. 355, 479 S.E.2d 210, cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997).

Cases Under Former §§ 14-5, 14-5.1, and 14-6 Still Applicable. — The language of this section indicates that the essential elements of the offense have not changed. The legislature merely abolished the difference in guilt and sentencing treatment between the principal to the felony and an accessory in repealing G.S. 14-5, 14-5.1 and 14-6 and replacing them with this section. Therefore, cases decided under the repealed statutes delineating the essential elements of accessory before the fact of felony are applicable to cases brought under the new statute. State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982).

Cases decided before the enactment of this section delineating the essential elements of accessory before the fact of felony are applicable to cases brought under this section. State v. Walden, 75 N.C. App. 79, 330 S.E.2d 271 (1985).

Establishing Theory of Acting in Concert. — Under the circumstances of this case, where victim was murdered in her own home, evidence of an unidentified latent fingerprint in addition to those of defendant supported the jury instruction concerning the theory of acting in concert. State v. Smart, 99 N.C. App. 730, 394 S.E.2d 475 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 520 (1991).

Acquittal of the named principal on charges of first-degree murder required, as a matter of law, that defendant's plea of guilty to accessory before the fact to second-degree murder be set aside; this rule prevailed whether the defendant, prior to the acquittal of the principal, has been tried and found guilty of a felony on the theory that he was an accessory before the fact, or has pled guilty to being an accessory before the fact to the felony. State v. Suites, 109 N.C. App. 373, 427 S.E.2d 318 (1993).

Fair Sentencing Act. — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A, the act resulted in revisions to other portions of the General Statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Applied in State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983); State v. Fletcher, 66 N.C. App. 36, 310 S.E.2d 787 (1984).

Cited in State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985); State v. Rowe, 81 N.C. App. 469, 344 S.E.2d 574 (1986); State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986); State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987); State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992); State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

II. ELEMENTS OF THE OFFENSE.

Who Is Accessory Before the Fact. — An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

An accessory before the fact is one who furnishes the means to carry on the crime, whose acts bring about the crime through the agency of or in connection with the perpetrators, who is a confederate, who instigates a crime. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

For a defendant, not actually or constructively present at the scene, to be criminally responsible for the acts of others as an accessory before the fact, it must be shown that he counseled, or procured, or commanded the others to perpetrate the crime. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded. State v. Hewitt, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

An accessory before the fact is one who procures, counsels, commands or encourages the principal to commit a crime. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

In this State, one who procures another to commit murder is an accessory before the fact to murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Under this section a defendant not actually or constructively present at the scene is guilty and punishable as a principal if it be shown that he counseled or procured or commanded the others to perpetrate the crime. State v. Bradley, 67 N.C. App. 81, 312 S.E.2d 519 (1984).

To convict a defendant on the theory of being an accessory before the fact, the State must also show that the principal committed the crime. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

To convict a defendant on the theory of being an accessory before the fact, the State must also show that the principal committed the crime. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

An accessory before the fact is one who is absent from the scene when the crime was committed but who procured, counselled, commanded or encouraged the principal to commit it. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

In order to convict defendant for murder in the first degree as an accessory before the fact, the State must prove beyond a reasonable doubt that (1) the principal committed murder in the first degree; (2) defendant was not present when the murder occurred; and (3) defendant procured, counseled or commanded murderer to commit the crime. State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991).

The essential elements of accessory before the fact to murder are (i) the defendant must have counseled, procured, commanded, encouraged, or aided the principal in the commission of the murder; (ii) the principal must have committed the murder; and (iii) the defendant must not have been present when the murder was committed. State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996).

Solicitation to commit murder is a lesser included offense of murder as an accessory before the fact. State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996).

The concept of accessory before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

There May Be Accessories Before the Fact to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Intent May Be Inferred. — The intent to aid or the showing of a felonious purpose may be inferred from the defendant's actions and his relation to the perpetrators. There need be no express words communicating the intent to aid or indicating that defendant shared a felonious purpose. State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

Elements of crime of being accessory after the fact are separate and distinct from those involved in crimes of being principal or accessory before the fact. State v. Cabey, 307 N.C. 496, 299 S.E.2d 194 (1983).

Conspiracy and accessory before the fact are separate crimes which do not merge, because accessory before the fact requires actual commission of the contemplated felony, while conspiracy does not, and conspiracy requires an agreement while an accessory need not agree to anything. State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986), rev'd on other grounds, 320 N.C. 626, 359 S.E.2d 774 (1987).

Conviction for Conspiracy to Commit Murder Did Not Merge into Conviction for Murder by Acting in Concert. — Defendant's conviction for conspiracy to commit murder did not merge into her conviction for murder by acting in concert as the requirement of an agreement, while necessary to sustain a conviction for conspiracy, was not a necessary element for murder by acting in concert. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Actual or constructive presence is no longer required to prove a crime under an aiding and abetting theory. State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), cert. denied, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

What Must Be Proven. — The elements necessary to be proved in order to sustain a conviction for accessory before the fact were: (1) that defendant counseled, procured or commanded the principal to commit the offense; (2) that defendant was not present when the principal committed the offense; and (3) that the principal committed the offense. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977); State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976); State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982).

There were several things that must have concurred in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961); State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

Causation of a crime by an alleged accessory is not "inherent" in the accessory's counsel, procurement, command or aid of the principal perpetrator. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987), disavowing statement to the contrary in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976).

The elements of accessory before the fact to murder are as follows: (1) Defendant must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim; (2) the principal must have murdered the victim; and (3) defendant must not have been present when the murder was committed. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

What Constitutes Counseling, Procuring and Commanding. — At a meeting of a board of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted recommending that unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within 60 days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. In reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, therefore, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of former G.S. 14-5, making accessory before the fact a substantive crime. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

The term "counsel" as used in former G.S. 14-5 describes the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done. State v. Hewitt, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

The meaning of the word "command," as applied to the case of principal and accessory is, where a person, having control over another, as a master over his servant, orders a thing to be done. State v. Mann, 2 N.C. 4 (1891).

What Must Be Proven — Murder. — In cases where a defendant is prosecuted as an accessory before the fact to murder, the State must prove beyond a reasonable doubt that the actions or statements of the defendant somehow caused or contributed to the actions of the principal, which in turn caused the victim's death. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

The elements of accessory before the fact to murder are as follows: (1) Defendant must have counseled, procured, commanded, encouraged, or aided the principal to murder the victim; (2) the principal must have murdered the victim; and (3) defendant must not have been present when the murder was committed. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

When Defendant Is "Present". — In order to determine whether a defendant is present, the court must determine whether "he is near enough to render assistance if need be and to encourage the actual perpetration of the felony." State v. Glaze, 37 N.C. App. 155, 245 S.E.2d 575 (1978).

Constructive Presence. — The actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. A person is deemed to be constructively present if he is near enough to render assistance if need be and to encourage the actual perpetration of the felony. State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

Evidence tending to show that defendant drove the automobile that carried men to a store, that to the knowledge of defendant the men entered the store, armed, that defendant stayed with the car, that later they were together when police stopped them and that defendant told police where they could find the stolen money, was sufficient to support an inference that defendant was constructively present at the time of the robbery. State v. Torain, 20 N.C. App. 69, 200 S.E.2d 665 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 278 (1974).

The actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. A guard who has been posted to give warning or the driver of a "get-away" car may be constructively present at the scene of a crime although stationed a convenient distance away. State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

Remaining in Vicinity of Offense. — A person may be guilty as an aider and abettor if that person accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense. State v. Pryor, 59 N.C. App. 1, 295 S.E.2d 610 (1982).

Larceny conviction was valid where the evidence showed that defendant procured the commission of the larceny, because the distinction that formerly existed between principals and accessories before the fact has been abolished. State v. Cartwright, 81 N.C. App. 144, 343 S.E.2d 557 (1986).

Where the idea of stealing from victim came from defendant who told the principals that he wanted tools, that victim's shop and mobile home were always left unlocked and that the keys were in victim's car and truck, there was sufficient evidence to find the defendant guilty of accessory before the fact to first-degree burglary, accessory to the fact to felonious entering, and accessory before the fact to felonious larceny. State v. Marr, 342 N.C. 607, 467 S.E.2d 236 (1996).

Evidence of Procuring and Participating Sufficient to Deny Motion to Dismiss. — Where defendant took the principals to a dwelling at night, armed them and told them to "rough up" the inhabitants, the trial court did not err in denying defendant's motion to dismiss or to set aside his conviction of first-degree burglary on grounds that he neither procured nor participated in breaking and entering. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

Trafficking. — Defendants may be convicted of the substantive offense of trafficking in cocaine if they were accessories before the fact. State v. Agudelo, 89 N.C. App. 640, 366 S.E.2d 921 (1988), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

III. PRACTICE AND PROCEDURE.

A. In General.

Jurisdiction Where Accessorial Acts Occur Outside State. — This State may constitutionally assert jurisdiction over a defendant who commits the crime of accessory before the fact to a felony committed within the State when the counselling, procuring or commanding took place without the State. State v. Darroch, 305 N.C. 196, 287 S.E.2d 856, cert. denied, 457 U.S. 1138, 102 S. Ct. 2969, 73 L. Ed. 2d 1356 (1982).

Prior Conviction of Principals Unnecessary. — Under the provisions of former G.S. 14-5 it was not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888); State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

It is not necessary to first convict principals in order to convict an accessory to a crime. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

But Guilt of Principal Must Be Established Beyond Reasonable Doubt. — In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt. State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

No Conviction of Accessory Where Principal Is Acquitted. — Former G.S. 14-5 did not change the common-law rule that an acquittal of the principal was an acquittal of the accessory. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

Because indictment charging defendant with assaulting victim specifically named as principal the person whom the defendant aided and abetted, and the principal was acquitted of assaulting the victim at a subsequent separate trial, because the named principal was acquitted, defendant's conviction for aiding and abetting that assault had to be vacated. State v. Byrd, 122 N.C. App. 497, 470 S.E.2d 548 (1996).

Effect of Acquittal of One of Several

Principals. — Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

Failure to Raise Acquittal of Principal on Appeal. — Where indictment charging defendant with robbery was amended at the close of evidence to allege that defendant acted as an aider and abettor, principal was acquitted of robbery at subsequent separate trial, but defendant did not argue on appeal that his conviction for robbery should be reversed on the basis that principal was acquitted of robbery, the appellate court would not address the issue and defendant's conviction for aiding and abetting robbery was not reversed. State v. Byrd, 122 N.C. App. 497, 470 S.E.2d 548 (1996).

New Trial Where Conviction of Principal Is Vacated. — Where the conviction of the principal has been vacated by an order for a new trial, a new trial as to the alleged abettor defendant must also be ordered. State v. Spencer, 18 N.C. App. 499, 197 S.E.2d 232 (1973).

Sentences Imposed Need Not Be Equal. — There is no rule of law that sentences imposed upon defendants for a crime jointly committed by them must be equal. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Sentences for Capital Felonies. — Although it was error for the trial court to fail to submit the special question to the jury regarding the basis of its verdict on the capital murder charge, since under the law in effect prior to October 1, 1994, both a Class A felony and a Class B felony required mandatory life sentences, the defendant was not prejudiced by the trial court's error. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

B. Indictment.

What Indictment Must Aver. — It is not necessary to allege maliciousness in the indictment. State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978).

Allegation of Underlying Felony. — In order to state a violation of former G.S. 14-5, the indictment had to allege an underlying felony. State v. Hanson, 57 N.C. App. 595, 291 S.E.2d 912 (1982).

Indictment Charging Principal Felony Is Sufficient. — In cases controlled by this section, an indictment charging the principal felony will support trial and conviction as an accessory before the fact. State v. Gallagher, 313 N.C. 132, 326 S.E.2d 873 (1985).

C. Evidence.

The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. State v. Chittem, 13 N.C. 49 (1828).

But not until judgment has been rendered on the verdict. State v. Duncan, 28 N.C. 98 (1845).

Sufficiency of Evidence. — Testimony that the accused had asked the person convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards at the place she designated, was sufficient for a conviction of murder as an accessory before the fact. State v. Jones, 176 N.C. 702, 97 S.E. 32 (1918).

Evidence was insufficient to convict defendant of conspiracy to embezzle and embezzlement based on the actions of defendant's spouse in obtaining blank checks from the family business and using defendant's parent's signature stamp to forge nearly one-half million dollars worth of checks, all without permission, because the spouse had not received the blank checks that were forged in the course of employment or by the terms of employment and it followed that because the State had failed to prove that the spouse was guilty of embezzlement, defendant could not be convicted of aiding and abetting embezzlement without proof that an embezzlement occurred. State v. Weaver, 160 N.C. App. 613, 586 S.E.2d 841, 2003 N.C. App. LEXIS 1931 (2003), aff'd, — N.C. —, 607 S.E.2d 599 (2005).

D. Instructions.

Instruction on Elements of Offense. — The State offered substantial evidence of each and every element of, and the judge properly instructed the jury on, accessory before the fact of felony, i.e., that: (1) the defendant counseled, procured or commanded the principal(s) to commit the offense; (2) the defendant was not present when the principal(s) committed the offense; and (3) the principals committed the offense. State v. Walden, 75 N.C. App. 79, 330 S.E.2d 271 (1985).

Instruction on Conspiracy. — Evidence sufficient to show defendant's involvement in a criminal conspiracy does not itself establish defendant's liability as a party to the substantive felony committed as a result of the conspiracy; it is reversible error for the court to so instruct the jury. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

Instructions on Heinous, Atrocious or Cruel Aggravating Circumstance Applied to Accessory. — Court rejected defendant's contention that the submission of the especially heinous, atrocious, or cruel aggravating circumstance violated his rights under the North Carolina and United States Constitutions because it impermissibly allowed the jury to find the existence of an aggravating circumstance based solely upon his codefendants' actions; although defendant was not present when his grandmother who adopted him and his nephew were stabbed and burned to death, defendant admitted to planning the murders and enlisting his codefendants to perform them. State v. Brewington, 352 N.C. 489, 532 S.E.2d 496, 2000 N.C. LEXIS 616 (2000), cert denied, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001).

Instruction on Second Degree Murder Held Error. — Where the state sought to prove murder by use of the "accessory before the fact" theory, the trial court erred in submitting second degree murder as a possible jury verdict since on the evidence presented the jury rationally could have only either convicted or acquitted her of first degree murder. State v. Arnold, 98 N.C. App. 518, 392 S.E.2d 140 (1990), aff'd, 329 N.C. 128, 404 S.E.2d 822 (1991).

Where trial court's instructions made no mention of the necessary causal connection between defendant's alleged statements and principal's actions, simply stating that defendant should be found guilty if the jury found that principal murdered victim and that defendant "knowingly instigated, counseled or procured" the murder, the jury was not adequately instructed with respect to the chain of causation necessary to a conviction of accessory before the fact to murder. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

No Error in Declining to Submit Accessory Before the Fact as Lesser Included Offense. — Defendant was at least constructively present when the killing occurred; therefore, it was not error to decline to submit to the jury as a possible verdict accessory before the fact of murder as a lesser included offense. State v. Willis, 332 N.C. 151, 420 S.E.2d 158 (1992).

The defendant was not entitled to an instruction on accessory before the fact, since he was constructively present at the crime scene, where he dropped the perpetrator off at the scene of the robbery-murder knowing that a crime of some type was to take place, and he stayed to help the perpetrator flee the scene. State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998).

§ 14-6: Repealed by Session Laws 1981, c. 686, s. 2.

Cross References. — For present provisions as to punishment of accessories before the fact, see G.S. 14-5.2.

§ 14-7. Accessories after the fact; trial and punishment.

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a crime, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such crime whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. Unless a different classification is expressly stated, that person shall be punished for an offense that is two classes lower than the felony the principal felon committed, except that an accessory after the fact to a Class A or Class B1 felony is a Class C felony, an accessory after the fact to a Class B2 felony is a Class D felony, an accessory after the fact to a Class H felony is a Class 1 misdemeanor, and an accessory after the fact to a Class I felony is a Class 2 misdemeanor. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the State; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (1797, c. 485, s. 1, P.R.; 1852, c. 58; R.C., c. 34, s. 54; Code, s. 978; Rev., s. 3289; C.S., s. 4177; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(p).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

In General. — An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

An accessory after the fact under this section is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such other, the felon, or in any manner aids him to escape arrest or punishment. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

"Accessory After the Fact" Is a Substantive Crime. — Accessory after the fact is a substantive crime. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Armed robbery under G.S. 14-87 differs in fact and in law from accessory after the fact under this section. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

The offense of being an accessory after the fact to manslaughter is a substantive felony offense. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

And Not a Lesser Degree of the Principal Crime. — See State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Hence, Participant in Felony Cannot Be Accessory. — A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Nor Can Acquittal as Accessory Bar Prosecution for Principal Crime. — An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Effect of Principal's Acquittal on an Accessory After the Fact. — This section does not permit the conviction of an accessory after the fact to a felony committed by a named principal if that named principal is acquitted. State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711, cert. denied, 323 N.C. 479, 373 S.E.2d 874 (1988).

Accessory Before and After the Fact Distinguished. — The elements of the crime of being an accessory after the fact are separate and distinct from those involved in the crimes of being a principal or an accessory before the fact. State v. Cabey, 307 N.C. 496, 299 S.E.2d 194 (1983).

Elements of Offense. — In order to convict a defendant of being an accessory after the fact under this section, the State must prove the following: (1) the felony has been committed by the principal; (2) the alleged accessory gave personal assistance to that principal to aid in his escaping detection, arrest, or punishment; and (3) the alleged accessory knew the principal committed the felony. State v. Duvall, 50 N.C. App. 684, 275 S.E.2d 842, rev'd on other grounds, 304 N.C. 557, 284 S.E.2d 495 (1981).

Under this section, the State had to prove three things in its prosecution of defendant as an accessory after the fact: (1) the principal committed a felony; (2) the alleged accomplice personally aided the principal in his attempts to avoid criminal liability by any means calculated to assist him in doing so; and (3) the accomplice gave such help with knowledge that the principal had committed a felony. State v. Fearing, 304 N.C. 499, 284 S.E.2d 479 (1981).

In order to prove a person was an accessory after the fact three essential elements must be shown: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally. State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982).

In a prosecution for accessory after the fact under this section, the State need only show that the defendant knew: (1) That a felony had been committed; (2) that the principal had committed it; and (3) that the defendant rendered assistance to the principal personally. State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 513, 329 S.E.2d 400; 313 N.C. 610, 332 S.E.2d 82 (1985).

Same — Robbery. — On a charge of accessory after the fact to robbery the State must show: (1) robbery, (2) the accused knew of it and (3) possessing that knowledge, he assisted the robber in escaping detection, arrest and punishment. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

Same — Rape. — To convict parents of the accused as accessories to the crime of rape, the State had the burden of proving beyond a reasonable doubt these essentials of the offense charged, namely: (1) That the son had actually committed the alleged crime of rape; (2) that the parents knew that the son had committed the alleged crime of rape; and (3) that the parents assisted the son in his efforts to avoid detection, arrest and punishment. State v. Overman, 284 N.C. 335, 200 S.E.2d 604 (1973).

Same — Manslaughter. — To constitute a person an accessory after the fact to manslaughter, these essentials must appear: (1) manslaughter must have been committed; (2) the accused must know that manslaughter has been committed by the person received, relieved or assisted; (3) the accessory must render assistance to the felon personally. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

One cannot become an accessory after the fact until the offense has become an accomplished fact. — Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948).

The crime of accessory after the fact has its beginning after the principal offense has been committed. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Joinable Offenses. — Being an accessory after the fact and aiding and abetting are joinable offenses. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

The offenses of accessory after the fact of a felony and being an aider and abettor to that felony are joinable offenses for purposes of indictment and trial, even though a defendant cannot be convicted of both. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

Aiding and Abetting as Aggravating Factor. — When a defendant pleads guilty to being an accessory after the fact of a crime, should the trial court find by a preponderance of the evidence that the defendant aided and abetted in the commission of that crime, it may use this factor in aggravation of defendant's sentence on the accessory charge. State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991), aff'd, 331 N.C. 379, 416 S.E.2d 3 (1992).

It is not necessary that the aid given by the accessory after the fact be effective to enable the felon to escape all or a part of his punishment. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

Effect of Directed Verdict to Principal Offense. — Since the crime of accessory after the fact has its beginning after the principal offense has been committed, a directed verdict of not guilty of armed robbery does not decide the issue of whether the defendant joined the criminal scheme after the robbery was complete. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A directed verdict of not guilty of armed robbery only removes the issues of whether defendant participated as a principal robber or whether he aided and abetted in the commission of the robbery. The possibility remains that after the robbery was committed, the defendant assisted the felons by transporting them in his car from the scene of the crime. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A directed verdict of not guilty of armed robbery foreclosed the State from subsequent prosecutions of defendant for armed robbery or for any lesser included offenses of armed robbery. But accessory after the fact of armed robbery is not a lesser included offense of armed robbery. Therefore, general double jeopardy motions would not bar the trial of defendant on charges of accessory after the fact to armed robbery. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A receiver of stolen goods is not an accessory after the fact. State v. Tyler, 85 N.C. 569 (1881).

Accepting part of the proceeds of a crime does not make one an accessory after the fact; rather, it constitutes the crime of receiving stolen goods. State v. Lewis, 58 N.C. App. 348,

293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1983).

Evidence Prejudicial to Both Charged Felon and Accessory After the Fact. — Where the court found prejudicial error in the proof that an alleged murderer committed the charged felony, and therefore awarded her a new trial, and the State had used the same evidence to also prove defendant was an accessory-after-the-fact, defendant was also entitled to a new trial. State v. Robey, 91 N.C. App. 198, 371 S.E.2d 711, cert. denied, 323 N.C. 479, 373 S.E.2d 874 (1988).

Fact that the perpetrator of an offense pleaded guilty to a lesser-included offense did not exculpate defendant on a charge of accessory after the fact. State v. McGee, — N.C. App. —, 676 S.E.2d 662, 2009 N.C. App. LEXIS 677 (2009).

Denial of motion to dismiss charge of accessory after the fact to voluntary manslaughter was proper where the principal and a witness testified that defendant suggested evading punishment by falsely claiming that the victim had attempted to rape defendant. State v. Jordan, 162 N.C. App. 308, 590 S.E.2d 424, 2004 N.C. App. LEXIS 125 (2004).

Evidence Held Sufficient. — The state presented sufficient evidence of the elements of accessory after the fact to withstand a motion to dismiss. State v. Barnes, 116 N.C. App. 311, 447 S.E.2d 478 (1994).

Defendant's conviction for accessory after the fact to second-degree murder was supported by evidence showing defendant personally helped the principal avoid arrest, including testimony about the perpetrator's guilt,circumstantial evidence linking the perpetrator to a car used in the crime, and the perpetrator's guilty plea, and testimony that defendant learned the perpetrator had "gotten his stripes" by attacking the victim, that defendant offered $2,000 for use of a car to leave town with the perpetrator, and that they left town. State v. Brewington, — N.C. App. —, 635 S.E.2d 512, 2006 N.C. App. LEXIS 2133 (2006).

Evidence Held Insufficient. — Evidence that defendant removed his truck from the scene of the crimes after the truck had been used to facilitate the crimes was insufficient to support verdict of accessory after the fact of breaking or entering and larceny. State v. Fie, 80 N.C. App. 577, 343 S.E.2d 248 (1986), rev'd on other grounds, 320 N.C. 626, 359 S.E.2d 774 (1987).

Evidence that witness was accessory after the fact did not subject her testimony to rules relating to accomplice testimony. State v. Cabey, 307 N.C. 496, 299 S.E.2d 194 (1983).

Instruction Not Warranted. — The trial court did not err in failing to instruct as to one defendant on the offenses of accessory before and accessory after the fact to the crimes of armed robbery and murder where the evidence showed that both defendants were present at the scene and were acting together in the commission of the armed robbery, and that the murders occurred in furtherance of their common purpose to commit this crime or as a natural consequence thereof. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Instruction Warranted. — It was not plain error for a trial court to instruct on the offense of accessory after the fact to second-degree murder because the state presented no evidence about what may have transpired between the victim and the principal offender before the principal shot the victim, and while physical evidence could have supported a finding of premeditation and deliberation, there was also testimony that the witness thought the victim had been "jumped," supporting a reasonable inference that the attack was spontaneous. State v. Brewington, — N.C. App. —, 635 S.E.2d 512, 2006 N.C. App. LEXIS 2133 (2006).

Applied in State v. Poole, 25 N.C. App. 715, 214 S.E.2d 774 (1975).

Cited in State v. Carrington, 35 N.C. App. 53, 240 S.E.2d 475 (1978); State v. Duvall, 304 N.C. 557, 284 S.E.2d 495 (1981); State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989); State v. Suites, 109 N.C. App. 373, 427 S.E.2d 318 (1993); State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (1994); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

ARTICLE 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1; 1971, c. 1231, s. 1; 1979, c. 760, s. 4; 1981, c. 179, s. 10.)

Legal Periodicals. — For survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For note, "The Treatment of Foreign Country Convictions As Predicates for Sentence Enhancement Under Recidivist Statutes," see 44 Duke L.J. 134.

Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes, see 24 Campbell L. Rev. 115 (2001).

CASE NOTES

Enhanced Punishment Is Constitutional. — The Legislature is not constitutionally prohibited from enhancing punishment for habitual offenders. State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

The Legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment. State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

The habitual felon provisions of G.S. 14-7.1 et seq. (the Habitual Felon Act) do not violate N.C. Const., Art. I, § 6. State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000); State v. Skipper, 146 N.C. App. 532, 553 S.E.2d 690, 2001 N.C. App. LEXIS 984 (2001).

Defendant's constitutional challenges to his sentence as an habitual felon failed because (1) the North Carolina Habitual Felon Act was not violative of the Separation of Powers Clause; (2) there was no double jeopardy infirmity inherent in the Habitual Felon Act as applied in conjunction with the North Carolina Structured Sentencing Act; and (3) the state appellate court and the state supreme court have rejected constitutional challenges to the Habitual Felon Act based on allegations of cruel and unusual punishment. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

Procedures Are Constitutional. — The procedures set forth in G.S. 14-7.1 through 14-7.6 comport with the defendant's federal and state constitutional guarantees. State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

Purpose. — The primary purpose of a recidivist statute is to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense, but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. State v. Thomas, 82 N.C. App. 682, 347 S.E.2d 494 (1986), cert. denied, 320 N.C. 637, 360 S.E.2d 102 (1987); State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Persons Intended to Be Affected. — The manifest intent of the General Assembly in enacting the Habitual Felon Act was to insure lengthier sentences for those persons who repeatedly violate the criminal laws of this State. Nowhere in the Act is there any indication that the Act was intended to apply only to those persons who repeatedly violate the same criminal law, and the court declined to write any such requirement into the law. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

Being an habitual felon is not a crime but is a status, the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Being an habitual felon is not a substantive crime. State v. Thomas, 82 N.C. App. 682, 347 S.E.2d 494 (1986), cert. denied, 320 N.C. 637, 360 S.E.2d 102 (1987).

Being an habitual felon is not a crime but is a status. The status itself, standing alone, will not support a criminal sentence, and a court may not treat the violation of the Habitual Felon Act as a substantive offense. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Because this section simply defines certain persons to be habitual felons, who, as such, are subject to greater punishment for criminal offenses, being an habitual felon is not a crime and cannot support, standing alone, a criminal sentence; rather, being an habitual felon is a status justifying an increased punishment for the principal felony. State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610, cert. denied, 337 N.C. 805, 449 S.E.2d 751 (1994).

Being an habitual felon is not a crime but is a status, which subjects the individual subsequently convicted of a crime to increased punishment for that crime. State v. Patton, 119 N.C. App. 229, 458 S.E.2d 230 (1995), rev'd on other grounds, 342 N.C. 633, 466 S.E.2d 708 (1996).

Trial court erred in imposing a habitual felon sentence in a separate judgment from principal felony convictions, and directing that the latter run at the expiration of the habitual felon sentence; on remand, the court should calculate defendant's prior record level pursuant to G.S. 15A-1340.14 and impose sentences upon the "underlying felonies as . . . Class C felonies." State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000).

Failure to Include Status in Indictment. — Trial court had jurisdiction to try the defendant as habitual felon even though indictments for the underlying felonies did not charge the defendant with being a habitual felon; the principal felony indictment did not need to refer to the defendant's alleged status as a habitual offender and defendant received adequate notice by separate indictment of the State's intent to prosecute her as a habitual felon. State v. Sanders, 95 N.C. App. 494, 383 S.E.2d 409, cert. denied, 325 N.C. 712, 388 S.E.2d 470 (1989).

Sufficiency of Indictment. — Where defendant did not dispute that his habitual felony indictment included each element specified in G.S. 14-7.3, the indictment was facially valid; defendant's claim that there was a variance between the indictment and the proof offered in support of the indictment should have been raised by a motion to dismiss and was waived by his guilty plea. State v. McGee, 175 N.C. App. 586, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006), review denied, appeal dismissed, 360 N.C. 542, 634 S.E.2d 891 (2006).

State presented substantial evidence that defendant had attained the status of habitual felon as each of the three judgments introduced by the state listed the name of defendant as the same name by which defendant was charged in the latest indictment and defendant introduced no evidence to rebut that prima facie showing by the state. State v. Tyson, 189 N.C. App. 408, 658 S.E.2d 285, 2008 N.C. App. LEXIS 652 (2008).

Indictment Held Sufficient. — Defendant contended that because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon; however, the habitual felon indictment alleging a prior conviction for felony possession with intent to manufacture, sell, or deliver a Schedule I controlled substance, in addition to two other felony convictions, was sufficient notice under North Carolina and case law. Additionally, because there was no defect in the indictment, the trial court had jurisdiction to sentence defendant as an habitual felon under G.S. 14-7.1 and G.S. 14-7.3. State v. McIlwaine, 169 N.C. App. 397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

Although defendant's habitual felon indictment predated defendant's indictment for possessing stolen property, habitual felon indictment was ancillary to the possessing stolen property charges and complied with G.S. 14-7.1. State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003).

Conviction on Predicate Felonies. — Defendant's argument, that he was not convicted for purposes of G.S. 14-7.1 until he was sentenced for the first predicate felony, and, therefore, he committed the second felony before he was "convicted" of the first felony, did not challenge the sufficiency of the indictment on its face, and thus defendant's guilty plea waived this argument; in any event, "conviction" referred to the jury's or factfinder's guilty verdict. State v. McGee, 175 N.C. App. 586, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006), review denied, appeal dismissed, 360 N.C. 542, 634 S.E.2d 891 (2006).

Separate Hearing to Determine Status Not Required. — The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony; the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

A separate habitual felon indictment is not required for each substantive felony indictment. State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996).

This Article does not authorize an independent proceeding to establish a defendant's status as an habitual felon. One must be charged as an habitual felon prior to the entry of a plea or a conviction on the substantive offense. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

Properly construed, this article clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the State seeks to establish that a defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

Admission of Habitual Felon Status. — Where admission of evidence showing that defendant previously had been adjudicated an habitual felon could not have affected the outcome of defendant's habitual felon proceeding, such evidence was not improperly admitted. State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

The prosecution may not use the conviction of the substantive felony to satisfy the requirements of this article. Simply stated, a person may not be indicted as an habitual felon until he is indicted for his fourth felony offense. Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983).

1973 Plea of Nolo Contendere. — Sentence entered in 1973 (before the enactment of G.S. 15A-1022), pursuant to plea of nolo contendere was not conviction for purposes of this section. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

A no contest plea is a "conviction" within the meaning of this section. State v. Jackson, 128 N.C. App. 626, 495 S.E.2d 916 (1998), review dismissed, 349 N.C. 287, 507 S.E.2d 37 (1998).

"Conviction", in the context of this section, includes final judgments entered upon the entry of a no contest plea, provided the no contest plea was entered after July 1, 1975. State v. Jackson, 128 N.C. App. 626, 495 S.E.2d 916 (1998), review dismissed, 349 N.C. 287, 507 S.E.2d 37 (1998).

Failure to be Present. — In light of the fact that defendant had waived his right to be at his trial on drug charges due to his unexplained absence from the court, there was no error on the part of the trial court with continuing with the habitual offender portion of defendant's trial since he was informed of the previous convictions the State intended to use and was given a fair opportunity to either admit or deny them or remain silent. State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612, 2007 N.C. App. LEXIS 2109 (2007).

Fair Sentencing Act. — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For discussion of the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

Structured Sentencing Act. — The Habitual Felon Act, G.S. 14-7.1 to 14-7.6 is different than the Structured Sentencing Act, G.S. 15A-1340.10 to 15A-1340.23, but does not conflict with that act; the Habitual Offender Act elevates a convicted person's status within structured sentencing so that the person is eligible for a longer minimum and maximum sentence. State v. Parks, 146 N.C. App. 568, 553 S.E.2d 695, 2001 N.C. App. LEXIS 982 (2001), cert. denied, appeal dismissed, 355 N.C. 220, 560 S.E.2d 355 (2002), cert. denied, 537 U.S. 832, 123 S. Ct. 140, 154 L. Ed. 2d 49 (2002).

The Structured Sentencing Act, G.S. 15A-1340.10 to 15A-1340.23 may be applied together with the Habitual Felon Act, G.S. 14-7.1 to 14-7.6, as long as different convictions justify the application of each. State v. Parks, 146 N.C. App. 568, 553 S.E.2d 695, 2001 N.C. App. LEXIS 982 (2001), cert. denied, appeal dismissed, 355 N.C. 220, 560 S.E.2d 355 (2002), cert. denied, 537 U.S. 832, 123 S. Ct. 140, 154 L. Ed. 2d 49 (2002).

Combined use of the Habitual Felon Act, G.S. 14-7.1 et seq., and the Structured Sentencing Act, G.S. 15A-1340.10 et seq., when imposing a sentence on an habitual felon, was not a violation of double jeopardy. State v. Cates, 154 N.C. App. 737, 573 S.E.2d 208, 2002 N.C. App. LEXIS 1515 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 897 (2003), cert. denied, 540 U.S. 846, 124 S. Ct. 121, 157 L. Ed. 2d 84 (2003).

Basis of Sentencing Habitual Felon. — In sentencing a habitual felon, the duration of the sentence is based not only on the defendant's most recent offense, but on his past criminal conduct as well. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

Consideration of Aggravating Factors. — The sentencing court can rely on certain prior criminal convictions to aggravate a current sentence; however, the court cannot consider as separate aggravating factors both the status of being an habitual felon and the felonies underlying the habitual felon adjudication. State v. Kirkpatrick, 345 N.C. 451, 480 S.E.2d 400 (1997).

Gross disproportionality principle applied to habitual felon sentencing; however, a prison sentence of 168 to 211 months for obtaining property by false pretenses was not grossly disproportionate where the predicate felonies were serious, included at least one violent offense, and the current charges arose out of defendant's use of a counterfeit check and false account scheme to obtain vehicles valued at $42,998 and $13,582. State v. Clifton, 158 N.C. App. 88, 580 S.E.2d 40, 2003 N.C. App. LEXIS 935 (2003), cert. denied, 357 N.C. 463, 586 S.E.2d 266 (2003).

Sentence on Conviction as Habitual Felon. — Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Sentence Enhancement. — The State did not present substantial evidence that third conviction relied upon to enhance sentence as a habitual felon was a felony, where State presented it's evidence regarding the questioned offense through a court clerk who read the contents of an out of state indictment and judgment for the offense, the indictment did not charge defendant with felonious possession of stolen property, and did not recite that defendant pled guilty to a felony or was sentenced as a felon, and there was no certification from any official that the offense to which defendant pled was a felony in that state at the time. State v. Lindsey, 118 N.C. App. 549, 455 S.E.2d 909 (1995).

State's use of defendant's prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. State v. Hall, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

Evidence Insufficient to Establish Habitual Offender Status. — Defendant's sentencing as a habitual offender required reversal based on the order reversing defendant's conviction for felony assault with a deadly weapon on a government official because defendant then lacked the criminal history to support the habitual offender enhancement. State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29, 2007 N.C. App. LEXIS 1978 (2007).

Use of Prior Convictions. — Defendant's prior convictions will either serve to establish his status as an habitual felon pursuant to G.S. 15-7.1 or to increase his prior record level pursuant to G.S. 15A-1340.14(b)(1-5); the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time. State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996).

Section 14-7.6 does not prohibit the use of convictions used to establish the defendant's status as an habitual offender to assign points pursuant to G.S. 15A-1340(b)(6) and (b)(7), because these provisions address the gravity and circumstances of the offense, rather than the mere existence of a prior offense. State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996).

Where defendant's prior convictions for possession of cocaine were defined by G.S. 90-95(d)(2) as misdemeanors punishable as felonies, they could not support the charges of possession of a firearm by a felon and being a habitual felon under G.S. 14-415.1 and G.S. 14-7.1. State v. Sneed, 161 N.C. App. 331, 588 S.E.2d 74, 2003 N.C. App. LEXIS 2050 (2003).

Habitual offender charge was supported by a judgment, signed by the presiding judge on the uniform citation form and included in the record on appeal and two other charges which had been consolidated for judgment but which were two separate offenses under G.S. 20-138.5. State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261, 2004 N.C. App. LEXIS 1018 (2004).

Defendant's prior conviction for possession of cocaine under G.S. 90-95(d)(2) was a felony and was properly used as a basis for his conviction upon his plea of guilty to being a habitual felon under G.S. 14-7.1. State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

Defendant was properly sentenced as a habitual offender where the record showed that defendant had been convicted of three previous felony offenses, including possession of cocaine. State v. Nettles, 170 N.C. App. 100, 612 S.E.2d 172, 2005 N.C. App. LEXIS 950 (2005).

Defendant was erroneously sentenced as a habitual offender because one of the prior convictions relied upon was a conviction from New Jersey for an offense that was not a felony in New Jersey. State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Defendant Has Burden of Proving Prior Felony Was Set Aside. — Though defendant may have had a valid defense to a habitual felony proceeding if he could establish that a juvenile felony conviction was unconditionally discharged under the provisions of 18 U.S.C.S. § 5021(a), defendant did not submit any evidence of such a discharge and thereby failed to carry his burden of proof under G.S. 14-7.1 to show that a prior felony was set aside. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

This section did not prohibit defendant's felony sentence from being enhanced on the grounds that he was an habitual felon when elements necessary to prove that he was an habitual felon were the same as those elements which were used to support the underlying felony. State v. Misenheimer, 123 N.C. App. 156, 472 S.E.2d 191 (1996).

Where the indictment referenced a principal felony which was subsequently dismissed; the principal felony was not an essential element of being an habitual felon and was, therefore, treated as surplusage and ignored. State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000).

Imposition of a 30-year sentence for a habitual felon who under the facts could have received a maximum sentence of life imprisonment under G.S. 14-1.1 was within constitutional limits and did not constitute cruel and unusual punishment. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

Issuance of a habitual felon indictment prior to the substantive felony indictment did not by itself void the habitual felon indictment where the notice and procedural requirements of the Habitual Felons Act, G.S. 14-7.1 to 14-7.6, were satisfied. State v. Blakney, 156 N.C. App. 671, 577 S.E.2d 387, cert. denied, 357 N.C. 252, 582 S.E.2d 611 (2003).

Change of Date on Indictment. — It was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment; therefore, because the date alleged in the indictment was neither an essential nor a substantial fact as to the charge of habitual felon, the trial court properly allowed the state to change a date in the habitual felon indictment. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

Separate Judgment and Commitment Held Error. — In prosecution for assault with a deadly weapon upon a law enforcement officer and being an habitual felon, the trial court erred in sentencing defendant in a separate judgment and commitment as an habitual felon. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Notice to Defendant of Habitual Offender Allegation Required Before Plea. — Defendant must have notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

Trial court did not err in considering defendant's prior adjudication as an habitual felon as a nonstatutory aggravating factor when sentencing defendant for uttering an instrument bearing a forged endorsement. State v. Kirkpatrick, 123 N.C. App. 86, 472 S.E.2d 371 (1996), aff'd, 346 N.C. 451, 480 S.E.2d 400 (1997).

Length of Time Since Past Conviction. — Under G.S. 14-7.1, a nineteen-year-old conviction could be a predicate for habitual felon status. State v. Hensley, 156 N.C. App. 634, 577 S.E.2d 417, 2003 N.C. App. LEXIS 234 (2003), cert. denied, 357 N.C. 167, 581 S.E.2d 64 (2003).

No Double Jeopardy Violation. — That a cocaine possession offense was used to support both an underlying substantive felony (the "felon" portion of the offense of "felon in possession of a firearm") and a habitual felon indictment did not subject defendant to double jeopardy. State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257, 2003 N.C. App. LEXIS 1729 (2003).

Selective Prosecution Not Shown. — Without substantial evidence of intentional discrimination, and absent a showing that the prosecutorial system was motivated by discriminatory purpose and had discriminatory effect, a District Attorney did not abuse his prosecutorial discretion in deciding to seek indictments against all individuals eligible for prosecution as habitual felons; defendant's claim that he was subject to selective prosecution was without merit. State v. Blyther, 175 N.C. App. 226, 623 S.E.2d 43, 2005 N.C. App. LEXIS 2740 (2005).

Applied in State v. Moore, 102 N.C. App. 434, 402 S.E.2d 435 (1991); State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999); State v. Brown, 146 N.C. App. 299, 552 S.E.2d 234, 2001 N.C. App. LEXIS 864 (2001); State v. Lee, 150 N.C. App. 701, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002); State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003); State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Winstead, 78 N.C. App. 180, 336 S.E.2d 721 (1985); State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995); State v. Brunson, 120 N.C. App. 571, 463 S.E.2d 417 (1995); State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997); State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998); State v. Davis, 130 N.C. App. 675, 505 S.E.2d 138 (1998); State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); State v. Hairston, 137 N.C. App. 352, 528 S.E.2d 29, 2000 N.C. App. LEXIS 308 (2000); State v. Briggs, 140 N.C. App. 484, 536 S.E.2d 858 (2000); State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001); State v. Fulp, 144 N.C. App. 428, 548 S.E.2d 785, 2001 N.C. App. LEXIS 436 (2001); State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697, 2001 N.C. App. LEXIS 936 (2001); State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002); State v. Dunn, 154 N.C. App. 1, 571 S.E.2d 650, 2002 N.C. App. LEXIS 1419 (2002); State v. May, 159 N.C. App. 159, 583 S.E.2d 302, 2003 N.C. App. LEXIS 1430 (2003); State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005); State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005); State v. Johnson, 186 N.C. App. 673, 651 S.E.2d 907, 2007 N.C. App. LEXIS 2305 (2007); Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008); State v. Smith, — N.C. App. —, 666 S.E.2d 191, 2008 N.C. App. LEXIS 1661 (2008); State v. Webb, — N.C. App. —, 666 S.E.2d 212, 2008 N.C. App. LEXIS 1652 (2008); State v. Tanner, — N.C. App. —, 666 S.E.2d 845, 2008 N.C. App. LEXIS 1759 (2008); State v. Miller, 363 N.C. 96, 678 S.E.2d 592, 2009 N.C. LEXIS 237 (2009).

§ 14-7.2. Punishment.

When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon, as in this Chapter provided, except in those cases where the death penalty or a life sentence is imposed. (1967, c. 1241, s. 2; 1981, c. 179, s. 11.)

CASE NOTES

Being an habitual felon is not a crime, but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

The district attorney has the authority and discretion to withdraw a habitual felon indictment as to some or all of the underlying felony charges pending against a defendant, up until the time that the jury returns a verdict of guilty that defendant had attained the status of a habitual felon. Once such a verdict has been returned, then the court must sentence defendant as a habitual felon pursuant to G.S. 14-7.2; however, G.S.14-7.2 is not applicable until defendant has been convicted of both the underlying felony and habitual felon status. State v. Murphy, — N.C. App. —, 666 S.E.2d 880, 2008 N.C. App. LEXIS 1762 (2008).

Because a prosecutor had the discretion whether to prosecute defendant as a habitual felon or not and had the authority to dismiss charges against defendant at any stage of the proceedings under G.S. 15A-931(a), the prosecutor could only seek habitual felon status under G.S. 14-7.2 and G.S. 14-7.6 as to a possession of a firearm charge and not as to attempted robbery and robbery charges. State v. Murphy, — N.C. App. —, 666 S.E.2d 880, 2008 N.C. App. LEXIS 1762 (2008).

Cited in State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982); State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986); State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000).

§ 14-7.3. Charge of habitual felon.

An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period. (1967, c. 1241, s. 3.)

CASE NOTES

One basic purpose behind this Chapter is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist. Failure to provide such notice where the State accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977); State v. Winstead, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

Applicability of § 14-7.4 to this Section. — Section 14-7.4 by its own terms specifically applies to conviction of habitual felons under this section. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

"Habitual felon" is a status, and once attained, such status is never lost. State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997).

Habitual Felon Indictment Ancillary to Indictment for Substantive Felony. — The Habitual Felons Act does not authorize an independent proceeding to determine defendant's status as a habitual felon separate from the prosecution of a predicate substantive felony; the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

An habitual felon indictment must be supported by a valid indictment on a substantive charge. State v. Winstead, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

The habitual felon indictment must be filed prior to the defendant's pleading in the substantive felony case. State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997).

Age or Date of Birth Not Required in Indictment. — Habitual offender indictment was not required to allege defendant's age or date or birth. State v. Sinclair, 191 N.C. App. 485, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (2008).

Specific Reference to Predicate Felony Not Required. — Nothing in the plain wording of this section requires a specific reference to the predicate substantive felony in the habitual felon indictment. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

Nothing in the plain wording of G.S. 14-7.3 requires a specific reference to the predicate substantive felony in an habitual felon indictment. The statute requires that the state give a defendant notice of the felonies on which it is relying to support the habitual felon charge; nowhere in the statute does it mention the predicate substantive felony or require it to be included in the indictment. State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

Separate Indictment Charging Defendant as Habitual Felon Contemplated. — Properly construed, this Chapter clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

New Indictment Required. — State did not satisfy the requirements of G.S. 14-7.3, and the trial court lacked the authority to sentence defendant as an habitual felon for a later offense, where the State had not obtained a new habitual felon indictment, and defendant did not agree to waive the same and admit his status pursuant to a bill of information; while the State previously charged defendant with being an habitual felon, defendant was already convicted of the substantive felonies associated with those bills of information, and a new indictment was required. State v. Bradley, 175 N.C. App. 234, 623 S.E.2d 85, 2005 N.C. App. LEXIS 2745 (2005), cert. denied, — N.C. —, 630 S.E.2d 189 (2006).

Defendant Received Sufficient Notice That He Was Being Prosecuted as Habitual Felon. — Where a superseding habitual felon indictment was filed three months before defendant's trial, defendant received sufficient notice under G.S. 14-7.3 that he was being prosecuted as an habitual felon. State v. Cogdell, — N.C. App. —, — S.E.2d —, 2004 N.C. App. LEXIS 717 (May 4, 2004).

Separate Indictments Valid. — This section does not require that the indictment charging defendant with the underlying felony must also charge that defendant is an habitual felon; where defendant was charged in one bill of indictment with felonious possession of cocaine, and in a separate bill of indictment with being an habitual felon, the indictments were not invalid. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

A separate habitual felon indictment is not required for each substantive felony indictment. State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996).

Defendant failed in his argument that the indictment for the principal felony could not support defendant's sentencing as a habitual felon because a separate indictment charged defendant with habitual felony status; the indictments were sufficient, as G.S. 14-7.3 did not require the indictment charging defendant with the underlying felony to also charge defendant as a habitual felon. State v. Peoples, 167 N.C. App. 63, 604 S.E.2d 321 (2004).

Defective Indictment. — Since it is clear from the indictment that prior to its return all the substantive felony proceedings upon which it is based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment on motion of the defendant should have been dismissed for failure of the bill to charge a cognizable offense. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Where the habitual felon indictment did not refer to any underlying felony with which defendant was charged, defendant's indictment as an habitual offender was fatally flawed and the trial court erred in enhancing defendant's sentence on that basis. State v. Farrior, 117 N.C. App. 429, 451 S.E.2d 332 (1994), cert. granted, 340 N.C. 116, 455 S.E.2d 663 (1995).

Trivial Amendment to Sufficient Indictment Irrelevant. — The amending of three indictments to include the words "in North Carolina" was irrelevant where the original indictment itself was not flawed and thus any attempt to correct a perceived flaw was harmless for the amendment could not have in any way prejudiced defendant. State v. Montford, 137 N.C. App. 495, 529 S.E.2d 247 (2000).

New Indictment. — Where there had been no entry of judgment or sentence as to the substantive underlying felony, until judgment was entered upon defendant's conviction of that substantive underlying felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

Charges in Separate Counts of Same Indictment. — Although defendant was charged with the underlying felony, common law robbery, and with being an habitual felon, in separate counts of the same bill of indictment rather than in separate bills of indictment this procedure did not violate this section. State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 (1995).

The statute does not require that the indictment charging a defendant with habitual felon status be contained in a separate bill of indictment. State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 (1995).

Denial of Motion to Quash Indictment. — Where defendant had previously stipulated to a prior conviction and did not argue a lack of notice of the hearing at trial, the state's requested corrections to the indictment as to the date and county of the prior conviction did not constitute an amendment; thus, the trial court did not err in denying defendant's motion to quash. State v. Lewis, 162 N.C. App. 277, 590 S.E.2d 318, 2004 N.C. App. LEXIS 130 (2004).

Indictment Held Sufficient. — Indictment charging defendant with being an habitual felon which expressly set forth each of the underlying felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statute," contained a sufficient statement of the name of the state or sovereign against whom the felonies were committed to comport with the requirements of this section. State v. Williams, 99 N.C. App. 333, 393 S.E.2d 156 (1990).

A habitual felon indictment citing the defendant's conviction for "the felony of breaking and entering buildings in violation of N.C.G.S. [G.S.] 14-54" was sufficient because the indictment clearly stated defendant had been convicted of felony breaking and entering, contained the date the felony was committed, the court in which he was convicted, the number assigned to the case, and the date of the conviction and, therefore, provided him with adequate notice of the underlying felony. State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000).

Habitual felon indictment complied with this section. State v. Smith, 112 N.C. App. 512, 436 S.E.2d 160 (1993).

Defendant's convictions of robbery with a firearm, G.S. 14-87(a), and having attained the status of habitual felon, G.S. 14-7.3, were affirmed; the State was only required to prove that defendant claimed that he possessed a firearm during his robberies of two stores. State v. Jarrett, 167 N.C. App. 336, 607 S.E.2d 661, 2004 N.C. App. LEXIS 2173 (2004), cert. denied, 359 N.C. 324, 611 S.E.2d 840 (2005).

Defendant contended that because the specific name of the controlled substance was not alleged in the indictment, the indictment was not sufficient to charge habitual felon; however, the habitual felon indictment alleging a prior conviction for felony possession with intent to manufacture, sell, or deliver a Schedule I controlled substance, in addition to two other felony convictions, was sufficient notice under North Carolina and case law. Additionally, because there was no defect in the indictment, the trial court had jurisdiction to sentence defendant as an habitual felon under G.S. 14-7.1 and G.S. 14-7.3. State v. McIlwaine, 169 N.C. App.

397, 610 S.E.2d 399, 2005 N.C. App. LEXIS 607 (2005).

Where defendant did not dispute that his habitual felony indictment included each element specified in G.S. 14-7.3, the indictment was facially valid; defendant's claim that there was a variance between the indictment and the proof offered in support of the indictment should have been raised by a motion to dismiss and was waived by his guilty plea. State v. McGee, 175 N.C. App. 586, 623 S.E.2d 782, 2006 N.C. App. LEXIS 180 (2006), review denied, appeal dismissed, 360 N.C. 542, 634 S.E.2d 891 (2006).

Running of 20-Day Period. — Under this section, the 20-day period runs from the time the grand jury returns an indictment on the habitual felon charge. State v. Winstead, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

Use of Prior Convictions. — Defendant was erroneously sentenced as a habitual offender because one of the prior convictions relied upon was a conviction from New Jersey for an offense that was not a felony in New Jersey. State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464, 2008 N.C. App. LEXIS 94 (2008).

Collateral Attack. — Defendant cannot collaterally attack a prior conviction which is the basis of a habitual felon charge. State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997).

Defendant's collateral attack questioning the validity of his original conviction for the habitual felon sentence was impermissible under G.S. 14-7.3. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Scope of Review. — When appealing the use of a prior conviction as a partial basis for an habitual felon indictment, inquiries are permissible only to determine whether the State gave defendant proper notice that he was being prosecuted for some substantive felony as a recidivist pursuant to this section. State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997).

Arraignment Not Proper. — Court erred in failing to dismiss the habitual misdemeanor assault charge where defendant was not properly arraigned; the State introduced no evidence of five prior convictions and failed to present evidence of an essential element of the charge requiring that the conviction for habitual misdemeanor assault be vacated. State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003).

Applied in State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994); State v. Taylor, 156 N.C. App. 172, 576 S.E.2d 114, 2003 N.C. App. LEXIS 76 (2003); State v. Adams, 156 N.C. App. 318, 576 S.E.2d 377, 2003 N.C. App. LEXIS 102 (2003); State v. May, 159 N.C. App. 159, 583 S.E.2d 302, 2003 N.C. App. LEXIS 1430 (2003).

Cited in State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982); State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986); State v. Davis, 123 N.C. App. 240, 472 S.E.2d 392 (1996); State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997); State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000); State v. Scott, 167 N.C. App. 783, 607 S.E.2d 10 (2005); State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005); State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008).

§ 14-7.4. Evidence of prior convictions of felony offenses.

In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1967, c. 1241, s. 4; 1981, c. 179, s. 12.)

CASE NOTES

Applicability. — This section by its own terms specifically applies to conviction of habitual felons under G.S. 14-7.3. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

The "prima facie evidence" provisions of this section do not unconstitutionally shift the burden of proof to the defendant on the essential element of identity but merely create a presumption that allows the jury to decide whether the elements of the crime have been proven beyond a reasonable doubt. State v. Hairston, 137 N.C. App. 352, 528 S.E.2d 29, 2000 N.C. App. LEXIS 308 (2000).

Proof of Prior Convictions. — Use of true copies of the court record to prove prior convictions under the Habitual Felons Act, as opposed to certified copies, was not improper. State v. Gant, 153 N.C. App. 136, 568 S.E.2d 909, 2002 N.C. App. LEXIS 1072 (2002), cert. denied, 356 N.C. 440, 572 S.E.2d 792 (2002).

Where defendant, in pleading nolo contendere, stipulated to three of defendant's eight prior convictions, but the State failed to prove any of the remaining convictions as required by G.S. 15A-1340.14(f) and G.S. 14-7.4, the trial court erred under G.S. 15A-1340.13(b) and G.S. 15A-1340.14(a) in sentencing defendant as a prior record level III offender based on prior convictions that were not proven at trial; the sentence, despite being agreed to by defendant, had to be authorized by G.S. 15A-1340.17. State v. Quick, 170 N.C. App. 166, 611 S.E.2d 864, 2005 N.C. App. LEXIS 897 (2005).

Defendant's collateral attack questioning the validity of his original conviction for the habitual felon sentence was impermissible under G.S. 14-7.3. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Admission of exhibits containing both the dates of defendant's prior offenses and resulting convictions for three felonies were properly admitted into evidence and supported defendant's conviction as an habitual offender. State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

State presented substantial evidence that defendant had attained the status of habitual felon as each of the three judgments introduced by the state listed the name of defendant as the same name by which defendant was charged in the latest indictment and defendant introduced no evidence to rebut that prima facie showing by the state. State v. Tyson, 189 N.C. App. 408, 658 S.E.2d 285, 2008 N.C. App. LEXIS 652 (2008).

Notes Need Not Be in Identical Order. — Requirement that document bear "same name as that by which the defendant is charged" does not mean that names must be identical in order for document to be prima facie evidence that defendant named in document is same as defendant before court. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

A faxed certified copy of a criminal record was admissible under this section to prove defendant's status as an habitual felon; the exhibit's reliability was bolstered below by defendant's own admission under oath that he indeed was convicted of the crimes listed therein. State v. Wall, 141 N.C. App. 529, 539 S.E.2d 692, 2000 N.C. App. LEXIS 1412 (2000), cert. denied, — N.C. —, 566 S.E.2d 480 (2002).

Facsimile copy of judgment and probation order were sufficient as proof of defendant's third felony under G.S. 14-7.4. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Names Held to Be "Same Name". — Names "Martin Bernard Petty" and "Martin Petty" are the "same name" for purposes of this section. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Where the documents introduced to prove defendant's prior conviction for breaking and entering were all identified as accurate copies of the originals, and each of the documents indicated that defendant's name was "Michael Hodge," for purposes of this section "Michael Hodge" and "William Michael Hodge" were the same name, and the documents at issue therefore constituted prima facie evidence that the defendant named in the prior case was the same as the defendant before the court. State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993).

Age Discrepancy. — Any discrepancy between actual age of defendant at time of conviction and his age as reflected on record of conviction goes to weight of evidence and not its admissibility. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Nolo Contendere Plea Entered Prior to Enactment of Chapter 15A. — Use of conviction resulting from nolo contendere plea entered prior to enactment of G.S. 15A-1022 as one of three prior felony convictions required by G.S. 14-7.1 to support charge of being habitual felon was improper, as rule at that time was that nolo contendere plea was neither admission nor adjudication of guilt. State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

The trial court erred by sentencing the defendant as an habitual felon where the issue was not submitted to the jury and the record did not show that he pleaded guilty to being an habitual felon; a stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea. State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001).

Plain Error Not Found. — It was not plain error for the trial court to admit copies of defendant's previous judgments during his habitual felon proceedings because defendant did not challenge the authenticity of the certified judgment sheets or the veracity of the convictions. State v. McNeil, 165 N.C. App. 777, 600 S.E.2d 31 (2004).

Applied in State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000).

Cited in State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986).

§ 14-7.5. Verdict and judgment.

When an indictment charges an habitual felon with a felony as above provided and an indictment also charges that said person is an habitual felon as provided herein, the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged. If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge. If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not an habitual felon, the trial judge shall pronounce judgment on the principal felony or felonies as provided by law. (1967, c. 1241, s. 5.)

Legal Periodicals. — For survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

CASE NOTES

The proceeding by which the State seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. The Chapter does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Trial court erred in denying defendant's request to inform the jury during the first phase of the trial that, if convicted, defendant was subject to punishment as a class C felon due to defendant's status as an habitual felon; while defendant had the right under G.S. 7A-97 to inform the jury of the punishment that could be imposed upon conviction of the crime for which defendant was being tried, this did not permit defendant to inform the jury of the maximum sentence as a result of an habitual felon adjudication. and G.S. 14-7.5, providing that an habitual felon trial was to be held separate from the principal felony trial, precluded instruction on the habitual offender penalty. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

A defendant charged as a habitual felon is not defending himself against the predicate substantive felony, but against a charge that he has at least three prior felony convictions; the trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to, and considered by, the jury. State v. Cheek, 339 N.C. 725, 453 S.E.2d 862 (1995).

Habitual Offender Statute Attaches Upon Third Conviction. — Defendant became an habitual offender when he was convicted of the third offense; however the jury's role in convicting the defendant as an habitual offender was still essential since it assured that the State had proven the fact of the three qualifying convictions to the jury's satisfaction. State v. Brown, 146 N.C. App. 590, 553 S.E.2d 428, 2001 N.C. App. LEXIS 976 (2001).

This section applies only to the indictment and not to the erroneous admission of oral evidence on cross-examination. State v. Thompson, 141 N.C. App. 698, 543 S.E.2d 160, 2001 N.C. App. LEXIS 20 (2001), cert. denied, 353 N.C. 396, 548 S.E.2d 157 (2001).

This Section Applies Only to the Indictment and Not to the Erroneous Admission of Oral Evidence. — Where the State during cross-examination asked defendant about his prior conviction for being a habitual felon, G.S. 14-7.5 was not violated because the State's questions did not refer to a pending habitual felon indictment against defendant but simply served to elicit information on defendant's criminal record. State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

Principal Felony Indictment Need Not

Mention Recidivist Status. — The legislature did not intend the first indictment notifying the defendant of the substantive charge against him to include a mention of the defendant's recidivist status. State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982).

This section does not give criminal defendant the right to inform the jury, during a principal felony trial, of the possible maximum sentence which might be imposed upon him at an habitual felon adjudication if he is found guilty of the principal offenses. State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000), cert. denied, 353 N.C. 279, 546 S.E.2d 395 (2000).

Jury Need Not Be Re-empaneled. — When, as contemplated by this section, the same jury considers both the principal felony and the question of defendant's recidivism, it is not necessary to re-empanel a jury once that jury has been properly empaneled pursuant to G.S. 15A-1216. State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

Pending, Uncompleted Felony Conviction Required. — Where there had been no entry of judgment or sentence as to the substantive underlying felony, until judgment was entered upon defendant's conviction of that substantive underlying felony, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

New Habitual Felon Indictment Did Not Result in Former Jeopardy. — Although habitual felon indictment was joined for trial with one underlying charge, the indictment was quashed before defendant was placed on trial upon the charge that he was an habitual felon. The subsequent indictment alleging defendant's status as an habitual felon was still part of, and ancillary to, the prosecution of defendant for an underlying felony, for which no judgment had been entered, and there was no former jeopardy. State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477, cert. denied, 336 N.C. 76, 445 S.E.2d 43 (1994).

The trial court erred by sentencing the defendant as an habitual felon where the issue was not submitted to the jury and the record did not show that he pleaded guilty to being an habitual felon; a stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea. State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001).

Trial court erred in finding defendant guilty of being a habitual felon based on defendant's stipulation to his status as such, where the court failed to establish a record showing that defendant's stipulation was a guilty plea to the habitual felon charge. State v. Edwards, 150 N.C. App. 544, 563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002).

Applied in State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); State v. Murphy, — N.C. App. —, 666 S.E.2d 880, 2008 N.C. App. LEXIS 1762 (2008).

Cited in State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986); State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993); State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996); State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003); State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003); State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005); State v. Massey, — N.C. App. —, 672 S.E.2d 696, 2009 N.C. App. LEXIS 146 (2009).

§ 14-7.6. Sentencing of habitual felons.

When an habitual felon as defined in this Article commits any felony under the laws of the State of North Carolina, the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced as a Class C felon. In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section. (1967, c. 1241, s. 6; 1981, c. 179, s. 13; 1993, c. 538, s. 9; 1994, Ex. Sess., c. 22, ss. 15, 16; c. 24, s. 14(b); 1993 (Reg. Sess., 1994), c. 767, s. 16.)

Legal Periodicals. — For comment discussing the North Carolina Fair Sentencing Act, see 60 N.C.L. Rev. 631 (1982).

For note, "Ramifications of the 1997 DWI/Felony Prior Record Level Amendment to the Structured Sentencing Act: State of North Carolina v. Tanya Watts Gentry," see 22 Campbell L. Rev. 211 (1999).

CASE NOTES

Being an habitual felon is not a crime, but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Being an habitual felon is not a substantive crime. State v. Thomas, 82 N.C. App. 682, 347 S.E.2d 494 (1986), cert. denied, 320 N.C. 637, 360 S.E.2d 102 (1987).

Being an habitual felon is not a crime but is a status. The status itself, standing alone, will not support a criminal sentence, and a court may not treat the violation of the Habitual Felon Act as a substantive offense. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Defendant was sentenced only once as required by the habitual felon statute, G.S. 14-7.6; he was not convicted of being an habitual felon, since the status being an habitual felon was not a separate offense, rather his status as an habitual felon enhanced his conviction of the crime attempting to obtain property by false pretenses. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. State v. Thomas, 82 N.C. App. 682, 347 S.E.2d 494 (1986), cert. denied, 320 N.C. 637, 360 S.E.2d 102 (1987); State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Rule of lenity, requiring that an ambiguous statute not be interpreted to impose a penalty on an individual which had not been clearly stated by the legislature, did not apply to the Habitual Felon Act, G.S. 14-7.6, because there was no ambiguity in that statute's directive as to the use of prior convictions. State v. Cates, 154 N.C. App. 737, 573 S.E.2d 208, 2002 N.C. App. LEXIS 1515 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 897 (2003), cert. denied, 540 U.S. 846, 124 S. Ct. 121, 157 L. Ed. 2d 84 (2003).

Basis of Sentencing Habitual Felon. — In sentencing a habitual felon, the duration of the sentence is based not only on the defendant's most recent offense, but on his past criminal conduct as well. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

Use of Prior Convictions. — Defendant's prior convictions will either serve to establish his status as an habitual felon pursuant to G.S. 15-7.1 or to increase his prior record level pursuant to G.S. 15A-1340.14(b)(1-5); the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time. State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996).

By using the defendant's five felony convictions in the habitual felon indictment, the State was precluded from using the same five convictions to increase defendant's prior record level points; accordingly, the trial court erred in using one conviction used to establish defendant's habitual felon status to enhance defendant's sentence. State v. Lee, 150 N.C. App. 701, 564 S.E.2d 597, 2002 N.C. App. LEXIS 650 (2002), cert. denied, 356 N.C. 171, 568 S.E.2d 856 (2002).

Legislature did not intend to limit a prosecutor's discretion in choosing which of defendant's prior felony convictions to base an habitual offender prosecution on, so defendant's argument that the prosecutor chose to base the prosecution on defendant's less serious felonies, so that defendant's more serious felonies would be available for purposes of enhancing defendant's sentence, was overruled. State v. Cates, 154 N.C. App. 737, 573 S.E.2d 208, 2002 N.C. App. LEXIS 1515 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 897 (2003), cert. denied, 540 U.S. 846, 124 S. Ct. 121, 157 L. Ed. 2d 84 (2003).

State, in attempting to prove defendant's prior record level, incorrectly relied on defendant's same two cocaine possession convictions that were also used to establish his habitual felon status. State v. Miller, 168 N.C. App. 572, 608 S.E.2d 565, 2005 N.C. App. LEXIS 345 (2005).

State's use of defendant's prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act, G.S. 14-7.1 et seq., did not constitute cruel and unusual punishment. State v. Hall, 174 N.C. App. 353, 620 S.E.2d 723, 2005 N.C. App. LEXIS 2397 (2005).

Trial court's use of defendant's prior driving while impaired convictions in determining defendant's sentence as a Level II offender did not violate G.S. 15A-1340.16(d) as defendant's prior convictions were not used as aggravating factors; instead, the trial court added points to defendant's prior record pursuant to G.S. 15A-1340.14, which in contrast to using the same prior convictions to establish a person's status as an habitual felon, was not expressly prohibited. Further, the use of the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing did not violate the plain language of G.S. 15A-1340.01. State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700, 2006 N.C. App. LEXIS 523 (2006).

Trial court properly assigned one prior conviction point in sentencing because attempted felonious larceny, which was the present offense, was a lesser included offense of felonious larceny, which was a prior conviction, and thus all of the elements of the present offense were included in the prior conviction for G.S. 15A-1340.14(b)(6) purposes; further, G.S. 14-72 related solely to punishment for the separate crime of larceny, did not change the nature of the crime, and the elements remained the same. Thus, for purposes of G.S. 15A-1340.14(b)(6), it did not matter under what provision of G.S. 14-72 the prior larceny convictions were established. State v. Ford, — N.C. App. —, 672 S.E.2d 689, 2009 N.C. App. LEXIS 113 (2009).

No Contest Plea. — "Conviction" within the context of this section includes a judgment entered upon a no contest plea, as long as the statutory procedures in G.S. 15A-1022 for entering a no contest plea are followed by the trial court in entering the plea. State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Prosecutor's Discretion Whether to Charge Defendant as Habitual Felon. — Because a prosecutor had the discretion whether to prosecute defendant as a habitual felon or not and had the authority to dismiss charges against defendant at any stage of the proceedings under G.S. 15A-931(a), the prosecutor could only seek habitual felon status under G.S. 14-7.2 and G.S. 14-7.6 as to a possession of a firearm charge and not as to attempted robbery and robbery charges. State v. Murphy, — N.C. App. —, 666 S.E.2d 880, 2008 N.C. App. LEXIS 1762 (2008).

Because defendant pled guilty to having attained the status of an habitual felon, he waived all defenses other than the sufficiency of the indictment, and he did not challenge the sufficiency of the indictment; he was not allowed to attack the validity of his underlying convictions. State v. Ford, — N.C. App. —, 672 S.E.2d 689, 2009 N.C. App. LEXIS 113 (2009).

Sentence on Conviction as Habitual Felon. — Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Defendant's claim failed, where defendant argued that because financial identity fraud was punishable as a class H felony, defendant could not be sentenced at a greater level regardless of defendant's habitual felon status; because defendant was a habitual felon who was convicted of the felonies of failure to appear and financial identity fraud, defendant was to be sentenced as a class C felon under G.S. 14-7.6. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Sentence Upon Subsequent Conviction. — An habitual felon who is convicted of a subsequent felony is sentenced as a Class C felon which has a presumptive term of 15 years and a maximum term of life imprisonment. State v. Patton, 119 N.C. App. 229, 458 S.E.2d 230 (1995), rev'd on other grounds, 342 N.C. 633, 466 S.E.2d 708 (1996).

There is nothing in this section and G.S. 15A-1340.14(d) to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another separate conviction obtained the same week to determine prior record level. State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

This section did not prohibit defendant's felony sentence from being enhanced on the grounds that he was an habitual felon when elements necessary to prove that he was an habitual felon were the same as those elements which were used to support the underlying felony. State v. Misenheimer, 123 N.C. App. 156, 472 S.E.2d 191 (1996).

Imposition of a 30-year sentence for a habitual felon who under the facts could have received a maximum sentence of life imprisonment under G.S. 14-1.1 is within constitutional limits and does not constitute cruel and unusual punishment. State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985).

Sentence Was Proportionate and Not Cruel and Unusual. — Defendant had a lengthy criminal record and was sentenced accordingly for G.S. 14-100 false pretenses, which sentence was enhanced by his status of being an habitual offender under G.S. 14-7.6; the sentence of 142 months to 180 months was within the range for a Class C level V felon, was not disproportionate to the defendant's 25-year history of criminal convictions, and was not cruel and unusual under U.S. Const. amends. VIII, XIV. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Separate Judgment and Conviction

Held Error. — In prosecution for assault with a deadly weapon upon a law enforcement officer and being an habitual felon, the trial court erred in sentencing defendant in a separate judgment and commitment as an habitual felon. State v. Penland, 89 N.C. App. 350, 365 S.E.2d 721 (1988).

Trial court erred in entering judgment and commitment for defendant under the habitual offender case number since the error was clerical; however, the court was entitled to fix the error and reversal was not necessary. State v. McBride, 173 N.C. App. 101, 618 S.E.2d 754, 2005 N.C. App. LEXIS 1897 (2005).

Increased Sentence on Resentencing Upheld. — Where defendant's case was remanded on appeal on grounds that defendant was improperly given a separate sentence in an habitual felon court, it was not error for the trial court to increase defendant's sentence on resentencing from three years to 15 years. State v. Kirkpatrick, 89 N.C. App. 353, 365 S.E.2d 640 (1988).

Prior Crimes Relevant to Habitual Felon Status and to Aggravating Factors. — Evidence of a kidnapping defendant's prior crimes was properly used to establish the status of a habitual felon as well as to establish the aggravating factor of prior felony convictions to increase the presumptive sentence of the underlying felony. State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 502 U.S. 902, 112 S. Ct. 280, 116 L. Ed. 2d 232 (1991).

But Status and Underlying Felonies Are Not Separate Factors. — The sentencing court can rely on certain prior criminal convictions to aggravate a current sentence; however, the court cannot consider as separate aggravating factors both the status of being an habitual felon and the felonies underlying the habitual felon adjudication. State v. Kirkpatrick, 345 N.C. 451, 480 S.E.2d 400 (1997).

Trial court erred in sentencing defendant for the status of habitual felony offender alone and because the error was not clerical in nature, the reviewing court could not correct the error and defendant's sentence was vacated. State v. Taylor, 156 N.C. App. 172, 576 S.E.2d 114, 2003 N.C. App. LEXIS 76 (2003).

Trial court did not err in using three felony convictions to increase defendant's prior record level where each of those convictions had been consolidated for judgment with a felony conviction used to establish habitual felon status. State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

Construction with Other Laws. — This section does not prohibit the use of convictions used to establish the defendant's status as a habitual offender to assign points pursuant to G.S. 15A-1340(b)(6) and (b)(7), because these provisions address the gravity and circumstances of the offense, rather than the mere existence of a prior offense. State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996).

Trial court did not err in considering defendant's prior adjudication as an habitual felon as a nonstatutory aggravating factor when sentencing defendant for uttering an instrument bearing a forged endorsement. State v. Kirkpatrick, 123 N.C. App. 86, 472 S.E.2d 371 (1996), aff'd, 346 N.C. 451, 480 S.E.2d 400 (1997).

Concurrent Sentence Improper. — State had no right to appeal from a concurrent sentence because the sentence was governed by G.S. 14-7.6, which was outside the scope of appeal of G.S. 15A-1445(a)(3)(c); however, because the concurrent sentence was contrary to G.S. 14-7.6, under N.C. R. App. P. 2 the court would treat the appeal as a mandamus petition, vacate the judgment, and remand for resentencing. State v. Watkins, 189 N.C. App. 784, 659 S.E.2d 58, 2008 N.C. App. LEXIS 687 (2008).

Sentence Held Proper. — Sentence imposed on defendant of 84 months to 110 months imprisonment, where defendant had a prior record level of III, was not grossly disproportionate under the Eighth Amendment; defendant's sentence was as a Class C felony under G.S. 14-7.6 and his sentence was in the mitigated sentencing range of G.S. 15A-1340.17. State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

Applied in State v. Aldridge, 67 N.C. App. 655, 314 S.E.2d 139 (1984); State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

Cited in State v. Keyes, 56 N.C. App. 75, 286 S.E.2d 861 (1982); State v. Melvin, 326 N.C. 173, 388 S.E.2d 72 (1990); State v. Williams, 99 N.C. App. 333, 393 S.E.2d 156 (1990); State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (1993); State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 (1995); State v. McCrae, 124 N.C. App. 664, 478 S.E.2d 210 (1996); State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997); Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003); State v. Borders, 164 N.C. App. 120, 594 S.E.2d 813, 2004 N.C. App. LEXIS 740 (2004); Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

ARTICLE 2B.

Violent Habitual Felons.

§ 14-7.7. Persons defined as violent habitual felons.

(a) Any person who has been convicted of two violent felonies in any federal court, in a court of this or any other state of the United States, or in a combination of these courts is declared to be a violent habitual felon. For purposes of this Article, "convicted" means the person has been adjudged guilty of or has entered a plea of guilty or no contest to the violent felony charge, and judgment has been entered thereon when such action occurred on or after July 6, 1967. This Article does not apply to a second violent felony unless it is committed after the conviction or plea of guilty or no contest to the first violent felony. Any felony to which a pardon has been extended shall not, for the purposes of this Article, constitute a felony. The burden of proving a pardon shall rest with the defendant, and this State shall not be required to disprove a pardon. Conviction as an habitual felon shall not, for purposes of this Article, constitute a violent felony.

(b) For purposes of this Article, "violent felony" includes the following offenses:

(1) All Class A through E felonies.
(2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1).
(3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2). (1994, Ex. Sess., c. 22, ss. 31, 32; 2000-155, s. 14.)

CASE NOTES

Constitutionality. — The violent habitual felon statute is not unconstitutional on its face. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

Punishment as a violent habitual felon does not constitute double jeopardy. State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

Statute Is Not an Ex Post Facto Law. — This section is not an ex post facto law pursuant to N.C. Const., art. I, § 16; defendant's violent habitual felon status would only enhance his punishment for the second degree murder conviction in the instant case, and not his punishment for the underlying voluntary manslaughter felony, and although the violent habitual felon statute was not enacted until 1994, perpetrators were on notice between 1967 and 1994, pursuant to a habitual felon statute, that certain crimes could be used to enhance punishment for later crimes. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Separate Indictments. — Where defendant was charged in one bill of indictment with assault with a deadly weapon with intent to kill inflicting serious injury, and in a separate bill of being a violent habitual felon, defendant's argument that he was not legally charged as a violent habitual felon because the charge was in a separate indictment was without merit. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

Contents of Indictment. — A habitual felon indictment is not required to specifically refer to the predicate substantive felony because the defendant is not defending himself against the predicate substantive felony, but against the charge that he has been previously convicted of the required number of felonies. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

Violent Felony. — Assault with a deadly weapon inflicting serious injury is also a violent felony for which a defendant may be punished as an habitual violent offender. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

Evidence of Prior Violent Felonies. — The state established prima facie evidence of the defendant's prior violent felonies, where it placed into evidence certified copies of the defendant's previous convictions for armed robbery. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

Defendant's 1992 conviction in California of the North Carolina equivalent of an "attempt" to commit a second degree sexual offense, although classified as a Class H felony at the time, was classified as a Class D felony and could be used for the purposes of a conviction under this section. State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

Defendant's convictions of second degree murder and of being a violent habitual felon were affirmed; the trial court properly conducted a hearing as contemplated by G.S. 15A-1002(b) before its ruling that defendant was competent to stand trial where defendant was given adequate notice of the hearing, the trial court properly denied defendant's request for a jury instruction on self defense, the evidence showed that the victim did not carry a gun, that no gun was found on or near the victim, and that defendant never claimed that he saw the victim with a gun, and the trial court properly considered a previous voluntary manslaughter conviction in determining violent habitual felon status. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Collateral Estoppel. — Where defendant was acquitted on a charge of being a violent habitual felon, his later trial on the same charge, involving a different primary offense but the same two predicate offenses, was barred by collateral estoppel. State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516, 2001 N.C. App. LEXIS 727 (2001).

Cited in State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

§ 14-7.8. Punishment.

When a person is charged by indictment with the commission of a violent felony and is also charged with being a violent habitual felon as defined in G.S. 14-7.7, the person must, upon conviction, be sentenced in accordance with this Article, except in those cases where the death penalty is imposed. (1994, Ex. Sess., c. 22, s. 31.)

§ 14-7.9. Charge of violent habitual felon.

An indictment that charges a person who is a violent habitual felon within the meaning of G.S. 14-7.7 with the commission of any violent felony must, in order to sustain a conviction of violent habitual felon, also charge that the person is a violent habitual felon. The indictment charging the defendant as a violent habitual felon shall be separate from the indictment charging the defendant with the principal violent felony. An indictment that charges a person with being a violent habitual felon must set forth the date that prior violent felonies were committed, the name of the state or other sovereign against whom the violent felonies were committed, the dates of convictions of the violent felonies, and the identity of the court in which the convictions took place. A defendant charged with being a violent habitual felon in a bill of indictment shall not be required to go to trial on that charge within 20 days after the finding of a true bill by the grand jury unless the defendant waives this 20-day period. (1994, Ex. Sess., c. 22, s. 31.)

CASE NOTES

Name of State. — The name of the state against whom the violent felonies were committed need not be expressly stated if the indictment sufficiently indicates the state. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

Replacement of Technically Deficient Indictment. — Due process was not violated where the state obtained a second indictment charging the defendant as a violent habitual felon after the first indictment was technically-deficient because the defendant had not been sentenced for his armed robbery conviction and because the first indictment placed him on notice that he was being tried as a violent habitual felon. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

Held Sufficient. — Indictments were sufficient where each one listed two prior conviction for felonies in Florida that met the requirements under North Carolina law for violent habitual felon status, and each specified a different one of the current offenses as an underlying substantive charge. State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

Deficient Indictment. — Court erred in failing to dismiss the habitual misdemeanor assault charge where defendant was not properly arraigned; the State introduced no evidence of five prior convictions and failed to present evidence of an essential element of the charge requiring that the conviction for habitual misdemeanor assault be vacated. State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003).

§ 14-7.10. Evidence of prior convictions of violent felonies.

In all cases where a person is charged under this Article with being a violent habitual felon, the records of prior convictions of violent felonies shall be admissible in evidence, but only for the purpose of proving that the person has been convicted of former violent felonies. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1994, Ex. Sess., c. 22, s. 31.)

CASE NOTES

Prima Facie Case. — Trial court properly denied defendant's motion to dismiss a violent habitual felon indictment against defendant; there was substantial evidence that defendant had two prior felony convictions because, even though one of the judgments listed the convicted person's race as black while defendant was white, this section created the requirements for a statutory prima facie case, and since the prosecution met that standard, any discrepancies in the details contained in the judgments were for the jury to consider in weighing the evidence; the trial court also declined to dismiss the charge on grounds that one of the convictions did not qualify for use as an underlying felony, as voluntary manslaughter was a superseded offense pursuant to G.S. 14-7.7(b)(2), as the offense had been upgraded by the General Assembly to a class D felony. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Certified Copies of Conviction Sufficient. — The state established prima facie evidence of the defendant's prior violent felonies, where it placed into evidence certified copies of the defendant's previous convictions for armed robbery. State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998).

§ 14-7.11. Verdict and judgment.

When an indictment charges a violent habitual felon with a violent felony as provided in this Article and an indictment also charges that the person is a violent habitual felon as provided in this Article, the defendant shall be tried for the principal violent felony as provided by law. The indictment that the person is a violent habitual felon shall not be revealed to the jury unless the jury finds that the defendant is guilty of the principal violent felony or another violent felony with which the defendant is charged. If the jury finds the defendant guilty of a violent felony, the bill of indictment charging the defendant as a violent habitual felon may be presented to the same jury.

Except that the same jury may be used, the proceedings shall be as if the issue of violent habitual felon were a principal charge. If the jury finds that the defendant is a violent habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not a violent habitual felon, the trial judge shall pronounce judgment on the principal violent felony or felonies as provided by law. (1994, Ex. Sess., c. 22, s. 31.)

CASE NOTES

Improper Arraignment. — Court erred in failing to dismiss the habitual misdemeanor assault charge where defendant was not properly arraigned; the State introduced no evidence of five prior convictions and failed to present evidence of an essential element of the charge requiring that the conviction for habitual misdemeanor assault be vacated. State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003).

§ 14-7.12. Sentencing of violent habitual felons.

A person who is convicted of a violent felony and of being a violent habitual felon must, upon conviction (except where the death penalty is imposed), be sentenced to life imprisonment without parole. Life imprisonment without parole means that the person will spend the remainder of the person's natural life in prison. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences for violent habitual felons imposed under this Article shall run consecutively with and shall commence at the expiration of any other sentence being served by the person. (1994, Ex. Sess., c. 22, s. 31.)

CASE NOTES

Constitutionality. — The violent habitual felon statute is not unconstitutional on its face. State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997), cert denied, 354 N.C. 72, 553 S.E.2d 208 (2001).

The term "life imprisonment without parole" falls within the meaning of the constitutional term "imprisonment," so the sentence was authorized by the Constitution. State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997).

Purpose. — Former G.S. 15A-1380.5 allowed a defendant not already benefited by the merciful hand of the Governor to have his case reviewed by a superior court judge; it increases a defendant's chance of parole prior to the end of his natural life. State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997).

Applied in State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516, 2001 N.C. App. LEXIS 727 (2001).

Cited in State v. Mewborn, 131 N.C. App. 495, 507 S.E.2d 906 (1998); State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237, 2002 N.C. App. LEXIS 13 (2002).

§§ 14-7.13 through 14-7.19: Reserved for future codification purposes.

Article 2C.

Continuing Criminal Enterprise.

§ 14-7.20. Continuing criminal enterprise.

(a) Any person who engages in a continuing criminal enterprise shall be punished as a Class H felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.

(b) Any person who is convicted under subsection (a) of this section of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:

(1) The profits obtained by the person in the enterprise, and
(2) Any of the person's interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:

(1) The person violates any provision of this Chapter, the punishment of which is a felony; and
(2) The violation is a part of a continuing series of violations of this Chapter:
  a. Which are undertaken by the person in concert with five or more other persons with respect to whom the person occupies a position of organizer, a supervisory position, or any other position of management; and
  b. From which the person obtains substantial income or resources. (1995, c. 378, s. 1.)

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 3.

Rebellion.

§ 14-8. Rebellion against the State.

If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the State of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and shall be punished as a Class F felon. (Const., art. 4, s. 5; 1861, c. 18; 1866, c. 64; 1868, c. 60, s. 2; Code, s. 1106; Rev., s. 3437; C.S., s. 4178; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1122; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

§ 14-9: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(1).

Cross References. — As to structured sentencing of persons convicted of crimes, see G.S. 15A-1340.10 et seq.

§ 14-10. Secret political and military organizations forbidden.

If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extrajudicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extrajudicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a Class 1 misdemeanor. (1868-9, c. 267; 1870-1, c. 133; 1871-2, c. 143; Code, s. 1095; Rev., s. 3439; C.S., s. 4180; 1993, c. 539, s. 10; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For subsequent statutes relating to prohibited secret societies and activities, see G.S. 14-12.2 through 14-12.15.

CASE NOTES

Ku Klux Klan Held Ineligible for School Exemption. — It is beyond peradventure that the school exemption to this section's prohibition on engaging in military evolutions does not apply to a group like the Carolina Knights of the Ku Klux Klan that is engaged in practicing guerilla warfare aimed at subverting the government. Person v. Miller, 854 F.2d 656 (4th Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989).

There was ample evidence from which the jury could find that defendant violated this section where the chief military officer of the state listed those organizations authorized to conduct military operations and the list did not include the defendant's organization and he explicitly stated that neither defendant nor defendant's agent, was to his knowledge authorized by law to conduct military operations in North Carolina and also testified that in addition to high school and college ROTC programs, the state has only one accredited military academy. Person v. Miller, 854 F.2d 656 (4th Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989).

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

ARTICLE 4.

Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.

It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 466 (1941).

§ 14-12. Punishment for violations.

Any person or persons violating any of the provisions of this Article shall, for the first offense, be guilty of a Class 1 misdemeanor and be punished accordingly, and for the second offense shall be punished as a Class H felon. (1941, c. 37, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 11; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-12.1. Certain subversive activities made unlawful.

It shall be unlawful for any person to:

(1) By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

(2) Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means; or,

(3) Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be punished as a Class H felon.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be punished as a Class H felon.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the State of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau, institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged. Evidence satisfactory to the head of such department, bureau, institution or agency of the State shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028; 1953, c. 675, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Article 4A.

Prohibited Secret Societies and Activities.

§ 14-12.2. Definitions.

The terms used in this Article are defined as follows:

(1) The term "secret society" shall mean any two or more persons organized, associated together, combined or united for any common purpose whatsoever, who shall use among themselves any certain grips, signs or password, or who shall use for the advancement of any of their purposes or as a part of their ritual any disguise of the person, face or voice or any disguise whatsoever, or who shall take any extrajudicial oath or secret solemn pledge or administer such oath or pledge to those associated with them, or who shall transact business and advance their purposes at secret meeting or meetings which are tiled and guarded against intrusion by persons not associated with them.

(2) The term "secret political society" shall mean any secret society, as hereinbefore defined, which shall at any time have for a purpose the hindering or aiding the success of any candidate for public office, or the hindering or aiding the success of any political party or organization, or violating any lawfully declared policy of the government of the State or any of the laws and constitutional provisions of the State.

(3) The term "secret military society" shall mean any secret society, as hereinbefore defined, which shall at any time meet, assemble or engage in a venture when members thereof are illegally armed, or which shall at any time have for a purpose the engaging in any venture by members thereof which shall require illegal armed force or in which illegal armed force is to be used, or which shall at any time muster, drill or practice any military evolutions while illegally armed. (1953, c. 1193, s. 1.)

Legal Periodicals. — For comment on this Article, see 31 N.C.L. Rev. 401 (1953).

§ 14-12.3. Certain secret societies prohibited.

It shall be unlawful for any person to join, unite himself with, become a member of, apply for membership in, form, organize, solicit members for, combine and agree with any person or persons to form or organize, or to encourage, aid or assist in any way any secret political society or any secret military society or any secret society having for a purpose the violating or circumventing the laws of the State. (1953, c. 1193, s. 2.)

§ 14-12.4. Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes.

It shall be unlawful for any person to use, agree to use, or to encourage, aid or assist in the using of any signs, grips, passwords, disguise of the face, person or voice, or any disguise whatsoever in the furtherance of any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State; and it shall be unlawful for any person to take or administer, or agree to take or administer, any extrajudicial oath or secret solemn pledge to further any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State. (1953, c. 1193, s. 3.)

§ 14-12.5. Permitting, etc., meetings or demonstrations of prohibited secret societies.

It shall be unlawful for any person to permit or agree to permit any members of a secret political society or a secret military society or a secret society having for a purpose the violating or circumventing the laws of the State to meet or to hold any demonstration in or upon any property owned or controlled by him. (1953, c. 1193, s. 4.)

§ 14-12.6. Meeting places and meetings of secret societies regulated.

Every secret society which has been or is now being formed and organized within the State, and which has members within the State shall forthwith provide or cause to be provided for each unit, lodge, council, group of members, grand lodge or general supervising unit a regular meeting place in some building or structure, and shall forthwith place and thereafter regularly keep a plainly visible sign or placard on the immediate exterior of such building or structure or on the immediate exterior of the meeting room or hall within such building or structure, if the entire building or structure is not controlled by such secret society, bearing upon said sign or placard the name of the secret society, the name of the particular unit, lodge, council, group of members, grand lodge or general supervising unit thereof and the name of the secretary, officer, organizer or member thereof who knows the purposes of the secret society and who knows or has a list of the names and addresses of the members thereof, and as such secretary, officer, organizer or member dies, removes, resigns or is replaced, his or her successor's name shall be placed upon such sign or placard; any person or persons who shall hereafter undertake to form and organize any secret society or solicit membership for a secret society within the State shall fully comply with the foregoing provisions of this section before forming and organizing such secret society and before soliciting memberships therein; all units, lodges, councils, groups of members, grand lodge and general supervising units of all secret societies within the State shall hold all of their secret meetings at the regular meeting place of their respective units, lodges, councils, group of members, grand lodge or general supervising units or at the regular meeting place of some other unit, lodge, council, group of members, grand lodge or general supervising unit of the same secret society, and at no other place unless notice is given of the time and place of the meeting and the name of the secret society holding the meeting in some newspaper having circulation in the locality where the meeting is to be held at least two days before the meeting. (1953, c. 1193, s. 5.)

§ 14-12.7. Wearing of masks, hoods, etc., on public ways.

No person or persons at least 16 years of age shall, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, be or appear upon any lane, walkway, alley, street, road, highway or other public way in this State. (1953, c. 1193, s. 6; 1983, c. 175, ss. 1, 10; c. 720, s. 4.)

§ 14-12.8. Wearing of masks, hoods, etc., on public property.

No person or persons shall in this State, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, or appear upon or within the public property of any municipality or county of the State, or of the State of North Carolina. (1953, c. 1193, s. 7.)

§ 14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.

No person or persons at least 16 years of age shall, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, demand entrance or admission, enter or come upon or into, or be upon or in the premises, enclosure or house of any other person in any municipality or county of this State. (1953, c. 1193, s. 8; 1983, c. 175, ss. 2,10; c. 720, s. 4.)

CASE NOTES

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

§ 14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.

No person or persons at least 16 years of age shall while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, hold any manner of meeting, or make any demonstration upon the private property of another unless such person or persons shall first obtain from the owner or occupier of the property his or her written permission to do so, which said written permission shall be recorded in the office of the register of deeds of the county in which said property is located before the beginning of such meeting or demonstration. (1953, c. 1193, s. 9; 1983, c. 175, ss. 3, 10; c. 720, s. 4.)

§ 14-12.11. Exemptions from provisions of Article.

The following are exempted from the provisions of G.S. 14-12.7, 14-12.8, 14-12.9, 14-12.10 and 14-12.14:

(1) Any person or persons wearing traditional holiday costumes in season;

(2) Any person or persons engaged in trades and employment where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade or profession;

(3) Any person or persons using masks in theatrical productions including use in Mardi Gras celebrations and masquerade balls;

(4) Persons wearing gas masks prescribed in civil defense drills and exercises or emergencies; and

(5) Any person or persons, as members or members elect of a society, order or organization, engaged in any parade, ritual, initiation, ceremony, celebration or requirement of such society, order or organization, and wearing or using any manner of costume, paraphernalia, disguise, facial makeup, hood, implement or device, whether the identity of such person or persons is concealed or not, on any public or private street, road, way or property, or in any public or private building, provided permission shall have been first obtained therefor by a representative of such society, order or organization from the governing body of the municipality in which the same takes place, or, if not in a municipality, from the board of county commissioners of the county in which the same takes place.

Provided, that the provisions of this Article shall not apply to any preliminary meetings held in good faith for the purpose of organizing, promoting or forming a labor union or a local organization or subdivision of any labor union nor shall the provisions of this Article apply to any meetings held by a labor union or organization already organized, operating and functioning and holding meetings for the purpose of transacting and carrying out functions, pursuits and affairs expressly pertaining to such labor union. (1953, c. 1193, s. 10.)

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway or on any public place.

(a) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

(b) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State or on a public street or highway, or on any public place a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful. (1953, c. 1193, s. 11; 1967, c. 522, ss. 1, 2; 2008-197, s. 1.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or on any public place" in the section heading, and in subsection (b).

CASE NOTES

Cited in State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

§ 14-12.13. Placing exhibit with intention of intimidating, etc., another.

It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. For the purposes of this section, the term "exhibit" includes items such as a noose. (1953, c. 1193, s. 12; 2008-197, s. 2.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence.

§ 14-12.14. Placing exhibit while wearing mask, hood, or other disguise.

It shall be unlawful for any person or persons, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, to place or cause to be placed at or in any place in the State any exhibit of any kind whatsoever, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. For the purposes of this section, the term "exhibit" includes items such as a noose. (1953, c. 1193, s. 13; 1967, c. 522, s. 3; 2008-197, s. 3.)

Editor's Note. — Session Laws 2008-197, s. 5, provides: "The Legislative Research Commission shall study the impact of recent cross burnings and noose hangings within the State and determine if any modifications should be made to existing statutes to lawfully deter this type of conduct. The Legislative Research Commission shall report its findings and make recommendations for legislation to the 2009 Session of the General Assembly."

Effect of Amendments. — Session Laws 2008-197, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, added the last sentence.

§ 14-12.15. Punishment for violation of Article.

All persons violating any of the provisions of this Article, except for G.S. 14-12.12(b), 14-12.13, and 14-12.14, shall be guilty of a Class 1 misdemeanor. All persons violating the provisions of G.S. 14-12.12(b), 14-12.13, and 14-12.14 shall be punished as a Class H felon. (1953, c. 1193, s. 14; 1967, c. 602; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 12; 1994, Ex. Sess., c. 24, s. 14(c); 2008-197, s. 4.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Effect of Amendments. — Session Laws 2008-197, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H" for "Class I" at the end.

ARTICLE 5.

Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.

If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the State; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the State from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be punished as a Class I felon. (1811, c. 814, s. 3, P.R.; R.C., c. 34, s. 64; Code, s. 1035; Rev., s. 3422; C.S., s. 4181; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1123; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 379, s. 1(a).)

Cross References. — As to forgery, see G.S. 14-119 et seq. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-14. Possessing tools for counterfeiting.

If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of any coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the State, and shall be duly convicted thereof, the person so offending shall be punished as a Class I felon. (1811, c. 814, s. 4, P.R.; R.C., c. 34, s. 65; Code, s. 1036; Rev., s. 3423; C.S., s. 4182; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1124; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 379, s. 1(b).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Indictment Sufficient. — An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offense designated in this section. State v. Collins, 10 N.C. 191 (1824).

§ 14-15. Issuing substitutes for money without authority.

If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall be guilty of a Class 3 misdemeanor and only punishable by a fine not to exceed the sum of fifty dollars ($50.00); and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a Class 3 misdemeanor and only punishable by a fine not to exceed fifty dollars ($50.00). (R.C., c. 36, s. 5; Code, s. 2493; 1895, c. 127; Rev., s. 3711; C.S., s. 4183; 1993, c. 539, s. 13; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Cumberland: 1933, c. 33; Currituck: 1933, c. 328.

CASE NOTES

In General. — Act of 1816, c. 900, which was very similar to this section, was held constitutional and the intent in so issuing the notes, etc., was held an essential ingredient of the offense. In State v. Humphreys, 19 N.C. 555 (1837).

§ 14-16. Receiving or passing unauthorized substitutes for money.

If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in G.S. 14-15, whether the same be issued within or without the State, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall be guilty of a Class 3 misdemeanor and only punishable by a fine not to exceed five dollars ($5.00). (R.C., c. 36, s. 6; Code, s. 2494; 1895, c. 127; Rev., s. 3712; C.S., s. 4184; 1993, c. 539, s. 14; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applicability. — Section making it an offense to "pass and receive" bank notes did not apply to a bank, but the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than $3.00. State v. Bank of Fayetteville, 48 N.C. 450 (1856).

§§ 14-16.1 through 14-16.5: Reserved for future codification purposes.

Article 5A.

Endangering Executive, Legislative, and Court Officers.

§ 14-16.6. Assault on executive, legislative, or court officer.

(a) Any person who assaults any legislative officer, executive officer, or court officer, or any person who makes a violent attack upon the residence, office, temporary accommodation or means of transport of any one of those officers in a manner likely to endanger the officer, shall be guilty of a felony and shall be punished as a Class I felon.

(b) Any person who commits an offense under subsection (a) and uses a deadly weapon in the commission of that offense shall be punished as a Class F felon.

(c) Any person who commits an offense under subsection (a) and inflicts serious bodily injury to any legislative officer, executive officer, or court officer, shall be punished as a Class F felon. (1981, c. 822, s. 1; 1993, c. 539, s. 1125; 1994, Ex. Sess., c. 24, s. 14(c); 1999-398, s. 1.)

Cross References. — For definitions applicable to this Article, see G.S. 14-16.10. As to authority of the State Bureau of Investigation to investigate assaults upon or threats against the officers named in G.S. 147-2 and 147-3(c), see G.S. 114-15.

Legal Periodicals. — For "Legislative Survey: Criminal Law," see 22 Campbell L. Rev. 253 (2000).

§ 14-16.7. Threats against executive, legislative, or court officers.

(a) Any person who knowingly and willfully makes any threat to inflict serious bodily injury upon or to kill any legislative officer, executive officer, or court officer, shall be guilty of a felony and shall be punished as a Class I felon.

(b) Any person who knowingly and willfully deposits for conveyance in the mail any letter, writing, or other document containing a threat to inflict serious bodily injury upon or to kill any legislative officer, executive officer, or court officer, shall be guilty of a felony and shall be punished as a Class I felon. (1981, c. 822, s. 1; 1993, c. 539, s. 1126; 1994, Ex. Sess., c. 24, s. 14(c); 1999-398, s. 1.)

§ 14-16.8. No requirement of receipt of the threat.

In prosecutions under G.S. 14-16.7 of this Article it shall not be necessary to prove that any legislative officer, executive officer, or court officer actually received the threatening communication or actually believed the threat. (1981, c. 822, s. 1; 1999-398, s. 1.)

§ 14-16.9. Officers-elect to be covered.

Any person who has been elected to any office covered by this Article but has not yet taken the oath of office shall be considered to hold the office for the purpose of this Article and G.S. 114-15. (1981, c. 822, s. 1.)

§ 14-16.10. Definitions.

The following definitions apply in this Article:

(1) Court officer. — Magistrate, clerk of superior court, acting clerk, assistant or deputy clerk, judge, or justice of the General Court of Justice; district attorney, assistant district attorney, or any other attorney designated by the district attorney to act for the State or on behalf of the district attorney; public defender or assistant defender; court reporter; juvenile court counselor as defined in G.S. 7B-1501(18a); any attorney or other individual employed by or acting on behalf of the department of social services in proceedings pursuant to Subchapter I of Chapter 7B of the General Statutes; any attorney or other individual appointed pursuant to G.S. 7B-601 or G.S. 7B-1108 or employed by the Guardian ad Litem Services Division of the Administrative Office of the Courts.

(2) Executive officer. — A person named in G.S. 147-3(c).

(3) Legislative officer. — A person named in G.S. 147-2(1), (2), or (3). (1999-398, s. 1; 2001-490, s. 2.35; 2003-140, s. 10.)

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

Article 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 1, 2; c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 662, s. 1; 1987, c. 693; 1989, c. 694; 1993, c. 539, s. 112; 1994, Ex. Sess., c. 21, s. 1; c. 22, s. 4; c. 24, s. 14(c); 2001-470, s. 2; 2004-178, s. 1; 2007-81, s. 1.)

Cross References. — As to provisions regarding transfer to superior court, see now G.S. 7B-2200. As to accomplices, see G.S. 14-5.2. As to nuclear, biological, or chemical weapons of mass destruction, see G.S. 14-288.21 et seq. As to assault in this State, but death in another, see G.S. 15-131. As to indictment for homicide, see G.S. 15-144. As to verdict in prosecution for homicide, see G.S. 15-172. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to eligibility for parole of prisoners serving life sentence, see G.S. 15A-1371. As to capital punishment, see G.S. 15A-2000 et seq. As to provisions regarding controlled substances, see G.S. 90-90.

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For note, "State v. Norman: Self-Defense Unavailable to Battered Women Who Kill Passive Abusers," see 68 N.C. L. Rev. 1159 (1990).

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For article, "Was the First Woman Hanged in North Carolina a 'Battered spouse?'", see 19 Campbell L. Rev. 311 (1997).

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For comment, "North Carolina's Unconstitutional Expansion of an Ancient Maxim: Using DWI Fatalitites to Satisfy First Degree Felony Murder," see 22 Campbell L. Rev. 169 (1999).

CASE NOTES

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I. GENERAL CONSIDERATION.

Section Not Unconstitutionally Vague. — In light of the common understanding of what defines torture, the section is not unconstitutionally vague and puts a reasonable person on notice of what is forbidden. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Failure of this section to define the term "deadly weapon" does not result in the statute being unconstitutionally vague. Furthermore, because North Carolina cases provide adequate notice of what constitutes a deadly weapon, a defendant is not deprived of due process. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

The degrees of homicide may be defined as follows: Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation. Murder in the second degree is the unlawful killing of another human being with malice but without premeditation and deliberation. Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under the influence of some passion or heat of blood produced by adequate provocation. State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994), overruled on other grounds, State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (1995).

There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter; the other is provocation sufficient to incite defendant to act suddenly and without deliberation. State v. Watson, 338 N.C. 168, 449 S.E.2d 694 (1994), overruled on other grounds, State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (1995).

Section Divides Murder into Four Classes. — This section does not divide first degree murder into separate offenses, each of which has its own essential elements, but divides the offense into four distinct classes, according to the proof required for each. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Purpose of Classifying Degrees of Murder. — This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punishable by imprisonment. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

For history of this section, see State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947); State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982); State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983).

Repeal of Former § 15-162.1. — The repeal of G.S. 15-162.1, relating to guilty pleas, leaving this section intact, showed the 1969 legislature's intent for this section to stand alone. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence rev'd, Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

The repeal of G.S. 15-162.1 did not modify, change, add to, or take from this section. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Former G.S. 15-162.1 did not alter this section, which is capable of standing alone. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Applicability of Common-Law Definition. — By the Act of 1893, c. 85 (this section), the crime of murder has been divided into two degrees, first and second. The common-law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree — the killing must be willful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

The statutes where murder is divided into two degrees have not, as a general rule, added to or taken away any ingredient of murder at common law, and every murder at common law is murder under the statutes. See State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899); State v. Dalton, 178 N.C. 779, 101 S.E. 548 (1919); State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

This section does not give any new definition of murder, but permits that to remain as it was at common law. The section simply selects out of all murders denounced by common law those deemed more heinous on account of the mode of their perpetration, classifies them as murder in the first degree, and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

The common-law "year and a day" rule has become "obsolete," within the meaning of that term as used in G.S. 4-1, and the rule is no longer part of the common law of North Carolina for any purpose. State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

A person is criminally responsible for a homicide only if his act caused or directly contributed to the death of the victim. State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982), overruled on other grounds, State v. Taylor, 337 N.C. 597, 447 S.E.2d 360 (1994).

The corpus delicti in criminal homicide involves two elements: (1) the fact of the death, and (2) the existence of the criminal agency of another as the cause of death. State v. Jensen, 28 N.C. App. 436, 221 S.E.2d 717 (1976); State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

The corpus delicti consists of two requirements in homicide cases: (1) There must be a corpse or circumstantial evidence so strong and cogent that there can be no doubt of the death, and (2) the criminal agency must be shown. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844, cert. denied, 320 N.C. 514, 358 S.E.2d 523 (1987).

Criminal Agency of Another. — Evidence of "criminal agency of another," as that phrase has been used in defining the corpus delicti in homicide cases, means evidence which tends to show that the deceased died not as the result of natural or accidental causes, but by the hand of another. State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

Proof Required in Homicide Cases. — In homicide cases, as in all criminal cases, the State must show that a crime was committed and that defendant committed it. State v. Perry, 293 N.C. 97, 235 S.E.2d 52 (1977); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986).

In any prosecution for a homicide the State must prove two things: (1) That the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975), death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977); State v. Hooper, 79 N.C. App. 93, 339 S.E.2d 70 (1986), rev'd on other grounds, 318 N.C. 680, 351 S.E.2d 286 (1987).

Proof Must Be Beyond Reasonable Doubt. — It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Burden on State to Show Jurisdiction. — In a murder prosecution, the defendant's challenge to jurisdiction alleging the insufficiency of the evidence to show that the murder was committed in this State is not an affirmative defense. Rather, the State has the burden to show beyond a reasonable doubt that the courts of this State have jurisdiction to try the accused. Former cases to the contrary are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Inversion of Order of Proof on Motion to Suppress Did Not Shift Burden. — In a prosecution for first-degree murder, the trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect; there was nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise; and defendant was not prejudiced by the order of proof because it resulted in his having to call one of the State's principal witnesses as his own. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

A killing done with malice and not in self-defense is murder, even though the person killed may have been seeking to effect an unlawful arrest upon the defendant. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Use of Deadly Weapon. — In the absence of evidence of mitigating or justifying factors, all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Hands as Deadly Weapons. — When a strong or mature person makes an attack by hands alone on a small child, the jury may infer that the hands were used as deadly weapons. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Separate sentences for attempted first degree murder and assault with a deadly weapon with intent to kill did not result in double jeopardy where each offense required proof of at least one element that the other did not. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

Attempt to Kill Is Not Murder. — An attempt only, to kill, with the most diabolical intent, may be moral, but cannot be legal, murder. State v. Scates, 50 N.C. 420 (1858).

Principals and Accessories Distinguished. — The North Carolina law of homicide still maintains a careful distinction between principals and accessories. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

There May Be Accessories to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the assessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

An accessory before the fact may be tried for first-degree murder although the principal has pled guilty to second-degree murder. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

Acting in Concert. — Under the principle of acting in concert, a person may be found guilty of an offense if he is present at the scene of the crime and the evidence is sufficient to show that he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Independent Act by Subsequent Perpetrator. — If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was no understanding, or connection between them. State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992), overruled on other grounds, 334 N.C. 402, 432 S.E.2d 349 (1993) (citing State v. Scates, 50 N.C. (5 Jones) 420, 423-24 (1848)).

One who procures another to commit murder is an accessory before the fact to murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

The elements of being an accessory before the fact to murder are: (1) That defendant counseled, procured, commanded, encouraged or aided the principal to murder the victim; (2) that the principal did murder the victim; and (3) that defendant was not present when the crime was committed. State v. Sams, 317 N.C. 230, 345 S.E.2d 179 (1986); State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

In cases where a defendant is prosecuted as an accessory before the fact to murder, the State must prove beyond a reasonable doubt that the actions or statements of the defendant somehow caused or contributed to the actions of the principal, which in turn caused the victim's death. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

Where one incites or employs a mental defective to kill another the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is only an accessory before the fact if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Venue Allegations and Proof Not in Fatal Variance. — Where indictment alleged that felony murder occurred in Buncombe County and the evidence disclosed that the kidnapping, an essential element of the crime, occurred in Buncombe County, there was no fatal variance between the allegations in the indictment and proof at trial that victim actually died in Ashe County. State v. Vines, 317 N.C. 242, 345 S.E.2d 169 (1986).

Murder and Conspiracy Not Merged. — Failure of the trial judge to merge defendant's convictions when he granted codefendant's motion for merger of conspiracy conviction with first-degree murder conviction neither violated defendant's equal protection rights nor constituted error, where the evidence established that codefendant was not present at the actual murder, and his liability for the murder was predicated solely on his participation in the conspiracy, while defendant, on the other hand, not only conspired to murder victim, but actually participated in killing her. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Kidnapping Conviction Vacated. — Where the placing of a gag over the victim's mouth could not have been the proximate cause of her death without the binding of her hands and feet, which prevented the removal of the gag, so that the victim's death would not have occurred without these other ligatures, the restraint of the victim which resulted in her murder was indistinguishable from the restraint used by the State to support the kidnapping charge, and defendant's kidnapping conviction would be vacated. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

First degree kidnapping is not a lesser

included offense of murder. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

First degree kidnapping requires the State to prove facts not required to prove murder, and it addresses a distinct evil, the kidnapping of and failure to release the victim in a safe place or condition; thus, at least one essential element of each crime is not an element of the other. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

The charging of both felonious assault and attempted murder as to each victim was not error although these charges arose out of the same incident; substantial evidence existed against defendant of every essential element of both. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Killing of Viable But Unborn Child Is Not Murder. — Where second count charged that defendant unlawfully, willfully and feloniously did of malice aforethought kill and murder baby girl, a viable but unborn child, in violation of this section, trial judge improperly denied defendant's motion to dismiss second count of indictment since unlawful, willful and felonious killing of viable but unborn child is not murder within meaning of this section. State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989).

Jurisdiction Shown. — Evidence as a whole amounted to a prima facie showing of jurisdiction sufficient to carry the case to the jury and to permit the jury to infer that the murder took place in this state, where the evidence tended to show that there was a breaking and entering at the victim's home, that acts of violence took place there, and that the cement block and rock used by the killer to sink the victim's body in creek were taken from the victim's yard; a reasonable inference from this evidence is that the victim was dead when the cement block and rock were taken from her yard and placed in her car with her body for use in its disposal. State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995).

Instruction on Burden to Prove Jurisdiction Required. — Where the defendant challenged the facts of jurisdiction, but the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating, it was necessary to remand the case for a new trial on the charge of second-degree murder. State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995).

Death Need Not Be Intended for Conviction. — While defendant may not have intended to join the codefendant in shooting and killing the victim, defendant's intent was irrelevant under an acting in concert theory of felony murder in violation of G.S. 14-17; as long as defendant joined the codefendant in committing a felony, defendant was responsible for all other crimes committed in a single transaction that were in furtherance of a common purpose or plan. State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521, appeal dismissed, cert. denied, 637 S.E.2d 183 (N.C. 2006).

Defendant had no right to a reversal in his murder trial, despite his claim that the indictment was insufficient for saying only that he violated G.S. 14-17. The indictment met requirements of G.S. 15-144. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Entitlement to Parole Ineligibility Instruction. — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Mitigating Circumstances. — Where a state prisoner, who was sentenced to death for committing first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to adequately present mitigating evidence concerning his life history and his mental health, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner's sisters testified at sentencing about the prisoner's dysfunctional childhood; (2) the prisoner instructed the attorneys not to introduce further evidence of his background; and (3) a doctor testified at sentencing that the prisoner's mental disorders impaired his ability to control his behavior; furthermore, the prisoner could not demonstrate prejudice because the additional evidence identified by the prisoner was largely cumulative and the jury found that four severe aggravating circumstances under G.S. 15A-2000 outweighed any mitigating circumstances. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Indictment Upheld. — In light of *State v. Jones*, 616 S.E.2d 496 (N.C. 2005), which held that an indictment comported with both statutory and constitutional requirements, defendant's indictment for "attempted murder" was not defective, even though it lacked allegations that defendant acted with the specific intent to kill, premeditation, or deliberation. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Arrest of Judgment Proper. — Trial court did not err by electing to arrest judgment on a felonious child abuse with a deadly weapon conviction as only one felony was necessary to support a felony murder conviction, and the jury found that five felonies could support a felony murder charge including forcible rape, statutory rape, forcible sex offense, statutory sex offense, and felony child abuse with a deadly weapon. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Applied in State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946); State v. Lampkin, 227 N.C. 620, 44 S.E.2d 30 (1947); State v. Parrott, 228 N.C. 752, 46 S.E.2d 851 (1948); State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951); State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954); State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Johnson, 261 N.C. 727, 136 S.E.2d 84 (1964); State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); Crawford v. Bailey, 234 F. Supp. 700 (E.D.N.C 1964); State v. Brown, 263 N.C. 327, 139 S.E.2d 609 (1965); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Willis, 281 N.C. 558, 189 S.E.2d 190 (1972); State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972); State v. Ingram, 282 N.C. 142, 191 S.E.2d 595 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Hegler, 15 N.C. App. 51, 189 S.E.2d 596 (1972); State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972); Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973); State v. Huffman, 21 N.C. App. 331, 204 S.E.2d 241 (1974); State v. Perry, 21 N.C. App. 528, 204 S.E.2d 916 (1974); State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768 (1974); State v. Greenlee, 22 N.C. App. 489, 206 S.E.2d 753 (1974); State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977); State v. Carter, 293 N.C. 532, 238 S.E.2d 493 (1977); State v. Hunt, 43 N.C. App. 428, 259 S.E.2d 322 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Stanley, 56 N.C. App. 109, 286 S.E.2d 865 (1982); State v. Chamberlain, 307 N.C. 130, 297 S.E.2d 540 (1982); State v. Primes, 314 N.C. 202, 333 S.E.2d 278 (1985); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Turnage, 100 N.C. App. 234, 395 S.E.2d 156 (1990); State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993); State v. Jahn, 342 N.C. 176, 463 S.E.2d 204 (1995); State v. Britt, 132 N.C. App. 173, 510 S.E.2d 683 (1999); State v. Lesane, 137 N.C. App. 234, 528 S.E.2d 37, 2000 N.C. App. LEXIS 323 (2000); State v. Cummings, 352 N.C. 600, 536 S.E.2d 36, 2000 N.C. LEXIS 753 (2000); State v. Stokes, 150 N.C. App. 211, 565 S.E.2d 196, 2002 N.C. App. LEXIS 512 (2002); Schlaepfer v. Harkleroad, 244 F. Supp. 2d 589, 2003 U.S. Dist. LEXIS 1514 (W.D.N.C. 2003); State v. Fisher, 158 N.C. App. 133, 580 S.E.2d 405, 2003 N.C. App. LEXIS 1046 (2003); State v. Andrews, 170 N.C. App. 68, 612 S.E.2d 178, 2005 N.C. App. LEXIS 891 (2005); State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Cited in State v. Evans, 198 N.C. 82, 150 S.E. 678 (1930); State v. Macon, 198 N.C. 483, 152 S.E. 407 (1930); State v. Cooper, 205 N.C. 657, 172 S.E. 199 (1933); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1934); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1935); State v. Linney, 212 N.C. 739, 194 S.E. 470 (1937); State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Ewing, 227 N.C. 107, 40 S.E.2d 600 (1946); Fuquay v. Fuquay, 232 N.C. 692, 62 S.E.2d 83 (1950); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951); State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); Resendez v. Garrison, 528 F.2d 1310 (4th Cir. 1975); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977); State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977); State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977); State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977); State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978); State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); Reeves v. Reed, 596 F.2d 628 (4th Cir. 1979); State v. Scott, 296 N.C. 519, 251 S.E.2d 414

(1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980); In re Ford, 49 N.C. App. 680, 272 S.E.2d 157 (1980); State v. Cason, 51 N.C. App. 144, 275 S.E.2d 221 (1981); State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982); O'Tuel v. Osborne, 706 F.2d 498 (4th Cir. 1983); State v. Griffin, 308 N.C. 303, 302 S.E.2d 447 (1983); State v. Wood, 61 N.C. App. 446, 300 S.E.2d 903 (1983); State v. Hinson, 310 N.C. 245, 311 S.E.2d 256 (1984); State v. Whitley, 311 N.C. 656, 319 S.E.2d 584 (1984); Little v. Allsbrook, 731 F.2d 238 (4th Cir. 1984); State v. Michael, 311 N.C. 214, 316 S.E.2d 276 (1984); State v. Edmondson, 70 N.C. App. 426, 320 S.E.2d 315 (1984); State v. Williamson, 72 N.C. App. 657, 326 S.E.2d 37 (1985); State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985); Williams v. Gupton, 627 F. Supp. 669 (W.D.N.C. 1986); State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986); State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986); State v. Kimbrell, 84 N.C. App. 59, 351 S.E.2d 801 (1987); State v. Clark, 319 N.C. 215, 353 S.E.2d 205 (1987); State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987); State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399 (1987); State v. Rogers, 323 N.C. 658, 374 S.E.2d 852 (1989); State v. McQueen, 324 N.C. 118, 377 S.E.2d 38 (1989); State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); State v. Lynch, 327 N.C. 210, 393 S.E.2d 811 (1990); State v. Manning, 327 N.C. 608, 398 S.E.2d 319 (1990); State v. Alford, 329 N.C. 755, 407 S.E.2d 519 (1991); State v. Williams, 330 N.C. 579, 411 S.E.2d 814 (1992); State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993); State v. Stanley, 110 N.C. App. 87, 429 S.E.2d 349 (1993); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993); State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (1993); State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (1993); State v. Dobson, 337 N.C. 464, 446 S.E.2d 14 (1994); State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994); State v. Beamer, 339 N.C. 477, 451 S.E.2d 190 (1994); State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994); State v. Corbett, 339 N.C. 313, 451 S.E.2d 252 (1994); State v. House, 340 N.C. 187, 456 S.E.2d 292 (1995); State v. Lovett, 119 N.C. App. 689, 460 S.E.2d 177 (1995); Ashe v. Styles, 67 F.3d 46 (4th Cir. 1995); State v. Gainey, 343 N.C. 79, 468 S.E.2d 227 (1996); State v. Crawford, 344 N.C. 65, 472 S.E.2d 920 (1996); State v. Braxton, 344 N.C. 702, 477 S.E.2d 172 (1996); State v. Williams, 345 N.C. 137, 478 S.E.2d 782 (1996); State v. Coffey, 345 N.C. 389, 480 S.E.2d 664 (1997); State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997); State v. Tucker, 347 N.C. 235, 490 S.E.2d 559 (1997); State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997); State v. Swindler, 129 N.C. App. 1, 497 S.E.2d 318 (1998); State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); State v. Stinnett, 129 N.C. App. 192, 497 S.E.2d 696 (1998); Boyd v. French, 147 F.3d 319 (4th Cir. 1998); State v. Lee, 348 N.C. 474, 501 S.E.2d 334 (1998); State v. Cabe, 131 N.C. App. 310, 506 S.E.2d 749 (1998); Frye v. Lee, 89 F. Supp. 2d 693, 2000 U.S. Dist. LEXIS 2915 (W.D.N.C. 2000); State v. Holman, 353 N.C. 174, 540 S.E.2d 18, 2000 N.C. LEXIS 909 (2000); State v. Harris, 136 N.C. App. 611, 525 S.E.2d 208, 2000 N.C. App. LEXIS 106 (2000); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Krider, 145 N.C. App. 711, 550 S.E.2d 861, 2001 N.C. App. LEXIS 748 (2001); Hartman v. Lee, 283 F.3d 190, 2002 U.S. App. LEXIS 3448 (4th Cir. 2002); State v. Stokes, — N.C. App. —, 561 S.E.2d 547, 2002 N.C. App. LEXIS 312 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); State v. Hunt, 357 N.C. 257, 582 S.E.2d 593, 2003 N.C. LEXIS 746 (2003); Buckner v. Polk, 453 F.3d 195, 2006 U.S. App. LEXIS 16062 (4th Cir. 2006); State v. Peterson, 361 N.C. 587, 652 S.E.2d 216, 2007 N.C. LEXIS 1101 (2007); State v. Hall, 187 N.C. App. 308, 653 S.E.2d 200, 2007 N.C. App. LEXIS 2453 (2007); State v. Calhoun, 189 N.C. App. 166, 657 S.E.2d 424, 2008 N.C. App. LEXIS 402 (2008); State v. Cook, — N.C. App. —, 666 S.E.2d 795, 2008 N.C. App. LEXIS 1750 (2008); State v. Jacobs, — N.C. App. —, 673 S.E.2d 724, 2009 N.C. App. LEXIS 264 (2009).

II. MURDER IN THE FIRST DEGREE GENERALLY.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404

U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976), death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976), death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Rogers, 316 N.C. 203, 341 S.E.2d 713 (1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986), vacated on other grounds, Jackson v. North Carolina, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987); State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986); State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991); State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996), cert. denied, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997).

Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1980).

Murder in the first degree differs from murder in the second degree in that it requires premeditation and deliberation. State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981).

For discussion of language found in this section which defines murder in the first degree, see State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983).

Elements of First-Degree Murder. — In order to convict a defendant of first-degree murder the State is required to produce evidence which satisfies the jury beyond a reasonable doubt that he unlawfully killed a person with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976).

The elements required for conviction of first degree murder are (1) the unlawful killing of another human being; (2) with malice; and (3) with premeditation and deliberation. State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103, 2001 N.C. App. LEXIS 990 (2001).

Motive Is Not an Essential Element. — It is not necessary to a conviction of murder that the State prove motive. State v. Adams, 136 N.C. 617, 48 S.E. 589 (1904); State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

But Its Presence or Absence May Be Considered. — Motive is not an essential element of murder; however, while not necessary to be proven, motive or the absence of motive is a circumstance to be considered. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

Circumstances to Be Considered. — There is premeditation and deliberation when there are jury findings of (1) an absence of provocation on the part of the deceased, (2) the dealing of lethal blows by the defendants after the deceased had been rendered helpless, and (3) a killing accomplished in a brutal manner through the infliction of numerous mortal wounds. State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992).

In the context of attempted first-degree murder, circumstances that may tend to prove premeditation and deliberation include: (1) lack of provocation by the intended victim or victims;

(2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and intended victim or victims. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

The State's case may be strengthened by the showing of a motive when the evidence is circumstantial. State v. Turner, 143 N.C. 641, 57 S.E. 158 (1907); State v. Stratford, 149 N.C. 483, 62 S.E. 882 (1908); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

It is not required that the State show motive for a killing, but evidence of motive, if otherwise admissible, is not only competent, but often very important, in strengthening the evidence for the prosecution. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

And motive may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. State v. Adams, 138 N.C. 688, 50 S.E. 765 (1905); State v. Wilkins, 158 N.C. 603, 73 S.E. 992 (1912).

But motive, standing alone, is insufficient to support a conviction for murder. State v. Lee, 34 N.C. App. 106, 237 S.E.2d 315 (1977), aff'd, 294 N.C. 299, 240 S.E.2d 449 (1978).

A specific intent to kill is an essential element of first degree murder. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968); State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes the intent may be imputed by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

There was sufficient evidence to permit the jury to conclude that defendant intended to kill the store-owner's wife; defendant fired several shots upon entering the store, hitting the victims, both of whom were behind the counter, after the wife opened the cash drawer, defendant shot her and took the money, the wife was shot in the head and arm while the owner was shot twice in the chest, killing him, and there was no evidence that either victim provoked defendant or resisted. State v. Poag, 159 N.C. App. 312, 583 S.E.2d 661, 2003 N.C. App. LEXIS 1504 (2003), appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 857 (2003).

Trial court properly denied motion to dismiss the charge of attempted murder of an infant child as the State presented sufficient evidence of defendant's specific intent to kill the child by showing that defendant carjacked a woman and her infant child, drove the woman and her infant child to a deserted area, raped the woman, beat the woman to death, and drove away while leaving the child behind in his diapers on a hot day in grass a foot tall at the deserted area. Additionally, a pediatric critical care expert testified that the infant's injuries, especially sunburns, were life-threatening and that if the infant had not been found by a passerby before nightfall he could have died as a result of exposure and dehydration. State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333, 2005 N.C. App. LEXIS 2487 (2005).

The act of killing, and the guilty intent, must concur to constitute the offense. State v. Scates, 50 N.C. 420 (1858).

The intent to kill must arise from a fixed determination previously formed after weighing the matter. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986).

Burden of Persuasion as to Intent. — On the element of a deliberate and premeditated specific intent to kill in a first-degree murder case defendant has no burden of persuasion at all; the burden of persuasion on the existence of this element remains throughout the trial on the State. State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

Formation of Intent. — The deliberate strangling of a person to death, taken in consideration with the statement of the victim that if her son left the room the defendant would kill her, and with her plea to the defendant to let her write a letter to her son before he killed her, presents sufficient evidence of intent to kill to submit to the jury. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

There was evidence from which a jury could find the defendant formed the intent to kill his wife for some period of time before the killing where the defendant said that as he was arguing with his wife, he remembered what a friend had told him about his son's passing out after holding his breath and the defendant decided to choke his wife until she passed out. State v. Norman, 331 N.C. 738, 417 S.E.2d 233 (1992).

State Must Show That Defendant Had Formed Purpose to Kill Deceased. — Before a conviction for murder in the first degree can be had, the State must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill deceased. State v. Terry, 173 N.C. 761, 92 S.E. 154 (1917); State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965). See 5 N.C.L. Rev. 364.

If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917); State v. Cain, 178 N.C. 724, 100 S.E. 884 (1919).

If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first degree, i.e., premeditation, deliberation, and malice, concurred. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, 454 U.S. 933, 102 S. Ct. 431, 70 L. Ed. 2d 240, rehearing denied, 454 U.S. 1117, 102 S. Ct. 693, 70 L. Ed. 2d 655 (1981).

But where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree is without error. State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939).

Where Intent and Act Are Simultaneous There Is No Murder in First Degree. — Where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896); State v. Barrett, 142 N.C. 565, 54 S.E. 856 (1906).

Where the killing was the product of a specific intent to kill formed under the influence of the provocation of the quarrel or struggle itself, then there would be no deliberation and hence no murder in the first degree. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

Although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. State v. Johnson, 172 N.C. 920, 90 S.E. 426 (1916).

Intent May Be Proved by Circumstantial Evidence. — Intent, a necessary element of murder in the second degree, is a mental attitude which can rarely be proved by direct evidence. It must ordinarily be proved by circumstances from which it can be inferred. State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327, cert. denied, 293 N.C. 591, 238 S.E.2d 151 (1977).

And Is Question for Jury. — The jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Specific intent to kill shown. — Trial court properly denied defendant's motion to dismiss charge of attempted first degree murder in violation of G.S. 14-17, as defendant's acts of kidnapping his infant daughter and leaving her in a shed in freezing weather for two days, coupled with his stated interest in avoiding having to pay child support, showed a specific intent to kill the child. State v. Pittman, 174 N.C. App. 745, 622 S.E.2d 135, 2005 N.C. App. LEXIS 2583 (2005).

Culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge under this section. State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000).

Premeditation and Deliberation Are Essential Elements of First Degree Murder. — For a conviction of murder in the first degree the killing must be done with willful premeditation and determination. State v. McKay, 150 N.C. 813, 63 S.E. 1059 (1909); State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in the first degree ought not to be submitted to them. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

To convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by this section and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation.

State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

The evidence was sufficient to support conviction for murder by lying in wait where defendant entered victim's home while he was sleeping, armed himself, watched the victim come out of his room and followed him to the laundry room where he shot him. State v. Aikens, 342 N.C. 567, 467 S.E.2d 99 (1996).

Where defendant had to move from hallway into living room to retrieve gun and then return to shoot victim and afterwards defendant concealed the body and rifle and drove them to another town to dispose of them, the evidence permitted a reasonable inference that defendant premeditated and deliberated killing. State v. Jones, 342 N.C. 628, 467 S.E.2d 233 (1996).

And Must Be Shown in Addition to Presumption of Malice. — The presumption which arises from the use of a deadly weapon in the commission of a homicide is that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. State v. Miller, 197 N.C. 445, 149 S.E. 590 (1929); State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936); State v. Floyd, 226 N.C. 571, 39 S.E.2d 598 (1946); State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Unless Murder Was Committed by Means Specifically Stated in Section. — This section's plain language requires proof of premeditation only in a murder committed by some means not specifically stated in the statute. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. State v. Dunheen, 224 N.C. 738, 32 S.E.2d 322 (1944).

Premeditation and Deliberation Generally. — Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Premeditation and deliberation generally must be established by circumstantial evidence, because they ordinarily are not susceptible to proof by direct evidence. "Premeditation" means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. "Deliberation" means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

"Premeditation" means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

"Deliberation" means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

Defendant's convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury did not violate his right to be free of double jeopardy; in order to obtain a conviction for attempted first-murder, the state had to prove premeditation and deliberation, whereas it did not have to prove those elements to obtain a conviction for assault with a deadly weapon, which was a different offense requiring both proof of the use of a deadly weapon and proof of serious injury. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

Premeditation and Deliberation Embrace Term "Malice Aforethought". — "Malice aforethought" was a term used in defining murder prior to the time of the adoption of this section dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition, but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in this section, the term premeditation and deliberation is more comprehensive and embraces all that is meant by aforethought, and more. State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Premeditation is a prior determination to do the act. State v. Cameron, 166 N.C. 379, 81 S.E. 748 (1914); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Baggett, 293 N.C. 307, 237 S.E.2d 827 (1977); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Premeditation means thought of beforehand, for some length of time, however short. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 30 L. Ed. 2d 301 (1976); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Tysor, 307 N.C. 679, 300 S.E.2d 366 (1983); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

"Premeditation" means that defendant formed the specific intent to kill for a period of time, however short, before the killing. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Deliberation means that the action was done in a cool state of blood and does not require reflection or brooding for an apparent length of time, but rather an intention to kill executed by defendant in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion, suddenly aroused by just cause or legal provocation. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Deliberation Means That the Act Is Done in Cool State of Blood. — It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979); State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987).

Deliberation means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982); State v. Tysor, 307 N.C. 679, 300 S.E.2d 366 (1983); State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of blood in furtherance of some fixed design. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation, and in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose. State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983); State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Deliberation means that the defendant formed the intent to kill in a cool state of blood and not as a result of a violent passion due to sufficient provocation. State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

"Deliberation" means that defendant formed an intent to kill and carried out that intent in a cool state of blood, in furtherance of a fixed design for revenge or other unlawful purpose and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Lyons, 340 N.C. 646, 459 S.E.2d 770 (1995).

A defendant is said to have deliberated over a killing if he acted in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose, and he was not under the influence of a violent passion suddenly aroused by lawful or just cause or legal provocation. State v. Owen, 130 N.C. App. 505, 503 S.E.2d 426, 1998 N.C. App. LEXIS 1001 (1998), cert. denied, 349 N.C. 372, 525 S.E.2d 188 (1998).

And That the Intent Was Formed Likewise. — Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

"Cool state of blood" does not mean the absence of passion and emotions, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Saunders, 317 N.C. 308, 345 S.E. 212 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

In the context of determining the existence of deliberation, however, the term "cool state of blood" does not mean an absence of passion and emotion. One may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and, to a large extent, controlled by passion at the time. State v. Bonney, 329 N.C. 61, 405 S.E.2d 145 (1991).

"Deliberation" means that the intent to kill was formed while the defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation. In the context of determining the existence of deliberation, however, the term "cool state of blood" does not mean 'an absence of passion and emotion'". State v. Vause, 328 N.C. 231, 400 S.E.2d 57 (1991).

And the requirement of a cool state of blood does not mean that the defendant must be calm or tranquil. Premeditation and deliberation may be present even though the defendant is angry at the time of the killing, if he acts in the furtherance of a fixed design to kill. State v. Hamilton, 19 N.C. App. 436, 199

S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

But Defendant's Emotion Must Not Have Disturbed His Faculties or Reason. — The term "cool state of blood" does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to disturb the defendant's faculties and reason. State v. Tysor, 307 N.C. 679, 300 S.E.2d 366 (1983).

The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Passion does not always reduce the crime of murder, since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time; if the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

An unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990) in light of State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975).

Killing committed during the course of a quarrel or scuffle may constitute first-degree murder provided defendant formed the intent to kill in a cool state of blood before the quarrel or scuffle began and the killing during the quarrel was the product of this earlier formed intent. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

The fact that there was a quarrel does not preclude the possibility that the defendant formed the intent to kill with premeditation and deliberation. State v. Russell Council Judge, 308 N.C. 658, 303 S.E.2d 817 (1983).

No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. State v. Coffey, 174 N.C. 814, 94 S.E. 416 (1917); State v. Holdsclaw, 180 N.C. 731, 105 S.E. 181 (1920).

Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896).

Where one forms a purpose to take the life of another and weighs this purpose in his mind ltent. State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981).

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Where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

And deliberation and premeditation need not be of any perceptible length of time. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1917); State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939); State v. Hammonds, 216 N.C. 235, 4 S.E.2d 439 (1939).

No fixed length of time is required for the mental processes of premeditation and deliberation constituting first-degree murder. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917).

It Is Sufficient if Premeditation and Deliberation Occur Prior to the Killing. — No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970).

Premeditation is thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, 476 U.S. 1165, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Time for Premeditation Varies with Circumstances. — The true test for premeditation is not the duration of time as much as it is the extent of the reflection and the time for premeditation would naturally vary with different individuals and under differing circumstances. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975), overruled on other grounds, State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995).

Proof of Premeditation and Deliberation Is Proof of Intent to Kill. — Since a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated and remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Premeditation and Deliberation Must Usually Be Proved by Circumstantial Evidence. — Premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. State v. Watson, 222 N.C. 672, 24 S.E.2d 540 (1943); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986); State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, 328 N.C. 288, 401 S.E.2d 632 (1991).

Premeditation and deliberation usually are not proved by direct evidence but by actions and circumstances surrounding the killing.

State v. Truesdale, 340 N.C. 229, 456 S.E.2d 299 (1995).

Premeditation and deliberation are processes of the mind and are not subject to proof by direct evidence but must be proved, if at all, by circumstantial evidence. State v. Vause, 328 N.C. 231, 400 S.E.2d 57 (1991).

Since They Involve Processes of the Mind. — Since premeditation and deliberation refer to processes of the mind, they must almost always be proved, if at all, by circumstantial evidence. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986), sentence vacated and remanded for further consideration at 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987); 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).

Prosecutor's Statements That Jury Could Infer Premeditation from Circumstances Held Permissible. — Where defendant was convicted of murdering victim by strangulation, prosecutor's statements did not impermissibly eliminate the State's burden to prove the elements of premeditation and deliberation; because the prosecutor was arguing that the jury could infer premeditation and deliberation from the circumstances and manner in which defendant killed the victim, the argument was not an incorrect statement of law. State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991).

Comments by Prosecutor. — Defendant's first degree murder conviction for stabbing his wife to death was affirmed because the prosecutor's statements as ato the evidence were not grossly improper and the trial court's failure to intervene ex mero motu was not error. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Circumstances to Be Considered in Determining Premeditation and Deliberation. — Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Jackson, 317 N.C. 1, 343 S.E.2d 814 (1986), vacated on other grounds, Jackson v. North Carolina, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986); State v. Lloyd, 89 N.C. App. 630, 366 S.E.2d 912, cert. denied, 322 N.C. 483, 370 S.E.2d 231, 370 S.E.2d 232 (1988).

For additional cases setting out some or all of the above circumstances as factors to be considered in determining whether a killing was with premeditation and deliberation, see State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973); State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980); State v. Corn, 303 N.C. 293, 278 S.E.2d 221 (1981); State v. Calloway, 305 N.C. 747, 291 S.E.2d 622 (1982); State v. Hamlet, 312 N.C. 162, 321 S.E.2d 837 (1984); State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986); State v. Harris, 323 N.C. 112, 371 S.E.2d 689 (1988).

Among the circumstances that may be considered in determining whether a killing was with premeditation and deliberation are (1) a lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) the dealing of lethal blows after the deceased has been felled and rendered helpless, (4) evidence that the killing was done in a brutal manner, and (5) the nature and number of the victim's wounds. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), aff'd, 325 N.C. 125, 381 S.E.2d 681 (1989), vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), death sentence vacated, remanded for new capital sentencing proceeding, State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991); State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972).

Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Among other circumstances from which premeditation and deliberation may be inferred are (1) lack of provocation on the part of the deceased, (2) the conduct and statements of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill-will or previous difficulty between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds. State v. Vause, 328 N.C. 231, 400 S.E.2d 57 (1991).

Same — Brutality. — Evidence tending to show that defendant stabbed his victim no less than thirty-nine times and that he stabbed her repeatedly with sufficient force to bend the first knife he used before he picked up a second knife to complete the murderous attack permitted a reasonable finding that the killing was especially brutal and the defendant struck many of the deadly blows after the victim had been felled and rendered helpless. Such evidence, standing alone, was substantial evidence tending to show premeditation and deliberation. State v. Vause, 328 N.C. 231, 400 S.E.2d 57 (1991).

Same — Previous Hostile Feelings and Prior Assaults. — Previously existing hostile feelings between defendant and deceased, a prior assault upon the deceased by defendant, the use of grossly excessive force and killing in an unusually brutal way have all been held to be circumstances tending to show premeditation and deliberation. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

In a prosecution for murder in the first degree, malice on the part of defendant could be established by inference from the use of a deadly weapon and by surrounding circumstances which included two earlier assaults and accusations concerning deceased's romantic relationship with defendant's wife. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979), cert. denied, 304 N.C. 589, 290 S.E.2d 709 (1981).

Same — Nature and Number of Wounds. — The nature and number of the victims' wounds is one circumstance from which an inference of premeditation and deliberation can be drawn. State v. Brown, 306 N.C. 151, 293 S.E.2d 569, cert. denied, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

In determining whether a defendant acted after premeditation and deliberation, the nature of wounds to a victim is a circumstance to be considered. State v. Bearthes, 329 N.C. 149, 405 S.E.2d 170 (1991).

Sufficient evidence of premeditation supported defendant's conviction of first-degree murder under G.S. 14-17, where defendant stabbed the victim multiple times in a bar after the victim called defendant names and punched defendant; the evidence of premeditation, which taken together was adequate for a jury to convict, included that defendant slashed the victim multiple times and that defendant left the scene. State v. Dennison, 171 N.C. App. 504, 615 S.E.2d 404, 2005 N.C. App. LEXIS 1271 (2005), cert. denied, appeal dismissed, 360 N.C. 69, 622 S.E.2d 113 (2005).

Same — Unseemly Conduct Toward and Concealment of Body. — Any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Same — Vicious and Brutal Slaying. — Premeditation and deliberation may be inferred from the vicious and brutal slaying of a human being. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

The ingredients of premeditation and deliberation necessary in first-degree murder may be inferred from the vicious and brutal circumstances of the homicide indicating a complete lack of provocation and a viciousness which demonstrates that death was the actor's objective. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

State Must Prove Premeditation and Deliberation in Death by Strangulation. — Because strangulation is not among the methods of killing expressly established by this section as murder in the first degree, the State must prove premeditation and deliberation. State v. Richardson, 328 N.C. 505, 402 S.E.2d 401 (1991).

Inference of Malice from Attack on Infant. — Where defendant had nearly exclusive care of 30 day old child on the day in question, and testimony that fatal blows received by the victim likely occurred very shortly, perhaps a minute, before death, it was proper to instruct the jury that malice could be inferred from the attack of human hands alone. State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

The jury's finding of malice required for a second-degree murder conviction was supported by the State's evidence that defendant's blood alcohol level was 0.113 three hours after the accident, that the collision occurred in the victim's lane of travel, and that, at the time of the accident, charges of driving while impaired and driving while license revoked were pending against defendant. State v. Gray, 137 N.C. App. 345, 528 S.E.2d 46, 2000 N.C. App. LEXIS 324 (2000).

Where an adult has exclusive custody of a child for a period of time, and during such time the child suffers injuries which are neither self-inflicted nor accidental, the evidence is sufficient to create an inference that the adult inflicted the injuries. State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

No Presumption of Premeditation and Deliberation from Use of Deadly Weapon. — Premeditation and deliberation necessary to constitute murder in the first degree are not presumed from a killing with a deadly weapon. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994). See also, State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958).

Argument Not Grossly Improper. — In first-degree murder trial where prosecutor stated that deliberation meant a "cold-blooded murder" and that it did not include the case where a man comes home and "finds his wife shacked up there with somebody," such an example offered for the sake of comparison was not so grossly improper as to require the trial court to intervene ex mero motu. State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Instruction on Deliberation and Premeditation — Held Proper. — An instruction on deliberation that so long as the killing was the product of premeditation and deliberation it was murder in the first degree, notwithstanding that the execution thereof might have been done while the defendant was in a state of anger, passion, or emotional excitement, was a correct statement of law. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation", did not express a court opinion that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Where evidence showed there was blood throughout the house, the victim was found against the base of the couch, and she had many slash wounds on her body, including two deep wounds capable of causing death, this evidence supported the state's theory that defendant slashed the victim as she attempted to escape from him, chased her into the living room where she fell to the floor, and then stabbed her to death; therefore, the trial court did not err in instructing the jury that premeditation and deliberation may be proved by "the infliction of lethal blows after the victim was felled." State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Preliminary Question of Sufficiency of Evidence to Be Determined by Court. — In a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in its light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

In order for the trial court to submit a charge of first-degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation. "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. State v. Myers, 309 N.C. 78, 305 S.E.2d 506 (1983).

Attempt. — The offense of "attempted first degree felony murder" does not exist under North Carolina law, as this charge is a logical impossibility in that it would require the defendant to intend what is by definition an unintentional result. State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (1997).

Evidence Held Sufficient. — Testimony of facts and circumstances which occurred after the commission of a homicide which tended to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he thereafter stated he had done as he had intended, was competent upon the question of deliberation and premeditation, under the evidence in the case, to sustain a verdict of murder in the first degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

Defendant's want of provocation, absence of excuse, lack of justification, and statement that he shot a person "to prove a point", all permitted, if not compelled, a legitimate inference of premeditation and deliberation. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

Where there was no evidence that the deceased had any weapon or at any time offered any threat to defendant, the want of provocation and absence of any excuse or justification, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, and the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976).

State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit murder, where there was evidence that defendant had discussed the murder with another and the means by which it might be accomplished, that defendant sent the coconspirator a picture of the victim for identification purposes, that defendant sent sums of money to the coconspirator, and that after an unsuccessful attempt was made upon the victim's life, defendant had stated to a friend, who had introduced her to the coconspirator, that the coconspirator knew somebody who would "finish the job." State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

Where defendant was not harmed by the victim in any way and did not believe that he would have had any difficulty in defending himself against her, and the victim's death was an unnecessary and senseless killing; where the 55 stab wounds constituted grossly excessive force; and where force which would have been lethal had the victim not already been dead was applied when an automobile was driven over her felled body, the evidence was sufficient to take the issue of defendant's guilt of first-degree murder to the jury. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of a gunshot wound inflicted by a shot fired from a trailer; defendant, a short time before the shooting, had test fired a 12 gauge shotgun; 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting; a freshly-fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of the bed; and defendant was the only person in the trailer when the fatal shots were fired. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Evidence held sufficient to establish that victim was dead, and to allow the reasonable inference that she died by criminal agency and that the criminal agent was the defendant, despite the fact that her body was never found. State v. Head, 79 N.C. App. 1, 338 S.E.2d 908,

cert. denied, 316 N.C. 736, 345 S.E.2d 395 (1986).

Evidence held sufficient for the jury to determine that the defendant intentionally killed robbery victim with premeditation and deliberation. State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986).

For additional cases in which evidence of first degree murder was held sufficient, see State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985); State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986), cert. denied, 479 U.S. 871, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986); State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986); State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of 302 N.C. 401, 279 S.E.2d 356 (1981); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974).

Evidence held sufficient to support a finding of premeditation and deliberation in the murder of a victim who was brutally beaten to death. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Evidence held sufficient to prove premeditation and deliberation so as to support a conviction for first degree murder caused by the gagging and resultant suffocation of the victim. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

Evidence held sufficient to permit the jury to draw reasonable inferences that defendant acted with premeditation and deliberation when he shot and killed the deceased. State v. Saunders, 317 N.C. 308, 345 S.E.2d 212 (1986).

Evidence of defendant's conduct and threatening statements both before and after the killing was strong evidence of premeditation and deliberation, and was sufficient to permit the jury to find premeditation and deliberation beyond a reasonable doubt. State v. Joplin, 318 N.C. 126, 347 S.E.2d 421 (1986).

Evidence held sufficient to support convictions of first-degree murder and conspiracy to commit murder. State v. Lowery, 318 N.C. 54, 347 S.E.2d 729 (1986).

Evidence held sufficient to show provocation, premeditation and deliberation on the part of defendant, who inflicted multiple stab wounds on victim. State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

Evidence held to constitute substantial evidence of each element of armed robbery and first-degree murder committed with premeditation and deliberation, and of defendant as the perpetrator. State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987).

Where the defendant, who barricaded himself, his sister, and her two children, one of whom was only eight-months-old, in a railroad car for three days, was repeatedly offered both food and liquids for himself and the children, but refused to accept them or to release the children, even though negotiators warned the defendant that the baby would dehydrate, there was sufficient evidence from which a reasonable mind might conclude that the defendant had the requisite specific intent to kill the infant who died of dehydration. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

A person is criminally responsible for a homicide if his act caused or directly contributed to the death of the victim. Where the testimony of the pathologist was that hammer blows to the head caused the victim's death, and the cause of death tentatively cited by the emergency room physician, namely, myocardial infarction, was, according to the physician's own testimony, not medically conclusive, even if the jury had perceived that testimony as contradicting the findings of the forensic pathologist, such contradictions and discrepancies were for the jury to resolve and did not warrant dismissal. State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), aff'd, 325 N.C. 125, 381 S.E.2d 681 (1989), sentence vacated and remanded for consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of., death sentence vacated, remanded for new capital sentencing proceeding.

Evidence held sufficient to permit submission of issue of premeditation and deliberation to the jury. State v. Stocks, 319 N.C. 437, 355 S.E.2d 492 (1987).

Trial court did not err in denying defendant's motion to dismiss first degree murder charge at the close of all the evidence, where physician testified that the victim died of pneumonia, but that there was a direct relationship between the gunshot wound and the pneumonia. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Where victims, whose bodies were found in isolated areas of north Durham County, had been shot multiple times at close range, and both had close or contact wounds to the back, neck, face, and head behind the left ear, and there was no evidence of any provocation by either victim, the brutal method of these killings provided substantial evidence that the killer premeditated and deliberated. State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Evidence held sufficient to support a finding of premeditation and deliberation, as well as malice, by defendant in death of her 30 day old infant. State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

Evidence as to premeditation and deliberation held sufficient, where such evidence indicated that three victims in two different rooms suffered multiple wounds which were inflicted from a .22-caliber semi-automatic rifle. Defendant's contention that the ability to fire so rapidly negated the inference of premeditation based solely upon the number of wounds, and did not support the inference that the victims had already been felled before the lethal wounds were inflicted, was without merit. State v. Austin, 320 N.C. 276, 357 S.E.2d 641, cert. denied, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

There was sufficient evidence from which the jury could properly have inferred premeditation and deliberation, where a pathologist testified that the killing was accomplished by a person stabbing the victim through the neck, partially removing the knife, and then plunging it home again. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987), cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Evidence held sufficient to support defendant's conviction for murder in the first degree based upon premeditation and deliberation. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987); State v. Hager, 320 N.C. 77, 357 S.E.2d 615 (1987).

Evidence that defendant and deceased were the only persons in the home, that deceased was shot in the back from a distance of approximately two feet or point blank through some sheets and that the gun had to be cocked before it would fire, requiring 13 pounds of pressure, was sufficient for the jury to find defendant guilty of first degree murder. State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987).

Evidence held sufficient to convict defendant of first-degree murder. State v. Nichols, 321 N.C. 616, 365 S.E.2d 561 (1988).

Evidence held sufficient to show that defendant acted with premeditation and deliberation when he shot state trooper. State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

Evidence held sufficient to convict defendant of first-degree murder on theories of both premeditation and deliberation and felony-murder. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

The cumulative effect of actions and statements by defendant was more than sufficient evidence of a deliberate and premeditated killing so as to support a judgment of first degree murder. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Evidence held sufficient to show that defendant choked victim to death with premeditation and deliberation. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Where the evidence tended to show that defendant calmly volunteered his services as an assassin to his friend shortly after that friend's dispute with the victim, defendant then worked out the details of the crime with his friend's help; the two planned a ruse to gain access to the victim and discussed the need for a third party's assistance, and defendant then carried out the plan, announcing his deadly intention to the victim before shooting him with a .22-caliber pistol, defendant's conduct and declarations, coupled with the lack of legal provocation on the part of the victim, raised inferences of malice, premeditation, and deliberation sufficient to survive a motion to dismiss. State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of 292 N.C. 643, 235 S.E.2d 63 (1977).

Although doctors testified that in their opinion the defendant did not know right from wrong in regard to the acts at issue in defendant's trial for first-degree murder, a police officer testified the defendant had a "very normal" demeanor and that she appeared to be oriented to time and was responsive to questions; the burden was on the defendant to prove insanity, the jury did not have to believe the expert witnesses, and the evidence supported the guilty verdicts; therefore, it was not error to refuse to set them aside. State v. Shytle, 323 N.C. 684, 374 S.E.2d 573 (1989).

Where circumstantial evidence allowed a reasonable inference that defendant targeted a vulnerable victim, felled her with blows, assaulted her sexually, and manually strangled her until she died, the trial court did not err in denying defendant's motion to dismiss charge of first-degree murder against defendant. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Evidence that defendant entered victim's yard, placed a bucket under his window, stood on the bucket, aimed a .22 rifle through the window at victim, and fired the rifle at victim, and that subsequently he did not try to aid victim but covered him so that he could not be seen and left him to die, was substantial evidence from which the jury could find beyond a reasonable doubt that defendant intended to kill victim and that he did so with premeditation and deliberation, despite evidence of statements made by defendant before the shooting that they might have to shoot victim in the shoulder to keep him "under control." State v. Freeman, 326 N.C. 40, 387 S.E.2d 158 (1990).

Evidence tending to show that the defendant had control of weapon before she discharged it, killing husband; that the victim feared the defendant due to her prior actions toward him; and that the defendant gave inconsistent versions of "accident" which were inconsistent with the physical evidence; along with evidence of motive, and evidence that defendant's first husband had died in a manner strikingly similar to that in which her second husband died, was sufficient to support a finding that the defendant intentionally killed husband with malice after premeditation and deliberation. State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Evidence tending to show that defendant had become romantically involved with victim's girlfriend and that he shot victim despite absence of any immediate threat to his person justified submission of issue of first degree murder to jury. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

There was sufficient evidence of murder in the first degree on the basis of premeditation and deliberation where the State's evidence tended to show that the victim was shot while she was lying face down on the floor; the wound was a "hard contact" wound; the killer placed the gun directly against the victim's skull before pulling the trigger; there was no evidence of provocation by the victim; the store was orderly, and the victim was a former bank employee who had been trained to submit without resistance to an armed robber's demands. The evidence presented, viewed in the light most favorable to the State, supports the inference that the victim did not provoke defendant and that defendant killed the victim after she had been felled and rendered helpless. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Evidence which tended to show that murder victim, a store clerk, was shot while lying face down on the floor, his legs wrapped with an electric cord, and died of a gunshot wound to the middle of his back, a contact wound which went directly to and through his heart, was sufficient to submit a charge of first-degree murder to the jury on a theory of malice, premeditation and deliberation. State v. McPhail, 329 N.C. 636, 406 S.E.2d 591 (1991).

Evidence held to support defendant's conviction of first-degree murder of defendant's 16-year-old mentally handicapped daughter and to support the conclusion that defendant's action of leaving car on train track was proximate cause of daughter's death, which occurred when car was struck by train. State v. Brewer, 328 N.C. 515, 402 S.E.2d 380 (1991).

Evidence held sufficient to support trial judge's instructions on first-degree murder with premeditation and deliberation in case involving homicide of six-year-old forced to drink large amounts of water. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Even assuming that defendant had not formed an intent to kill at the time the assault began, no rational juror could have reasonably found that defendant, having beaten the victim into submission and having inserted his hand past his wrist into the victim's vagina at least twice, pulling out the victim's organs, did not act with premeditation and deliberation when he later dragged her 120 feet into the woods leaving her helpless and bleeding to death; the evidence showing that the offense was committed over such a long period of time, with so many conscious decisions by the defendant, clearly supported the trial court's finding that the defendant possessed the requisite premeditation and deliberation. State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

The evidence was substantial as to each element of the offense of first-degree murder and the defendant being the perpetrator. State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (1994).

The fact that defendant went to great lengths to conceal murder, including disposing of the body and destroying or hiding evidence such as the pipe, the sheets, and the mattress and his uncaring attitude about the victim, evidenced by killing her and then dumping her nude body by the roadside, could all be considered by the jury in finding premeditation and deliberation. State v. Weathers, 339 N.C. 441, 451 S.E.2d 266 (1994).

Evidence was sufficient to support a conclusion that defendant acted with malice, premeditation and deliberation where defendant and the victim fought earlier in the evening, defendant followed the victim to a convenience store parking lot, defendant shot the victim after the victim had turned his back to defendant and was walking away, and defendant knew the victim was unarmed. State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994).

Evidence held sufficient to prove that defendant committed premeditated and deliberate murder. State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995).

The time interval between defendant's departure from the confrontation and the shooting was clearly sufficient to allow him to think out the act and form a fixed design to kill in a cool state of blood, and his statements in the wake of the shooting indicated that he in fact did so; the evidence was sufficient to permit a reasonable inference that defendant premeditated and deliberated the killing. State v. Holt, 342 N.C. 395, 464 S.E.2d 672 (1995).

Where there was substantial evidence to support a finding that the offense charged had been committed and that the defendant committed it, the case was for the jury and the motion to dismiss was properly denied. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

Substantial evidence, including the contents of victim's stomach, the motive, the weapon, the fact that defendant looked into who owned victim's car, which had been parked outside his former girl friend's house, the fact that he had his car painted and cleaned after victim disappeared, mtDNA sequencing, and other circumstances, supported the conviction of defendant under this section. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999), cert. dismissed, 352 N.C. 669, 535 S.E.2d 33 (2000).

The evidence was sufficient to point to defendant as the killer and withstand his motions to dismiss, where it showed that victim was stabbed 11 times with knives from the kitchen of the residence; there were no signs of forced entry, notwithstanding defendant's statement to the contrary about hearing footsteps in the residence; money and other valuables were found on the kitchen table; victim wanted defendant to leave the residence and no longer wanted to be married; and defendant on numerous occasions inquired as to the particulars of how an inmate murdered his girlfriend. State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629, 2000 N.C. App. LEXIS 1032 (2000), cert. denied, 353 N.C. 269, 546 S.E.2d 114 (2000).

Evidence that defendant armed himself with a loaded assault rifle as part of plan to rob the victim, and that there was only a very brief time between the time defendant entered the apartment and the time the victim was shot, was sufficient to allow the jury to conclude that defendant intentionally killed the victim with premeditation and deliberation and support conviction for first-degree murder. State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31, 2004 N.C. App. LEXIS 246 (2004).

Evidence that two defendants told another person to stop a car that was transporting them, that the driver saw both of them walk towards a car he had just passed, that the driver heard gunshots, that both defendants had a handgun when they returned to the car, and that casings found near a person who was shot to death were linked to the handguns defendants had in their possession, was sufficient to sustain defendants' conviction for first-degree murder; the appellate court held that the trial court did not commit error when it refused to give the jury an instruction on second-degree murder as a lesser included offense and that the State properly charged defendants using a short form indictment. State v. Pope, 163 N.C. App. 486, 593 S.E.2d 813, 2004 N.C. App. LEXIS 423 (2004).

Evidence was sufficient to support the jury's verdict convicting defendant of first-degree murder, and thus the trial court properly denied defendant's motions to dismiss and to set aside the verdict; (1) defendant admitted that he shot the victim in the head and told the police that the victim had been blackmailing him over a tape of defendant's wife, (2) victim's body was found buried on defendant's property, and (3) defendant denied any knowledge of what happened to the victim until after the body was discovered on his property and then changed his story to reveal the confrontation between the victim and him. State v. Gladden, 168 N.C. App. 548, 608 S.E.2d 93, 2005 N.C. App. LEXIS 351 (2005), appeal dismissed, cert. denied, — N.C. —, 614 S.E.2d 312 (2005).

Evidence was sufficient to support an attempted first-degree murder conviction because the evidence established that the prisoner broke into the victims' home, brandished a gun, threatened to kill both victims, and then shot both victims. Fredrick v. Beck, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 28000 (W.D.N.C. Oct. 28, 2005).

State introduced ample and sufficient evidence to allow the jury to make reasonable inferences of defendant's guilt of first-degree murder by aiding and abetting, including testimony and exhibits to prove defendant's affair, ongoing problems in defendant's marriage, defendant's financial status and the insurance payout, and defendant's suspicious behavior and flight following the murder. State v. Theer, 181 N.C. App. 349, 639 S.E.2d 655, 2007 N.C. App. LEXIS 151 (2007).

Evidence supported defendant's conviction for first-degree murder as there was sufficient evidence to support the elements of premeditation and deliberation in the form of defendant's statements and conduct before and after the killing, ill will between the parties, and the nature and number of the victim's wounds. The victim's back was turned when defendant fired defendant's weapon, giving defendant adequate time to weigh the consequences of the act. State v. Bass, 190 N.C. App. 339, 660 S.E.2d 123, 2008 N.C. App. LEXIS 864 (2008), appeal dismissed, cert. denied, 362 N.C. 683, 670 S.E.2d 566 (2008).

The evidence was sufficient to support a finding of premeditation and deliberation where the evidence showed that after a confrontation between defendant and victim, defendant went to his trailer and got his gun, told his girlfriend that victim had beaten him and that if he beat him anymore he would shoot him and after defendant left, his girlfriend called store where the victim was and said that defendant had a gun and had said he was going to shoot victim. As victim approached a trailer, defendant backed into an adjacent driveway and motioned for victim to come over, and when victim, who was unarmed, got within three to five feet of defendant's truck, defendant stuck his gun out of the window and shot him. Defendant did not attempt to help victim; rather, he sat in his truck and looked at him. He told an emergency medical technician that the victim would not breathe because he had taken a gun and blown his brains out and there was testimony that to fire the gun, it was necessary to load it, close it, and cock it before pulling the trigger. There was evidence that defendant reloaded the gun after shooting the victim.

State v. Vaughn, 324 N.C. 301, 377 S.E.2d 738 (1989).

Denial of defendant's motion to dismiss was upheld after the appellate court determined that there was sufficient evidence that defendant was the perpetrator of the crime and that he acted with premeditation and deliberation; among other things, there was fiber evidence and evidence connected with defendant's boat linking him to the crime, and evidence of an elaborate process of concealing the body to support premeditation and deliberation. State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324, 2004 N.C. App. LEXIS 116 (2004), cert. denied, 358 N.C. 237, — S.E.2d — (2004).

The evidence was sufficient to permit a rational juror to find that defendant killed the officers with premeditation and deliberation where, during defendant's struggle with officers, his intent changed from a mere attempt to flee to the killing of the officers to further his escape. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Evidence Held Sufficient to Raise Inference of Premeditation and Deliberation. — Where the evidence, taken in the light most favorable to the State, showed that no knives or other weapons were found at the scene of the crime and no drawers were open; the victim was shot three times, once in the back; prior to the day of the shooting, defendant threatened, "If I ever come here and see another man in this house, I'll kill him"; and after the shooting, defendant told lieutenant that he had shot two people but did not at that time claim that he had done so in self-defense; this evidence raised the legitimate inference that defendant killed with premeditation and deliberation and not in self-defense, and the trial court did not err in submitting the first-degree murder charge based on premeditation and deliberation. State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (1994).

Finding of Malice, Premeditation And Deliberation Precludes Voluntary Manslaughter. — The jury's finding that defendant was guilty of first degree murder on the basis of malice, premeditation and deliberation rendered harmless the trial court's failure to submit the lesser included offense of voluntary manslaughter. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Evidence Did Not Show That Defendant Acted in Heat of Passion. — Although attempted voluntary manslaughter was a lesser-included offense of attempted first-degree murder, the trial court properly refused to instruct the jury that defendant could be found guilty of attempted voluntary manslaughter because the evidence did not show that defendant acted in the heat of passion. State v. Rainey, 154 N.C. App. 282, 574 S.E.2d 25, 2002 N.C. App. LEXIS 1462 (2002), cert. denied, 356 N.C. 621, 575 S.E.2d 520 (2002).

Evidence held sufficient to support a charge of conspiracy to commit murder. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

The evidence of repeated coordinated assaults and the defendant's agreement to "go on a killing spree" clearly refuted his argument that the State did not offer sufficient evidence of one or more conspiracies to commit first-degree murder. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

Evidence held sufficient to convict the defendants of first degree murder as aiders and abetters. State v. Vanhoy, 343 N.C. 476, 471 S.E.2d 404 (1996), overruled on other grounds, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Evidence Held Insufficient. — Evidence which established a brutal murder, showed that defendant had the opportunity to commit it and raised suspicion in imaginative minds, nevertheless did not suffice to sustain a conviction. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Where the evidence showed that defendant wanted his wife dead, that he actively sought her death, and that he harbored great hostility toward her without more, was not enough to permit a jury to find that he killed her. While such evidence might have supported a reasonable inference that defendant was responsible for his wife's death and that he procured someone to murder her, these facts alone would not make defendant guilty of murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Death from Pneumonia Resulting from Wound. — Trial court did not err in denying defendant's motion to dismiss first degree murder charge at the close of all the evidence, where physician testified that the victim died of pneumonia, but that there was a direct relationship between the gunshot wound and the pneumonia. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Demonstrative Evidence Was Relevent to Show Premeditation. — Where defendant, who was convicted of strangling his pregnant high school girlfriend, testified that his action was impulsive and that he tore off the "skirt" part of the apron after the strangulation, it was proper to allow a detective, using a mannequin at trial, to demonstrate how the apron was tied around the victim's neck as the demonstration was relevant as to whether defendant acted with premeditation and deliberation and the demonstration was not excessively inflammatory. State v. Fowler, 159 N.C. App. 504, 583 S.E.2d 637, 2003 N.C. App. LEXIS 1511 (2003).

III. MURDER BY MEANS STATED IN SECTION.

Premeditation and Intent to Kill Are Not Elements of Murder by Means Stated in Section. — Premeditation and deliberation is not an element of the crime of first-degree murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture. Likewise, a specific intent to kill is not an element of first-degree murder when the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the presence or absence of premeditation, deliberation and specific intent to kill is irrelevant. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987); State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Neither premeditation and deliberation nor intent to kill are elements of murder in the first degree when the homicide is perpetrated by means of torture. State v. Phillips, 328 N.C. 1, 399 S.E.2d 293, cert. denied, 501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).

Premeditation and deliberation are not elements of the crime of first-degree murder perpetrated by means of lying in wait, nor is a specific intent to kill. State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992).

A murder perpetrated by means of poison is murder in the first degree. State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

Any murder committed by means of poison is automatically first-degree murder. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

When a murder is committed by means of poison, premeditation and deliberation are not elements of the crime of first-degree murder and premeditation and deliberation are hence irrelevant. State v. Moore, 335 N.C. 567, 440 S.E.2d 797, cert. denied, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994).

A separate showing of malice is not necessary for the charges of first-degree murder by means of poison and attempted first-degree murder by poison. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

In light of defendant's conviction for murder based on lying in wait, the trial court erred in refusing to arrest judgment on his conviction for secret assault. The legislature did not intend to punish a defendant both for a secret assault and for a murder when the assault is the very act that underlies the conviction for first-degree murder by lying in wait. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Purposes of Secret Assault and Murder by Lying in Wait Contrasted. — The purpose of the secret assault statute is to provide for the protection of society in cases of assault from ambush which do not result in the death of the victim, while the purpose of the murder by lying in wait statute is to provide for such protection in cases of assault from ambush which do result in the death of the victim. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Secret Assault Underlying Conviction for Murder by Lying in Wait Not Punishable. — To provide for additional punishment for the assault underlying a conviction for murder by lying in wait would serve little purpose other than to augment paperwork, trial time, and the potential for error in an already overburdened court system. The legislature, in enacting the secret assault and murder by lying in wait statutes, did not intend this result, and courts will, and the court accordingly arrest a judgment entered upon the secret assault conviction for a defendant convicted of murder by lying in wait. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Intent to Kill by Poison Need Not Be Proved. — When the State proceeds upon a theory of first-degree murder perpetrated by means of poison, the State is not required to come forward with evidence tending to show that the defendant possessed the intent to kill the victim, and the trial judge should not instruct the jury that it is required to find such an intent as a prerequisite for returning a conviction for first-degree murder. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

When a murder is committed by means of poison, the murder is first degree, even if all the evidence presented tends to show only an intent to make the victim ill. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

Evidence of Other Poisonings. — In a capital poisoning case, there was no error in admission of evidence tending to show that defendant was responsible for the poisoning deaths of four other individuals, not including the murder for which she was convicted, based upon long-established state law permitting use of "other crime" evidence when probative of a defendant's knowledge of a relevant set of circumstances, specific intent to commit the crime, motive for the crime, or plan or design to commit the crime. Barfield v. Harris, 540 F. Supp. 451 (E.D.N.C. 1982), aff'd, 719 F.2d 58 (4th Cir. 1983).

Burden on State in Prosecution for Murder by Poison. — In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent.

State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

Evidence of Murder by Poison Held Sufficient. — In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand motions for directed verdict and for judgment of nonsuit where defendant purchased rat poison with intent to kill deceased, and pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption and deceased drank the tea and almost immediately became ill and died. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Evidence held sufficient to take first-degree murder by poison case to jury. See State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Murder perpetrated by lying in wait refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. The assassin need not be concealed, nor need the victim be unaware of his presence. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Any murder committed by means of lying in wait is automatically first-degree murder. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Murder from Ambush Is Murder by Lying in Wait. — When this section speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches and waits in ambush for his victim is most certainly lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

And Constitutes First-Degree Murder. — Defendants who lay in wait and killed deceased from ambush are guilty of murder in the first degree. State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916). See State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934); State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934).

Assailant Need Not Be Concealed to Lie in Wait. — It is not necessary that an assailant be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Evidence of Murder by Lying in Wait. — Evidence that defendant brought a gun to a residence where he had previously seen victim; that after expressing animosity towards victim, defendant entered the residence without the gun, checking as to victim's presence; that defendant did not reveal the gun or indicate his plan of attack to the victim in any way; that defendant then went out onto the porch, positioned himself behind a clothes dryer and waited for victim to come outside; and that when victim entered the porch area, defendant did not warn him of his presence, but instead waited until he exited the porch area before shooting him in the back, clearly supported the court's action in submitting murder perpetrated by lying in wait to the jury. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Where defendant, by his own admission, was sneaking around dark golf course and, with a suddenness which deprived police officer victim of all opportunity to defend himself, fired upon and killed the officer, he was guilty of first degree murder by lying in wait, and it was not necessary for the state to show that defendant had an announced purpose or intent to kill the officer when he shot him under those circumstances. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Where the State's evidence tended to show that the defendant hid in the victim's closet and waited for her to return to her room before jumping out of the closet and assaulting her with a hammer, leading to her death, the evidence clearly supported submission to the jury of murder by lying in wait. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

Period of "Waiting" May Be Momentary. — The state need not prove that the killer stationed himself and waited at the site of the killing for some period of time before it may proceed on a theory of lying in wait. Even a moment's deliberate pause before killing one unaware of the impending assault and consequently without opportunity to defend himself satisfies the definition of murder perpetrated by lying in wait. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Evidence of Intoxication Irrelevant. — As a specific intent to kill is not an element of the crime of first-degree murder by lying in wait, evidence of intoxication is irrelevant as a defense. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Starvation. — Deprivation of life-sustaining liquids amounts to starvation under this section. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Evidence that defendant, for the purpose of punishment, forced six-year-old to drink large quantities of water, causing his death, constituted adequate evidence of torture. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Murder by Torture Is Murder in First Degree. — When a homicide is perpetrated by means of torture, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

First-degree murder by torture requires the State to prove that the accused intentionally tortured the victim and that such torture was a proximate cause of the victim's death. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Murder by Torture Shown. — The evidence supported the submission of first-degree murder by torture where for four weeks defendant punished his 21/2 year old niece by shaking her; by beating her with fists, a belt, a metal tray, a broken antenna, and a pair of tennis shoes; by making her wear soiled pants on her head; and by smacking and slapping her. Accordingly, the trial court properly denied defendants motion to dismiss the charge of first-degree murder on the basis of torture. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Murder by torture is analogous to felony murder in that malice may be implied by the very act of torturing the victim. The commission of torture implies the requisite malice, and a separate showing of malice is not necessary. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

Jury's finding of course of conduct and the intentional infliction of grievous pain and cruel suffering resulting in death satisfied statutory and constitutional requirements regarding torture. State v. Crawford, 329 N.C. 466, 406 S.E.2d 579 (1991).

IV. MURDER IN PERPETRATION OF A FELONY.

Purpose. — The felony murder rule was promulgated to deter even accidental killings from occurring during the commission of or attempted commission of a dangerous felony. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

Elements. — The elements necessary to prove felony murder are that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

North Carolina does not recognize an offense of second-degree felony murder. State v. Hunt, 91 N.C. App. 574, 372 S.E.2d 744 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

The offense of "attempted first degree felony murder" does not exist under North Carolina law. State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (1997).

A charge of "attempted felony murder" is a logical impossibility in that it requires the defendant to intend what is by definition an unintentional result; accordingly, the offense of "attempted felony murder" does not exist in North Carolina. State v. Lea, 126 N.C. App. 440, 485 S.E.2d 874 (1997).

The felony-murder rule does not unconstitutionally relieve the State of the burden of proving malice, since malice is not an element of the crime. Further, no burden is placed upon a defendant to prove or disprove any of the elements of the crime. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

State Is Not Relieved from Proving Mens Rea. — The felony murder rule, as set out in this section, does not establish a presumption of premeditation and deliberation are not elements of felony murder; the State is not relieved from proving criminal mens rea. State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

Term "Felony Murder" Disapproved. — Since "felony murder" is not a statutory term, its use in an issue submitted to the jury is ill-advised and its usage is expressly disapproved. State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977).

Premeditation and deliberation are not elements of the crime of felony-murder. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

And Premeditation and Deliberation Need Not Be Proved. — A murder committed in the perpetration or attempt to perpetrate a felony is murder in the first degree, and in such instance the State is not put to proof of premeditation and deliberation. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Jenerett, 281 N.C. 81, 187 S.E.2d 735 (1972); State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69

(1976); State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

Death Need Not Be Intended. — A homicide is murder in the first degree if it results from the commission or attempted commission of one of the specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

The killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or foreseeably dangerous to human life, was murder at common law. State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976).

When evidence shows the killing of a person by one who is engaged in the perpetration or the attempt to perpetrate a felony described in this section, the perpetrator may properly be charged and convicted of murder in the first degree, notwithstanding such person's intentions or conduct. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Felony murder, by its definition, does not require intent to kill as an element that must be satisfied for a conviction. State v. Cagle, 346 N.C. 497, 488 S.E.2d 535 (1997), cert. denied, 522 U.S. 1032, 118 S. Ct. 635, 139 L. Ed. 2d 614 (1998).

Trial court did not err in instructing the jury both on premeditation and deliberation, and felony murder, as defendant could be convicted of felony murder even though it was the co-felon he shot and killed during the robbery of the seafood merchant; the State only had to show that the killing occurred by defendant's hands during the perpetration of a felony, and not that the intended victim was killed. State v. Torres, 171 N.C. App. 419, 615 S.E.2d 36, 2005 N.C. App. LEXIS 1200 (2005).

All Conspirators in Felony Are Guilty. — The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment necessarily or probably required the use of force and violence which may result in the taking of life unlawfully, every party in such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933); State v. Stefanoff, 206 N.C. 443, 174 S.E. 411 (1934); State v. Green, 207 N.C. 369, 177 S.E. 120 (1934); State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1939); State v. Miller, 219 N.C. 514, 14 S.E.2d 522 (1941); State v. Bennet, 226 N.C. 82, 36 S.E.2d 708 (1946); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972); State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

But an interrelationship between felony and the homicide is prerequisite to application of felony-murder doctrine. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Unbroken Chain of Events Is Required. — A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977); State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

In felony murder, the killing may, but need not, be intentional. There must, however, be an unbroken chain of events leading from the attempted felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Trial court properly denied defendant's motion to dismiss the charge of first-degree felony murder because a break in time, place, and causal relationship did not occur between the victim's death, which happened in an auto accident in a high speed chase on a highway 30 minutes after defendant stole a vehicle, and the underlying felony of robbery with a dangerous weapon, in which defendant stole the vehicle from the owner of the vehicle with a knife in a shopping mall parking lot. State v. Doyle, 161 N.C. App. 247, 587 S.E.2d 917, 2003 N.C. App. LEXIS 2059 (2003).

Continuous Transaction. — A dwelling is occupied, for purposes of the arson statute, when the interval between the mortal blow and the burning is short, and the murder and the arson constitute parts of a continuous transaction. State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992).

Trial court properly submitted a first-degree murder charge to the jury on the basis of felony murder, where the evidence tended to show that defendant shot the first victim after the first victim tackled defendant's brother, that the second victim immediately grabbed defendant attempting to disarm him, and that defendant then shot the second victim in the head. State v. Johnson, 182 N.C. App. 63, 641 S.E.2d 364, 2007 N.C. App. LEXIS 500 (2007).

Where the felony and the murder were interrelated parts of a series of events that formed one continuous transaction, defendant was properly charged with first-degree murder under the felony-murder theory. State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996).

There was no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide were part of the same series of events, forming one continuous transaction. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Victim's Arrival Not a Break in Chain. — Where victim's arrival at the scene could be viewed as a break in the chain of events only insofar as his arrival interrupted the commission of felonies that, up until that moment, had been ongoing, his killing by the defendant resulted from and was the culmination of defendant's course of criminal conduct. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Nor Is Commission of Underlying Felony. — A killing is committed in the perpetration or attempted perpetration of a felony when there is no break in the chain of events leading from the initial felony to the act causing death, and the underlying felony is not deemed terminated prior to the killing merely because the participants have proceeded far enough to be convicted of the underlying felony. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

But completion of the felony is not required to sustain a conviction under the felony-murder rule. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

As the purpose of the felony murder role is to deter even accidental killings from occurring during the commission of a dangerous felony, to allow self-defense, perfect or imperfect, to apply to felony murder would defeat that purpose. It is only certain applicable underlying felonies that can be subject to an instruction on perfect self-defense. State v. Richardson, 341 N.C. 658, 462 S.E.2d 492 (1995).

The felony murder rule may be applied when the underlying felony is murder. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

A murder committed in the perpetration or attempt to perpetrate arson is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

A homicide committed in the perpetration or attempted perpetration of rape is murder in the first degree and proof thereof dispenses with the necessity of proof of premeditation and deliberation. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946); State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Homicide in Perpetration or Attempted Perpetration of Burglary. — A finding that a homicide was committed in the perpetration of a burglary suffices to support a conviction of murder in the first degree. State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

Defendant's admission he pulled up a chair to the outside of the victim's window, had a gun in his possession when it discharged, and shot the victim, allowed the jury to infer defendant's attempted first-degree burglary and resulting felony murder. State v. Bumgarner, 147 N.C. App. 409, 556 S.E.2d 324, 2001 N.C. App. LEXIS 1178 (2001).

Murder committed in the perpetration or attempt to perpetrate robbery is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought.

State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914); State v. Glover, 208 N.C. 68, 179 S.E. 6 (1935); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Alston, 215 N.C. 713, 3 S.E.2d 11 (1939); State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1939); State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958); State v. Bunton, 247 N.C. 510, 101 S.E.2d 454 (1958); State v. Bailey, 254 N.C. 380, 119 S.E.2d 165 (1961); State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970); State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

Alternative Acts of Robbery. — Where a trial court's instructions allowed a jury to find defendant guilty of felony murder if it found that he committed either robbery with a dangerous weapon of a store owner or robbery with a dangerous weapon of a customer — the commission of one of the several felonies enumerated in G.S. 14-17 — the N.C. Const., Art. I, § 24 and G.S. 15A-1237(b) requirements of jury unanimity were satisfied. Either of these alternative acts established an element of felony murder. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Evidence that defendant robbed a restaurant at night, ordered the victims to lie down and then methodically aimed and shot them was sufficient to show premeditation and deliberation, and it was thus not error for the trial court to refuse to instruct the jury on second degree murder. State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991).

An essential element of armed robbery, indeed the heart of the offense, is that a firearm or other dangerous weapon is used whereby the life of a person is endangered or threatened. This act is by its nature inherently dangerous to human life; and if this danger against which the statute is aimed occurs and the robber kills, the act is ordinarily murder under the felony-murder rule. State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

If there is evidence tending to show that defendant took property belonging to the deceased immediately after killing him, such evidence would support a jury determination that the killing occurred during the perpetration of a robbery. State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978).

Interval Between Murder and Taking. — For purposes of a felony murder charge, a homicide victim is still a "person," within the meaning of the robbery statute, when the interval between the fatal blow and the taking of property is short. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Neither the commission of armed robbery, as defined by G.S. 14-87(a), nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing. State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992).

What Unspecified Felonies Are Within Purview of Section. — Any unspecified felony is within the purview of this section if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

A felony which is inherently dangerous to life is within the purview of this section, although not specified therein. State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

The felony-murder language contained in this section will be accorded its plain meaning, and will not be interpreted to mean that only those offenses which are expressly set out and felonies where the use of a deadly weapon is not an element of the felony may serve as underlying felonies for purposes of the felony-murder rule. State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986).

Felony murder rule may be used in automobile cases where an underlying felony is committed, even though the General Assembly has enacted the more specific statutes of felony death by vehicle and misdemeanor death by vehicle, G.S. 20-141.4. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405 (1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

And prohibition against ex post facto laws was not violated by the felony murder rule's application in automobile accident. State v. Jones, 133 N.C. App. 448, 516 S.E.2d 405

(1999), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 159, 538 S.E.2d 917 (2000).

Discharging Firearm into Occupied Property. — The criminal offense created by G.S. 14-34.1 is a felony within the purview of this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976); State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982); State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986).

A person has committed the felony of firing into an occupied vehicle under G.S. 14-34.1, which will support a conviction of felony murder under this section, if he intentionally, without legal justification or excuse, discharges a firearm into an occupied vehicle, with knowledge that the vehicle is then occupied by one or more persons, or when he has reasonable grounds to believe that the vehicle might be occupied by one or more persons. State v. Wheeler, 321 N.C. 725, 365 S.E.2d 609 (1988).

Any rational trier of fact could have found that defendant intended to fire into vehicle in which victim was sitting when he was killed from evidence that defendant pointed his pistol toward the vehicle and fired the pistol so that a bullet went into the vehicle. State v. Wheeler, 321 N.C. 725, 365 S.E.2d 609 (1988).

Discharging a firearm into an occupied structure is a felony which will support a first degree felony murder prosecution. When persons act in concert to commit the felony of discharging a firearm into an occupied structure, each person is guilty not only of that felony but for any homicide committed in its perpetration. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Evidence supported instruction that there was evidence that defendant confessed to first degree murder where he stated that willfully and with knowledge he discharged his gun three times into an occupied vehicle. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Felonious Escape. — A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

Felonious Breaking and Entering and Larceny. — Where the evidence tends to show that defendant, armed with a pistol, feloniously broke into and entered an apartment, that he committed the crime of felonious larceny therein, and that while in said apartment he came upon and shot and killed the deceased, these crimes created substantial foreseeable human risks and therefore were unspecified felonies within the purview of this section. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Where the initial breaking into doctor's office was not accomplished with a deadly weapon, and there was no evidence that defendants even possessed a deadly weapon when they broke into the office, the breaking or entering could not serve as an underlying felony on which to predicate a felony murder conviction based on the murder of security guard. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Evidence was sufficient for first-degree murder under the felony-murder rule of G.S. 14-17 because there was a common plan to break into a house and either kill or rob: defendant obtained guns and drove a codefendant to the house; the codefendant broke into and entered the house carrying a gun; defendant was carrying a gun when he left the vehicle to check on the codefendant; and the victim was found in the basement of the house. State v. Wiley, 182 N.C. App. 437, 642 S.E.2d 717, 2007 N.C. App. LEXIS 688 (2007).

Sodomy. — Without deciding whether every felony not specified in this section must be inherently dangerous to life, the crime committed where a 15-year-old boy, under threat of gunfire and knife, was compelled to submit to an act of sodomy by the defendant was a crime as atrocious and as inherently dangerous as the specified felonies in this section. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 762 (1972).

Kidnapping. — When persons act in concert to commit the felony of first-degree kidnapping, each person is guilty not only of first-degree kidnapping, but also for any homicide committed in its perpetration. State v. Roseborough, 344 N.C. 121, 472 S.E.2d 763 (1996).

Where the evidence showed that the victim was transported in her car to the location of the murder, that defendant took the victim's keys, and that he then drove back to and attempted to rob the store amply supported submission of felony murder with kidnapping as the underlying felony. State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 652 (1998).

When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim; because defendant's misrepresentation was clearly calculated to mislead and did in fact mislead, defendant's actions constituted a false pretense and the "purpose" element of the kidnapping charge was satisfied and thus, the kidnapping and felony murder convictions were supported by sufficient evidence. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Felonious Child Abuse. — Felony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Felonious Child Abuse And Use of Hands as Deadly Weapons. — The court rejected the defendant's ex post facto objections and upheld the defendant's conviction, under this section, of murder while committing felonious child abuse in violation of G.S. 14-318.4 with the use of a deadly weapon, her hands, although this theory had not, at the time of the victim's death, been used to support a first degree murder conviction resulting from the use of the hands as deadly weapons. State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

Mere possession of a deadly weapon is enough to satisfy the requirement that the use of a deadly weapon distinguishes the commission or attempted commission of an unspecified or "other" felony and makes the defendant guilty of a felony murder, even if the weapon is not physically used to actually commit the felony. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Assault with a Deadly Weapon with Intent to Kill. — Where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32, which is a felony involving use of a deadly weapon, the crime was thus within the purview of the felony-murder statute. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Deadly Weapons. — Where there was evidence that the defendant used gasoline and fire to burn a mobile home while it was occupied, the gasoline and fire were used in combination as "a deadly weapon" for purposes of a felony murder conviction. State v. Hales, 344 N.C. 419, 474 S.E.2d 328 (1996).

State did not have to prove that defendant knew the codefendant possessed a gun in order to for defendant to be convicted of felony murder under G.S. 14-17 based on trafficking in cocaine with a deadly weapon in violation of G.S. 90-95 under a concert of action theory; defendant's knowledge that the codefendant had a gun was irrelevant as long as the codefendant killed the victim while possession or attempting to possess the drugs, which the State substantially established was the common purpose of defendant and the codefendant. State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521, appeal dismissed, cert. denied, 637 S.E.2d 183 (N.C. 2006).

Pecuniary gain is not an essential element of felony murder. This circumstance examines the motive of the defendant rather than his acts; however, while motive does not constitute an element of the offense, it is appropriate to be considered on the question of sentence. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony. State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983), overruled on other grounds in State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985).

It is proper to show solely by a defendant's confession that the homicide was murder in the first degree by showing that the murder was committed in the perpetration of another felony. State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983), overruled on other grounds in State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985).

Merger of Underlying Felony into Murder Conviction. — When a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction provides not basis for an additional sentence; hence it merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Where defendants were charged with first-degree murder under the felony murder doctrine, the underlying felony became part of the first-degree murder charge, and further prosecution for the underlying felony was prohibited; therefore, the trial court was not required to instruct the jury as to the lesser included offenses of the underlying felony. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

When the sole basis of a defendant's conviction of first-degree murder is pursuant to the felony murder rule, no additional sentence may be imposed for the underlying felony as a separate independent offense, since the underlying felony merges with the conviction of first degree murder. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

A defendant may not be punished both for felony murder and for the underlying, predicate felony. Thus, the underlying felony supporting a conviction for felony murder merges into the murder conviction, provides no basis for an additional sentence, and any judgment imposed thereon must be arrested. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

If a defendant is convicted only of first-degree felony murder, the underlying felony cannot be used as an aggravating circumstance at the sentencing proceeding, nor if convicted of the underlying felony can a defendant be sentenced separately for that felony. State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767, 2002 N.C. LEXIS 1251 (2002).

Same — Arson. — Where proof of arson charge was an essential and indispensable element in the State's proof of felony-murder, it afforded no basis for additional punishment. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Same — Robbery. — Where it appeared conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which defendants were convicted, such charges became a part of and were merged into the murder charges. Having been so used, the defendants could not again be charged, convicted and sentenced for these elements, although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

When the State, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of an armed robbery so as to establish that the murder was murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution or sentence of the defendant for commission of the armed robbery. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

Same — Discharging Firearm into Occupied Property. — When a felony within the purview of G.S. 14-34.1 is relied upon as an essential element of and the basis for the conviction of a defendant for murder in the first degree under the felony-murder rule, no additional punishment can be imposed for such felony as an independent criminal offense. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Same — Firing at Automobile. — State presented sufficient evidence for a reasonable jury to have found that defendant intended to shoot at the victim's truck as he drove away, and committed the offense of felony murder in violation of G.S. 14-17. State v. Mays, 154 N.C. App. 572, 573 S.E.2d 202, 2002 N.C. App. LEXIS 1542 (2002).

No double jeopardy existed where defendant was convicted of both discharging a firearm into a vehicle and felony murder, because North Carolina does not recognize the merger doctrine. State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008), review denied, appeal dismissed, 668 S.E.2d 569 (2008), cert. denied, 129 S. Ct. 1532 (U.S. 2009).

Punishment for Offense Which Was Not the Underlying Felony. — When a defendant has been convicted of murder in the first degree based upon a finding that the murder was committed in the perpetration of a felony, separate punishment may not be imposed for the underlying felony. However, separate punishment may be imposed for any offense which arose out of the same transaction, but was not the underlying felony for the felony-murder conviction. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Same — Where Defendant Is Convicted on Theory of Premeditation and Deliberation. — When a defendant has been convicted of first degree murder on a theory of premeditation and deliberation and in the process commits some other felony, the other felony is not an element of the murder conviction although the other felony may be part of the same continuous transaction, and therefore, a defendant may in such cases be sentenced upon both the murder conviction and the other felony conviction. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

When a defendant is charged with both felony murder and premeditated and deliberate murder, but the jury returns a verdict of guilty of first degree murder without specifying upon which theory it relied, the court is to treat the verdict as a conviction for felony murder. The merger rule would then prohibit the court from considering the underlying felony in the sentencing hearing. However, when the jury's verdict specifies both theories in its verdict of murder in the first degree, it is the court's decision, not that of the jury, to select the theory on which the sentence for the homicide is to be based. And where the sentence for homicide rests upon the premeditated and deliberate murder conviction, the merger rule does not apply. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

When a jury is properly instructed upon both theories of premeditation and deliberation and felony murder, and returns a first degree murder verdict without specifying whether it relied on either or both theories, the case is treated as if the jury relied upon the felony murder theory for purposes of applying the merger rule, and judgment imposed on a conviction for the underlying felony must be arrested. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981), overruled in part by State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133, State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).

Where the jury specifically found defendant guilty of first degree murder of one victim under the felony murder rule, but made no finding as to defendant's guilt on the basis of malice, premeditation and deliberation, and the underlying felony was the second-degree murder of another victim, the trial court could not impose an additional sentence upon defendant by sentencing him separately for this murder. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Nonmerger of Felony Where Defendant Found Guilty Under Dual Theories. — When the evidence so warrants, a trial judge may submit a special verdict form to the jury that allows the jurors to indicate whether they find defendant guilty of first degree murder based upon premeditation and deliberation or first degree murder based on a felony murder. However, if both theories are submitted to the jury and the jury finds defendant guilty under both theories, the underlying felony need not merge with the murder. State v. Lewis, 321 N.C. 42, 361 S.E.2d 728 (1987).

Nonmerger Where Victim Does Not Die from Assault. — Where the victim did not die as a result of an assault with a machete, but from strangulation, the assault was a separate offense from the murder and the trial court did not err in submitting a felony murder instruction to the jury because the felonious assault did not merge into the homicide. State v. Carroll, 356 N.C. 526, 573 S.E.2d 899, 2002 N.C. LEXIS 1265 (2002), cert. denied, 539 U.S. 949, 123 S. Ct. 2624, 156 L. Ed. 2d 640 (2003).

Where the court has consolidated first-degree murder and armed robbery charges in the same trial against defendant under G.S. 15-152 (now G.S. 15A-926(a)), the court may instruct the jury on murder in the first degree as a separate crime requiring deliberation, premeditation, and malice, rather than permit the jury to rely on the felony-murder rule as a basis for finding defendant guilty of first degree murder. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 104 (1974).

Where the trial judge submitted case to the jury on alternative theories charging felony murder in the commission of armed robbery and felonious breaking and entering, one of which was determined to be erroneous and the other properly submitted, and it could not be discerned from the record the theory upon which the jury relied, the case would be remanded for a new trial. State v. Pakulski, 319 N.C. 562, 356 S.E.2d 319 (1987).

Indictment for Underlying Felony. — The State was not required to indict defendant for burglary in order to use burglary as the underlying felony in felony murder charges; thus, any variance between the burglary indictment and the jury charge on burglary did not prevent the State from using burglary as the underlying felony. State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002), appeal dismissed, cert. denied, 356 N.C. 443, 573 S.E.2d 508 (2002).

Submission of Felony Murder Charge Not Error. — Although there was sufficient evidence to submit felony murder to the jury, even if there were not, defendant could have suffered no prejudice thereby where the jury did not find him guilty of any charges based on a felony murder theory. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Failure to Submit Felony Murder Theory. — Because defendant, who was convicted of first degree murder upon a theory of premeditation and deliberation, could have received the same sentence regardless of whether a felony murder theory was also submitted to the jury, he suffered no prejudice by failure of the court to submit such theory to the jury. State v. Lewis, 321 N.C. 42, 361 S.E.2d 728 (1987).

Felony Murder in Course of Kidnapping. — Where evidence was sufficient to establish that the blows used for restraint were separate and apart from the blows causing death, trial court did not err in denying motion to dismiss second-degree kidnapping charge. State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996), cert. denied, 522 U.S. 826, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997).

Evidence of Murder in Perpetration of Felony Held Sufficient. — Evidence tending to show that the prisoner, with another, entered a store with intent to rob its cash drawer and shot and killed the deceased was evidence of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court upon conflicting evidence. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1931).

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery was sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. State v. Langley, 204 N.C. 687, 169 S.E. 705 (1933).

Evidence tending to show that defendant drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station, and that deceased was killed by a shot from a gun fired from the outside was sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1933).

Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, was sufficient to support an instruction to the jury on the question of murder in the first degree. State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934).

Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, was sufficient to be submitted to the jury on the charge of murder in the first degree. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery was sufficient to take the issue of their guilt of murder in the first degree to the jury. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

The confession of defendant that while he was having sexual intercourse with an eight-year-old child, she started to scream and that he put his hand over her mouth, that when he took his hand off her mouth she spoke once and said nothing more, and that he believed her to be dead and carried her away and hid her body, with corroborating evidence that deceased was last seen with defendant, and that her body was found at the place where defendant said he placed it, with expert medical testimony of the use of force and violence in the penetration of deceased's vagina, and that death resulted from suffocation from the bursting of air sacs in deceased's lungs, was held sufficient to be submitted to the jury and sustain a conviction of murder in the first degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

In a prosecution for murder committed during perpetration of an armed robbery and for conspiracy to commit armed robbery, the proof of murder in the first degree is complete when the State proves beyond a reasonable doubt the trigger man shot and killed the victim in the trigger man's attempt to rob him. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

In a prosecution for first degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Where the evidence, taken in the light most favorable to the State, permits a legitimate inference that defendant was engaged in the perpetration or attempted perpetration of a robbery at the time the deceased was killed, the jury is entitled to draw the inference, notwithstanding the State's introduction of defendant's extrajudicial declarations in which he stated that he killed in self-defense rather than in the course of a robbery. State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978).

Evidence held sufficient to establish that defendant killed victim in the perpetration of the felony of attempting to burn a building used for trade, a felony committed with the use of a deadly weapon, a fire bomb. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985), aff'd, 95 N.C. App. 572, 383 S.E.2d 224 (1989).

Evidence tending to show that the defendant was engaged in a common plan with another individual to perpetrate a robbery against victim and that defendant was present at the scene of the robbery, along with evidence from which the jury could find that the other individual killed the victim in furtherance of the plan to rob him, was sufficient for the jury to find the defendant guilty of first-degree murder under the felony-murder rule, notwithstanding the fact that it might conclude that he did not participate in the actual killing. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Evidence as to the position of the victim's legs and evidence of the removal of clothes from the lower part of the victim's body was sufficient, along with other evidence, to be submitted to the jury on a charge of felony murder when the underlying felony was attempted rape. State v. Harris, 319 N.C. 383, 354 S.E.2d 222 (1987).

Despite testimony of victim to a completed armed robbery, where defendant testified that when he went into house he intended to rob both men who were there, but that after he shot murder victim the other victim asked defendant not to shoot him and threw his wallet toward defendant and that defendant left without taking the wallet, this was evidence from which the jury could have found all the elements of attempted armed robbery so as to support a verdict of felony murder based on attempted armed robbery. State v. Blake, 326 N.C. 31, 387 S.E.2d 160 (1990).

The following evidence, viewed in the light most favorable to the State, supported defendant's conviction for both felony murder and armed robbery: (1) the defendant was at the scene of the crimes at the approximate time of the crimes; (2) he left a witness in a car while he entered a store; (3) he returned to car wearing a different shirt; (4) he was seen leaving the store; (5) he gave money to a witness stating he had gotten it in the store and had had to shoot someone; (6) he threatened to shoot witness if he told anyone; and (7) there had been money in the store earlier in the day. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

Where evidence that defendant's conduct before the killing appeared to be that of a person "casing a job" or preparing to commit a robbery, and since he was armed, anticipating a possible homicide, and where defendant testified that he and his brother had driven to several convenience stores on the day of the robbery and shooting, that they stopped at the mart at closing time, that no other customers were in the store, and that he saw the victim follow his brother out of the store arguing with him, heard a noise, then saw the victim on the ground, and immediately left the scene it was reasonable to infer that defendant was serving as a lookout for the robbery. State v. Lane, 328 N.C. 598, 403 S.E.2d 267, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 261 (1991).

Where the felony murder theory upon which the case was submitted was fully supported by the evidence, failure to submit the case on a transferred intent theory, that might also have been supported by the evidence, gave defendant no cause to complain. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

Since the evidence supported the guilt of both defendants as to all of the felonious assaults, it made no difference which of the felonious assaults was the underlying felony, which defendant actually fired the fatal shots or whether defendants intended that the victim be killed. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

The evidence was sufficient to support a conclusion that murder was premeditated and deliberate where defendant carried a gun readied for firing during attempted robbery, indicating he anticipated a violent confrontation and the potential need for deadly force, and there was a lack of provocation on the part of the victim. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Evidence that defendant intended to commit armed robbery against the victim, that in furtherance of this intent, he followed the victim outside armed with a sawed off shotgun, and that within the next two minutes defendant shot and killed the victim, was sufficient to support conviction for first degree felony murder. State v. Gillis, 158 N.C. App. 48, 580 S.E.2d 32, 2003 N.C. App. LEXIS 941 (2003).

Evidence which showed that defendant entered an apartment armed with a loaded shotgun, chambered a round of ammunition, verbally threatened the occupants with death, hit one of the occupants in the head to coerce surrender of his property, and shot another occupant in the head at close range while he was involved in a confrontation with another robber was sufficient to sustain the jury's verdict that the killing and robbery were part of a single transaction, and the trial court did not err when it selected attempted armed robbery as the predicate felony for felony murder, arrested only that conviction, and entered judgments convicting defendant of felony murder and three counts of armed robbery. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

State presented sufficient evidence that the codefendant had constructive possession of the cocaine around the time of the shooting to find that defendant, by virtue of concert of action, committed trafficking in cocaine by possession of more than 400 grams of cocaine while also possessing a deadly weapon in violation of G.S. 90-95; when the codefendant shot the victim, the codefendant obtained dominion and control over the victim and the area around him, including the cocaine, and the codefendant's shooting of the victim within moments of the codefendant stepping into the apartment with the gun to complete the gun transaction was sufficient to convict defendant of felony murder under G.S. 14-17. State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742, 2006 N.C. App. LEXIS 521, appeal dismissed, cert. denied, 637 S.E.2d 183 (N.C. 2006).

Instruction Held Improper. — Where the evidence was sufficient to be submitted to the jury on the theory of defendant's guilt of murdering his victim in an attempt to commit the crime of rape, but was insufficient to show defendant's guilt of the crime of kidnapping, an instruction that defendant would be guilty of murder in the first degree if the jury should find that the murder was perpetrated in the attempt to commit the crime of rape of in the commission of the felony of kidnapping would be held prejudicial, as permitting the jury to rest its verdict on a theory not supported by the evidence. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

Attempted Sale of Cocaine as Underlying Felony. — Evidence was sufficient for a reasonable juror to find attempted sale of cocaine by defendant, a lesser-included offense of sale of cocaine, thus, the trial court's submission to the jury of sale of cocaine as a predicate felony to support defendant's felony murder conviction for one victim's death was not error State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

V. MURDER IN THE SECOND DEGREE.

Common-Law Murder Is Murder in Second Degree. — By this section the crime of murder in the second degree is as at common law. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

Since the Act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N.C. 636, 34 S.E. 247 (1899).

Unless Specifically Made Murder in First Degree. — All crimes which were murder at common law remain murder in the second degree, unless otherwise made murder in the first degree under one of the specific classifications of the statutes. State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982).

Under statutes of this description, murder in the second degree is common-law murder but the killing is not accompanied by the distinguishing features of murder in the first degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Murder in the second degree is a lesser included offense of first degree murder. With the exception of the element of premeditation and deliberation, the elements of the two charges are the same and any defendant preparing a defense for first degree murder is ipso facto preparing a defense for second degree murder. State v. Goodson, 101 N.C. App. 665, 401 S.E.2d 118 (1991).

Aggravating Factor Required Additional Evidence. — G.S. 15A-1340.16(d) was not violated because the prosecution was required to prove facts for the aggravated sentences that were in addition to the elements of defendant's crimes of second degree murder and assault with a deadly weapon inflicting serious injury. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Although second-degree murder is a lesser included offense of premeditated and deliberate first-degree murder, a trial court does not have to submit a verdict of second-degree murder to the jury unless it is supported by the evidence. State v. Annadale, 329 N.C. 557, 406 S.E.2d 837 (1991).

The essential elements of murder in the second degree are that the killing was unlawful and with malice. For these elements to be presumed present, the burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

The law of North Carolina continues to be that the elements of malice and unlawfulness are essential to a second-degree murder conviction. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

Malice Is an Element of Murder in Second Degree. — An unlawful killing with malice is murder in the second degree. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Malice is always a necessary ingredient of murder. State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

But Malice Aforethought Is Not Required. — The offense of murder in the second degree requires malice as an element, but not malice aforethought. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

The Importance of Malice in Attempted Second-Degree Murder. — Although defendant contended that attempted second-degree murder was a legal impossibility because "one cannot specifically intend a crime of general, or non-specific, intent," the court held that there are forms of second-degree murder in which the malice element contains the intent to kill, and that attempted second-degree murder, therefore, does properly exist in North Carolina. State v. Coble, 134 N.C. App. 607, 518 S.E.2d 251, 1999 N.C. App. LEXIS 860 (1999), appeal dismissed, cert. granted, 351 N.C. 111, 541 S.E.2d 152 (1999).

Premeditation and Deliberation Are Not Elements of Murder in the Second Degree. — Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265 (1973); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Christopher, 29 N.C. App. 231, 223 S.E.2d 835 (1976); State v. Periman, 32 N.C. App. 33, 230 S.E.2d 802 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Rogers, 299 N.C. 597, 264 S.E.2d 89 (1980); State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v.

Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422 (1981); State v. Cooke, 306 N.C. 117, 291 S.E.2d 649 (1982); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

The unlawful killing of a human being with malice but without premeditation and deliberation is murder in the second degree. State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996), cert. denied, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997).

Nor Is Intent to Kill. — A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978).

For a conviction of second-degree murder the jury need not find specific intent to kill. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

But Some Intentional Act Must Be in Chain of Causation. — The specific intent to kill is not an essential element of either second degree murder or involuntary manslaughter; however, neither crime exists in the absence of some intentional act in the chain of causation leading to death. State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985), cert. denied, 316 N.C. 196, 341 S.E.2d 579 (1986).

A conviction under this section was supported by evidence that defendant and the victim were embroiled in a tempestuous relationship; that the defendant and the victim had words the night of the shooting, and she tried to leave him; that he followed her with a high-powered rifle and fired a shot at her legs to frighten her; that they returned to the house and continued arguing; that defendant then pointed the rifle at the victim or in her direction and fired; and that he realized she was hit but had not intended to kill her. State v. Lathan, 138 N.C. App. 234, 530 S.E.2d 615, 2000 N.C. App. LEXIS 603 (2000).

As an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

And State Must Prove That Defendant Intentionally Inflicted the Fatal Wound. — To convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

If upon a consideration of all the testimony, including the testimony of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed the deceased, it should return a verdict of not guilty of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

And That Defendant's Act Was a Proximate Cause of Death. — To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death. State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

Since proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

But foreseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

And Culpable Negligence May Support a Conviction. — Culpable negligence from which death proximately ensues makes the actor guilty of manslaughter, and under some circumstances guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

If the State is unable to prove an intentional shooting, no presumption of malice arises, and thus, in order to convict defendant of unlawful homicide, the State had to satisfy the jury beyond a reasonable doubt that defendant's culpable negligence proximately caused the death of his wife. Otherwise, defendant would be entitled to an acquittal. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Both involuntary manslaughter and second-degree murder can involve an act of "culpable negligence" that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, an act of culpable negligence also imports danger to another and is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life, it will support a conviction for second-degree murder. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

What Is Malice. — Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183

N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Hamilton, 77 N.C. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Malice is not only hatred, ill will, or spite, as it is ordinarily understood — to be sure that is malice — but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

Malice exists as a matter of law whenever there has been unlawful and intentional homicide without excuse or mitigating circumstance. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

Any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person, is sufficient to supply the malice necessary for second-degree murder. Such an act will always be accompanied by a general intent to do the act itself, but it need not be accompanied by a specific intent to accomplish any particular purpose or to do any particular thing. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

If Malice Is Shown. — Since the distinction between manslaughter and murder in the second-degree is malice, culpable negligence will not support a murder charge unless there are sufficient facts to support a finding of malice. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

In a legal sense, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985).

Malice May Be Express or Implied. — Malice as an essential characteristic of the crime of murder in the second degree may be either express or implied. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Express Malice Is Not Required. — But it is not necessary to a conviction for murder that the State prove express malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907).

Malice may be implied from the acts of defendant. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

The manner of the killing by defendant, his acts and conduct attending its commission, and his declaration immediately connected therewith were evidence of express malice. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

And from Circumstances Other Than Use of Deadly Weapon. — Malice may be implied from circumstances other than the use of a deadly weapon. State v. Periman, 32 N.C. App. 33, 230 S.E.2d 802 (1977).

Malice may be shown by evidence of hatred, ill will, or dislike. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question of malice. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Inference of Malice from Death Ensuing from Attack Made with Hands and Feet Only. — Ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply the malice required to make the homicide second-degree murder, because ordinarily death would not be caused by the use of such means. The inference would be quite different, however, if the same assault were committed upon an infant of tender years or upon a person enfeebled by old age, sickness, or other apparent physical disability. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Whether an attack made with hands or feet alone which proximately causes death gives rise to either a presumption of malice as a matter of law or to an inference of malice as a matter of fact will depend upon the facts of the particular case. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

The fact that a defendant struck a person with his hand or kicked a person and proximately caused that person's death would not support either a presumption of malice as a matter of law or an inference of malice as a matter of fact unless the defendant was then using his hands or feet as deadly weapons. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Nothing else appearing, the trial court properly could instruct the jury that, should they find the defendant used his hands or feet as deadly weapons and intentionally inflicted a wound upon the deceased proximately causing his death, the law presumes that the killing was unlawful and done with malice. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Malice Shown with Shaken Baby Syndrome. — The state presented substantial evidence that the defendant acted with malice in a prosecution for second-degree murder in the death of his two-month old son, where there was evidence of shaken child syndrome, and medical testimony also indicated that the defendant previously had inflicted a severe blow to the baby's head. State v. Qualls, 130 N.C. App. 1, 502 S.E.2d 31 (1998), aff'd, 350 N.C. 56, 510 S.E.2d 376 (1999).

Inference of Malice from Circumstances Surrounding Killing. — Malice sufficient to support a conviction of second-degree murder may be proven by inference from circumstances surrounding the killing. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844 (1987).

Evidence that defendant, with a history of driving at speeds far in excess of speed limits, entered a sharp curve with a speed limit of 35 mph at more than 70 mph, while under the influence of alcohol, and collided head-on with a vehicle and caused the deaths of two persons supported the jury's finding of malice. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

Evidence which showed that defendant and defendant's girlfriend had been drinking heavily before they decided to purchase more alcohol, that defendant decided to drive even though defendant's license was permanently revoked and defendant was impaired, and that defendant lost control of a car and that defendant's girlfriend died in the ensuing accident supported jury's findings that defendant's actions demonstrated malice necessary to establish second-degree murder. State v. Vassey, 154 N.C. App. 384, 572 S.E.2d 248, 2002 N.C. App. LEXIS 1460 (2002), cert. denied, 356 N.C. 692, 579 S.E.2d 96 (2003), cert. denied, 357 N.C. 469, 587 S.E.2d 339 (2003), cert. dismissed, — N.C. —, 614 S.E.2d 921 (2005).

Defendant's conviction for second-degree murder was upheld on appeal, because defendant failed to show any prejudice with regard to the trial court's admission of a gun residue test over defendant's objection, because defendant did not object to the admission of any statements made during the test, only the test results itself, and the trial court's finding that exigent circumstances existed was supported by the evidence in that the test had to have been administered within a few hours of the shooting and defendant admitted he was one of the last to have seen the victim alive. State v. Page, 169 N.C. App. 127, 609 S.E.2d 432, 2005 N.C. App. LEXIS 514 (2005).

Substantial evidence existed to demonstrate the type of malice manifesting a mind utterly without regard for human life and social duty which would support a second degree murder conviction where the defendant operated his automobile with a high degree of alcohol in his blood and where, during the 16.7-mile chase, defendant ran both a stop sign and a red stop light, passing stopped traffic at speeds of 90-95 m.p.h. State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861, 2000 N.C. App. LEXIS 632 (2000).

Presumptions of Unlawfulness and Malice from Killing with Deadly Weapon. — When a killing resulting from the intentional use of a deadly weapon is established, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955); State v. Revis, 253 N.C. 50, 116 S.E.2d 171 (1960); State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965); State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds in State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971); State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971), cert denied, 409 U.S. 987, 93 S. Ct. 342, 34 L. Ed. 2d 253 (1972); State v. McIlwain, 279 N.C. 469, 183 S.E.2d 538 (1971); State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971); State v. Cannady, 17 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973); State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973); State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d

389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976); State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

Intentional killing of a human being with a deadly weapon implies malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907); State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922); State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Bright, 215 N.C. 537, 2 S.E.2d 541 (1939); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

The common-law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927).

A presumption of malice arises when one intentionally assaults another with a deadly weapon and thereby proximately causes his death. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

For Such Presumptions to Apply Intent Must Be Shown. — The presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide, unless he admits, or the State proves, that he intentionally killed the deceased with a deadly weapon. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

For the presumptions of malice and unlawfulness to arise from a killing with a deadly weapon, the defendant must admit or the State must prove beyond a reasonable doubt that the killing was intentional. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

But Intent Need Not Be to Kill. — The expression "intentional killing" is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Intent Must Be to Use Deadly Weapon as a Weapon. — The intentional use of a deadly weapon as a weapon is necessary to give rise to presumptions of unlawfulness and of malice. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

It is error for the trial court to instruct the jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since in order for a presumption of malice to arise, it has to be established or admitted that the defendant intentionally used a deadly weapon as a weapon and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. The presumptions do not arise if an instrument, which is or may be a deadly weapon, is not intentionally used as a weapon, e.g., from an accidental discharge of a shotgun. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

And to Inflict a Wound. — Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of G.S. 14-34. In order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Felonious Intent to Commit Second-Degree Murder Is Logical Impossibility. — The trial judge erroneously submitted second-degree murder as the intended felony for first-degree burglary; because second-degree murder does not involve the intent to kill, it cannot serve as the felonious intent element for purposes of burglary. Just as attempted second-degree murder is a logical impossibility, so too is the felonious intent to commit second-degree murder. State v. Van Jordan, 140 N.C. App. 594, 537 S.E.2d 843, 2000 N.C. App. LEXIS 1246 (2000).

Effect of Mental Illness and Alcoholism on Presumption of Malice. — In a second degree murder case, evidence of a defendant's mental illness and alcoholism will not rebut the presumption of malice where the killing was accomplished by the intentional use of a deadly weapon so as to entitle defendant to a jury instruction on the lesser-included offense of voluntary manslaughter. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

Diminished Capacity Irrelevant. — Trial court properly refused to instruct jury to consider diminished capacity when it deliberated whether to convict defendant of second-degree murder. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

Instruction Warranted. — Where defendant had been drinking heavily and smoking crack cocaine for several hours, it was possible for a trier of fact to find that he lacked the requisite state of mind — that is, the necessary specific intent of premeditation and deliberation — for first degree murder, and the trial court's instruction of second degree murder was, therefore, proper. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704, 1999 N.C. App. LEXIS 1309 (1999), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000).

Error in Instructing on Presumption of Malice Absent Use of Deadly Weapon. — The trial court in a homicide prosecution erred in instructing the jury to presume the existence of malice if they found that the victim's death was intentionally caused where there was no evidence of the use of a deadly weapon, since malice is presumed only where death resulted from the intentional use of a deadly weapon. State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973). But see State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983) as to use of hands and feet as deadly weapons.

Error in Instructing on Presumption of Malice. — In light of the fact that the trial court (1) repeatedly instructed the jury that they had to find that the defendant acted with malice in order to find him guilty of second-degree murder, and (2) instructed the jury that if the State failed to prove the defendant acted with malice, then the defendant could be guilty of no more than voluntary manslaughter, the court's misstatement in the final mandate that second-degree murder was killing without malice did not constitute plain error. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

Instruction as to Presumptions of Malice and Unlawfulness Shifts Burden of Production to Defendant. — Instruction that if the State proved beyond a reasonable doubt that the defendant intentionally killed victim with a deadly weapon, or that he intentionally inflicted a wound upon her with a deadly weapon that proximately caused her death, then the law implied, first, that the killing was unlawful, and secondly, that it was done with malice, did not impermissibly shift the burden of proof to defendant but merely shifted the burden of production. And a state may legitimately shift a burden of production on an element of the crime to the defendant, so long as the presumed fact is rationally connected to a proven fact. Rook v. Rice, 783 F.2d 401 (4th Cir.), cert. denied, 478 U.S. 1022, 106 S. Ct. 3315, 92 L. Ed. 2d 745 (1986).

Jury Instruction Regarding "Bent on Mischief." — The portion of a jury instruction defining "deliberately bent on mischief" correctly conveyed to the jury that it could infer malice if it found that defendant's acts manifested depravity of mind and disregard of human life. State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999), aff'd, 351 N.C. 386, 527 S.E.2d 299 (2000).

No Evidence to Warrant Instruction on Second-Degree Murder. — Where the jury returned a verdict that defendant was guilty of first-degree murder under the felony-murder rule and not of premeditated and deliberated murder, no evidence in the record warranted submission of an instruction on second-degree murder. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

Jury Question Warranted. — Sufficient evidence was found to allow the issue of defendant's guilt of second-degree murder to be submitted to the jury. State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (1993).

Constitutionality of Presumptions of Malice and Unlawfulness. — Under the decision of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the due process clause of U.S. Const., Amend. XIV prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and that in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 306 (1977).

The Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977).

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not apply to the presumption of malice created when the

State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. State v. Johnson, 28 N.C. App. 265, 220 S.E.2d 834, cert. denied, 289 N.C. 454, 223 S.E.2d 162 (1976).

The ruling of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not preclude all use of traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the State of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and constitutional. State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977).

Requiring defendant to rebut the presumption of malice flowing from state's proof of the intentional infliction of a wound upon the deceased with a deadly weapon, proximately resulting in death, does not violate Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), since the presumption persists only in the absence of evidence to the contrary, and evidence raising an issue on the existence of malice and unlawfulness causes the presumption to disappear, leaving only a permissible inference which the jury may accept or reject. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

Such Presumptions Are Mandatory. — In a homicide case, in the absence of evidence of a killing in the heat of passion and the absence of evidence of self-defense, proof of the intentional infliction of a wound raises not mere permissible inferences but mandatory presumptions of the existence of malice and unlawfulness entitling the State at least to a conviction of murder in the second degree. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

But Not Irrebuttable. — An instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive, irrebuttable presumption. The presumption is mandatory in that defendant, to avoid its effect, must produce some evidence raising an issue on the existence of malice and unlawfulness or rely on such evidence as the State may have adduced. In the presence of evidence raising such issues, the presumption disappears altogether, leaving only a permissible inference which the jury may accept or reject. State v. Reynolds, 307 N.C. 184, 297 S.E.2d 532 (1982).

Where all the evidence tends to show that defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death, such evidence raises inferences of an unlawful killing with malice which are sufficient to permit, but not require, the jury to return a verdict of murder in the second degree. State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978).

Presumption of Malice Disappears Where Evidence Shows Self-Defense or Provocation. — When there is some evidence justifying an instruction concerning self-defense or heat of passion killing upon sudden provocation, any presumption of malice arising from a finding that defendant intentionally inflicted the wounds with a deadly weapon disappears, leaving only a permissible inference which the jury may accept or reject. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Whether there is evidence in the case from which a jury could find a killing in the heat of passion or self-defense so that the mandatory presumptions are transformed into permissible inferences depends largely on the quantum of the evidence rather than its quality or credibility. This is a question for the court, not the jury. No instructions on this principle should be given to the jury. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Where defendant produced evidence from which the jury could have found that he killed in the heat of passion suddenly aroused or that he killed in self-defense, the State was not entitled to the benefit of mandatory presumptions of malice and unlawfulness. It was entitled at most to the benefit of permissible inferences that these elements existed if the jury should find it had proved beyond a reasonable doubt defendant's intentional infliction of a wound with a deadly weapon resulting in death. These permissible inferences placed no burden upon defendant to rebut them by raising a reasonable doubt as to the existence of the inferred elements. It was error to so instruct the jury. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

But Logical Inferences May Be Weighed Against the Evidence. — If there is evidence of provocation or self-defense, the mandatory presumptions of malice and unlawfulness disappear, but the logical inferences from the facts proved may be weighed against the evidence. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977); State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

Evidence of self-defense or of killing in a heat of passion upon sudden provocation are matters of excuse and mitigation, which should be weighed against the raised inferences of unlawfulness and malice. State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978).

Instruction as to Presumptions Absent Evidence of Passion, Provocation, or Self-Defense. — If, after the mandatory presumptions as to the unlawfulness of the killing and as to malice arise, there is no evidence that the killing was in the heat of passion on sudden provocation or in self-defense, the law requires that the jury be instructed that the defendant must be convicted of murder in the second degree. State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983).

Self-Serving Declarations Not Sufficient to Rebut Presumption. — In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation nor evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

State's Burden of Proof. — In offering evidence of "all other kinds of murder" as that phrase is employed in the second sentence of this section, the State must bear the burden of proving that the killing was intentional, unlawful and done with malice aforethought, even though it may have been proximately caused by the unlawful distribution of controlled substances or proximately caused by the commission or the attempted commission of any felony not specified in the first sentence of this section and without the use of a deadly weapon. State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982).

If the State is to carry its burden of proof on a charge of murder in cases in which a killing occurs during the commission of a felony committed or attempted without the use of a deadly weapon and not one of the felonies specified in this section, it must show that the killing was murder as at common law by proof beyond a reasonable doubt that it was an intentional and unlawful killing with malice aforethought. In such cases the State will have borne the burden of proof necessary to sustain a conviction of murder in the second degree. If the State additionally can prove beyond a reasonable doubt that the murder was premeditated and deliberate, it will have borne its burden of proving the offense was murder in the first degree. State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982).

In a prosecution for unlawful homicide, the burden is always upon the State to prove an unlawful slaying. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

The State Must Prove Each Element of the Crime. — The State must bear the burden throughout the trial of proving each element of the crime charged, including, where applicable, malice and unlawfulness beyond a reasonable doubt. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

But the State is not required to prove malice and unlawfulness unless there is some evidence of their nonexistence. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

State need not prove malice and unlawfulness unless there is some evidence of their nonexistence, but once such evidence is presented, the State must prove these elements beyond a reasonable doubt. State v. Bondurant, 309 N.C. 674, 309 S.E.2d 170 (1983).

Such as Heat of Passion. — When there is some evidence of heat of passion on sudden provocation, which negates malice, then in order to prove the existence of malice the State must prove the absence of heat of passion beyond a reasonable doubt. State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982).

Defendant's Burden Is to Produce Some Evidence of Their Nonexistence. — In a murder prosecution, defendant has no burden to produce evidence sufficient to raise a reasonable doubt as to the existence of malice or unlawfulness. His burden is simply to produce some evidence from which a jury could find the nonexistence of these elements, i.e., to produce some evidence of a killing in the heat of passion or some evidence of self-defense from which a jury could find the existence of these things. Upon production of such evidence, the burden is upon the State to prove beyond a reasonable doubt the existence of malice and the absence of self defense. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

As Defendant Has No Burden to Raise Reasonable Doubt. — The question whether evidence is sufficient to raise a reasonable doubt is always for the jury under proper instructions from the court. The instructions should, however, be put in terms of the State's burden to prove every element beyond a reasonable doubt, not defendant's burden to raise a reasonable doubt, since defendant has no such burden. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Instructions Placing Burden on Defendant to Prove Lesser Offense or Justification Are Improper. — Instructions placing the burden on defendant (1) to show circumstances that would reduce the offense from second-degree murder to manslaughter and (2) to justify the killing on ground of self-defense were erroneous in view of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), and State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977); State v. McLaurin, 33 N.C. App. 589, 235 S.E.2d 871 (1977).

An instruction placing the burden on petitioner to satisfy the jury of the absence of malice, or that the killing was committed in self-defense, is constitutional error unless the court should find that there was no evidence to support verdicts of either manslaughter or not guilty, or the instruction was otherwise harmless error beyond a reasonable doubt. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

Murder in Second Degree Is Included in Murder in First Degree. — If a person is found guilty of murder in the first degree, a fortiori, his guilt encompasses murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

And manslaughter is a lesser included offense of murder in the second degree. State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978).

Murder in Second Degree and Manslaughter Distinguished. — The difference between second-degree murder and manslaughter is that malice, express or implied, is present in the former and not in the latter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

In order for an accused to reduce the crime of second-degree murder to voluntary manslaughter, he must rely on evidence presented by the State or assume a burden to go forward with or produce evidence of heat of passion on sudden provocation. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

Reduction to Manslaughter for Killing in Heat of Passion on Adequate Provocation. — The crime of second degree murder may be reduced to voluntary manslaughter upon a showing that defendant killed his victim in the heat of passion caused by provocation adequate to negate the element of malice. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Reduction to Manslaughter Where Self-Defense Is Used. — Second degree murder may be reduced to voluntary manslaughter if the killing results from the use of excessive force in the exercise of self-defense. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

What Is Excessive Force in Exercise of Self-Defense. — Excessive force in the exercise of self-defense is that force used by a defendant who honestly believes that he must use deadly force to repel an attack, but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Sentencing. — Murder in the second degree is a Class C felony and therefore the judge sentencing a defendant who is adjudged guilty of this crime must impose a 15-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Defendant's aggravated sentence for second degree murder did not violated the ex post facto clauses in N.C. Const., Art. 1, § 16 and U.S. Const., Art. 1, § 10, because the trial court had the authority to use a special verdict for the jury to determine aggravating factors at the time of defendant's trial. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

No prejudicial error resulted from defendant's resentencing, in light of Blackwell, as a procedural mechanism existed by which to submit the aggravating factors to the jury, and there was overwhelming and uncontradicted evidence that defendant joined with more than one other person in the commission of the second-degree murder of the victim. State v. Harris, 185 N.C. App. 285, 648 S.E.2d 218, 2007 N.C. App. LEXIS 1708 (2007).

Sentencing — Premeditation and Deliberation as Aggravating Factor. — The trial court properly used and found ample evidence of premeditation and deliberation as an aggravating factor in second degree murder plan. State v. Brewer, 321 N.C. 284, 362 S.E.2d 261 (1987).

Where a defendant tried for murder in the first degree is found guilty of murder in the second degree, trial court may not find by the preponderance of the evidence that the killing was after premeditation and deliberation and use this finding as an aggravating factor. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

A trial judge can find as an aggravating factor that the killing was done with premeditation and deliberation when a defendant charged with first degree murder pleads guilty to second degree murder. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

Where a defendant is convicted on an indictment charging only second degree murder, a determination by the preponderance of the evidence that defendant premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Therefore, a sentencing judge is not barred from using premeditation and deliberation as an aggravating factor in such a case. State v. Vandiver, 326 N.C. 348, 389 S.E.2d 30 (1990).

Supplying Drugs Known to Be Dangerous. — Evidence which tended to show that defendant supplied drugs to the victim with the knowledge that the drugs were inherently dangerous due to the fact that two other people had become violently ill after using the drugs in defendant's presence, was sufficient to establish "a wrongful act intentionally done without just cause or excuse" and, therefore, the jury could have reasonably inferred that the defendant acted with malice necessary for a conviction of second-degree murder. State v. Liner, 98 N.C. App. 600, 391 S.E.2d 820 (1990).

Submission of second-degree murder as possible jury verdict during trial on charge of first-degree murder was not error where witness' testimony that defendant was in the back seat holding the victim down while the other defendant pommeled her and then confronted her with a knife, in conjunction with testimony that the victim's inert body was then dragged to the side of the road, permits an inference beyond any reasonable doubt that defendant acted with malice and in concert in the unlawful killing of the victim. State v. Goodson, 101 N.C. App. 665, 401 S.E.2d 118 (1991).

Course of Conduct. — Where the offenses of first-degree murder and assault with a deadly weapon were joined offenses for which defendant was convicted contemporaneously with his conviction for second-degree murder, a Class C felony covered by the Fair Sentencing Act, finding these offenses to have established a "course of conduct" in aggravation of second-degree murder, violated the prohibition of such factors in State v. Westmoreland, 314 N.C. 442, 334 S.E.2d 223 (1985); therefore, defendant was entitled to resentencing in the second-degree murder case, where the "course of conduct" aggravating factor would not be considered. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

The evidence was insufficient to support the defendant's conviction of second degree murder for shaking his girlfriend's baby where the doctor testified that the victim died from shaken baby syndrome, which he said was caused by more than a light shaking; the defendant did not mention shaking the child at the first interview with police, but only after the results of the autopsy were made known to him, at which time he said he "became frustrated and started shaking [the baby]" but did not "realize that he was shaking her that hard" and that he did not mean to hurt her. Many small blood vessels on the surface of the victim's brain were torn and bleeding, but larger vessels were not torn and there were no other internal or external injuries to the victim's body, her ribs were not bruised or fractured, and there were no external head injuries and the skull was not fractured. State v. Blue, 138 N.C. App. 404, 531 S.E.2d 267, 2000 N.C. App. LEXIS 633 (2000), aff'd in part, rev'd in part on other grounds, and remanded, 353 N.C. 364, 543 S.E.2d 478 (2001).

Evidence Held Sufficient. — The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that the killing was unlawful and done with malice, and such unlawful killing with malice was murder in the second degree, where all the evidence tended to show that defendant stubbornly continued over a period of hours to curse the deceased and to assault his helpless victim time after time with various deadly weapons while a witness was begging him to cease and desist, and that by these persistent assaults without the slightest provocation he inflicted mortal wounds proximately causing the death of his victim. This evidence afforded no basis upon which defendant could be found guilty of manslaughter. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The evidence was sufficient to be submitted to the jury in a second-degree murder prosecution where it tended to show that the defendant and the deceased were imprisoned in the same prison unit, and that a prison guard saw them arguing and broke them up, that later the guard saw defendant approach deceased who was lying on his bunk and make a striking movement toward the deceased's body, that although the guard saw no knife or other weapon in defendant's hand, a small knife was later discovered in a heater and that deceased had died from a stab wound to the chest. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

The State's evidence was sufficient to support defendant's conviction of second-degree murder where it tended to show that the victim entered a car occupied by defendant and defendant's companion in order to sell defendant a stolen M-16 rifle; the victim was seated in the front seat and defendant was seated in the back seat; defendant told the victim he had to pick up the money for the rifle at a friend's house; as the car was being driven by defendant's companion, defendant shot the victim in the head with a pistol which belonged to the girlfriend of the defendant's companion; defendant threatened to shoot his companion unless he followed defendant's orders, whereupon the companion assisted defendant in burying the body, and a search of the residence of defendant and his companion uncovered the M-16 rifle. State v. Fletcher, 301 N.C. 709, 272 S.E.2d 859 (1981).

The State's evidence was sufficient to support convictions of defendants for second-degree murder where it tended to show that the victim, a State's witness, and another person were standing in the front yard of the witness's house at 4:00 A.M.; the witness heard a vehicle approaching the house, and heard one defendant screaming at him; the witness saw such defendant driving a pickup truck on the road in front of the house and saw the second defendant firing a gun from the back of the pickup; after passing the house, the pickup turned around and drove by the house again, at which time the second defendant fired several more shots; and the victim sustained a gunshot wound in the neck and died as a result thereof. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

For additional cases in which evidence of second-degree murder was held sufficient, see State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964); State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Moore, 46 N.C. App. 563, 265 S.E.2d 421, cert. denied, 301 N.C. 103, 273 S.E.2d 308 (1980).

Evidence held sufficient to support a verdict of guilty of second-degree murder. State v. Blake, 83 N.C. App. 77, 349 S.E.2d 78 (1986), cert. denied as to additional issues, 318 N.C. 697, 351 S.E.2d 751, aff'd, 319 N.C. 599, 356 S.E.2d 352 (1987); State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987); State v. Blake, 319 N.C. 599, 356 S.E.2d 352 (1987); State v. Hemphill, 104 N.C. App. 431, 409 S.E.2d 744 (1991).

Evidence was clearly sufficient to show that the defendant, whether acting alone or together with a codefendant pursuant to a common purpose, committed the crimes of second-degree murder and armed robbery against the victim. State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986), cert. denied, 319 N.C. 460, 356 S.E.2d 8 (1987).

While the opinions of the several medical expert witnesses differed as to the cause of the subarachnoid hemorrhage from which the victim's death resulted, evidence tending to show that the defendant struck the victim with an iron bar, that the victim fell immediately and was rendered unconscious and went into cardiac arrest, as well as testimony by the State's pathologist that the victim's death was caused by the subarachnoid hemorrhage, which in his opinion was produced by trauma, was sufficiently substantial evidence on the issue of proximate cause to warrant submission of second-degree murder charge to the jury. State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986), cert. denied, 319 N.C. 226, 353 S.E.2d 410 (1987).

Evidence of three strong blows to different sides of the head, one severe enough to tear the victim's ear almost completely off, was sufficient to establish malice and intent to kill for purposes of second degree murder conviction. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844, cert. denied, 320 N.C. 514, 358 S.E.2d 523 (1987).

Evidence was sufficient to support denial of motion to dismiss in trial for second degree murder under a theory of acting in concert. State v. Moore, 87 N.C. App. 156, 360 S.E.2d 293 (1987), cert. denied, 321 N.C. 477, 364 S.E.2d 664 (1988).

Evidence held sufficient to allow the jury to reasonably find that murder was committed by defendant in furtherance of a robbery of the victim and his place of business, and accordingly, to support defendant's convictions for both second-degree murder and armed robbery. State v. Pearson, 89 N.C. App. 620, 366 S.E.2d 895, cert. denied, 323 N.C. 178, 373 S.E.2d 120, cert. denied, 323 N.C. 627, 374 S.E.2d 597 (1988).

Evidence held sufficient to show evidence of malice so as to support conviction of second-degree murder. State v. Roberson, 90 N.C. App. 219, 368 S.E.2d 3, cert. denied, 322 N.C. 487, 370 S.E.2d 237 (1988).

For additional case in which evidence of second-degree murder was held sufficient, see State v. Farris, 93 N.C. App. 757, 379 S.E.2d 283 (1989), discretionary review improvidently allowed, 326 N.C. 45, 387 S.E.2d 54 (1990).

Testimony of the eyewitness that after victim begged defendant not to kill him, that defendant said, "I'm going to kill you anyway" and that he proceeded to do so by deliberately firing a bullet through victim's skull was sufficient to support conviction of second-degree murder. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

Where defendant struck victim on the head with a handgun with such force that the victim was knocked instantly to the pavement, and where victim hit the pavement with sufficient force to shatter a bottle and cause punctures to the victim's face and to cause bone fragments to enter the victim's brain, there was substantial evidence from which the jury could conclude that the assault was one likely to cause death or serious bodily injury and was, therefore, an intentional killing. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

Although a physician testified that the hemorrhaging on the top surface of the brain and the cut on top of homicide victim's head would not generally be considered serious injuries, there was no evidence to show that the act of striking another person in the head with a handgun with sufficient force to knock that person to the ground is not an assault likely to cause death or serious bodily injury. State v. Piche, 102 N.C. App. 630, 403 S.E.2d 559 (1991).

While evidence tended to show that defendant may have killed her husband, it did not necessarily lead to the conclusion that defendant first premeditated and deliberated his death; thus, the evidence supported a finding of second-degree murder. State v. Webster, 111 N.C. App. 72, 431 S.E.2d 808, cert. denied, 335

N.C. 180, 438 S.E.2d 206 (1993), aff'd, 337 N.C. 674, 447 S.E.2d 349 (1994), cert. denied, 335 N.C. 180, 438 S.E.2d 206 (1993).

The evidence supported a conviction under this section and the defendant's acts manifested recklessness of consequences and a total disregard for human life where the evidence showed that the he drove while impaired by alcohol, at a time when his license was in a state of permanent revocation; that he drove his pickup truck erratically, swerved off the road, and struck the victim's bicycle killing him instantly; and that he was previously convicted of driving while impaired in 1991 and a 1997 conviction for driving while impaired was on appeal. State v. McAllister, 530 S.E.2d 859, 2000 N.C. App. LEXIS 600 (2000).

Defendant's convictions of second degree murder, and of being a violent habitual felon were affirmed; the trial court properly conducted a hearing as contemplated by G.S. 15A-1002(b) before its ruling that defendant was competent to stand trial where defendant was given adequate notice of the hearing, the trial court properly denied defendant's request for a jury instruction on self defense, the evidence showed that the victim did not carry a gun, that no gun was found on or near the victim, and that defendant never claimed that he saw the victim with a gun, and the trial court properly considered a previous voluntary manslaughter conviction in determining violent habitual felon status. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Evidence that defendant had a breath alcohol concentration of 0.08 and performed poorly on field sobriety tests after he caused an automobile accident that resulted in the death of a child was sufficient to sustain defendant's conviction for second-degree murder, and the trial court did not err by allowing the State to introduce evidence that defendant was convicted of driving while impaired after he was involved in another accident in 1996, to prove malice. State v. Locklear, 159 N.C. App. 588, 583 S.E.2d 726, 2003 N.C. App. LEXIS 1535 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 394 (2004), aff'd, 359 N.C. 63, 602 S.E.2d 359 (2004).

Defendant's conviction for accessory after the fact to second-degree murder was supported by evidence showing defendant personally helped the principal avoid arrest, including testimony about the perpetrator's guilt, circumstantial evidence linking the perpetrator to a car used in the crime, and the perpetrator's guilty plea, and testimony that defendant learned the perpetrator had "gotten his stripes" by attacking the victim, that defendant offered $2,000 for use of a car to leave town with the perpetrator, and that they left town. State v. Brewington, — N.C. App. —, 635 S.E.2d 512, 2006 N.C. App. LEXIS 2133 (2006).

Sufficient evidence supported a second-degree murder charge against defendant, where defendant used a deadly weapon, a gun, and intentionally shot the victim after the victim tackled defendant's brother. State v. Johnson, 182 N.C. App. 63, 641 S.E.2d 364, 2007 N.C. App. LEXIS 500 (2007).

Evidence that defendant fired several shots in the direction of three individuals, in a small trailer occupied by six persons, and that he admitted shooting one of the individuals, was sufficient to support his conviction of the second degree murder of that individual under G.S. 14-17. State v. Brower, 186 N.C. App. 397, 651 S.E.2d 390, 2007 N.C. App. LEXIS 2209 (2007).

Evidence was sufficient to support defendant's convictions for second degree murder where defendant stole a van, drove it recklessly while being pursued by police, which resulted in the van flipping over, colliding with another vehicle, and the occupants thereof being killed; there was sufficient evidence of defendant's malice. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

Evidence Held Insufficient. — Evidence was insufficient to be submitted to the jury on charges of second-degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaughter where the evidence tended to show that defendant, a 16 year old boy, shot his 10 year old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing, defendant was "messing around with a shotgun", and the gun accidentally went off. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Evidence that the defendant and the victim argued, without more, was insufficient to show that the defendant's anger was strong enough to disturb his ability to reason, and without evidence showing that the defendant was incapable of deliberating his actions, the evidence could not support the lesser included offense of second-degree murder. State v. Solomon, 340 N.C. 212, 456 S.E.2d 778 (1995).

For additional case in which evidence was held insufficient to support a finding of second-degree murder, see State v. Johnson, 78 N.C. App. 729, 338 S.E.2d 584, cert. denied, 316 N.C. 382, 342 S.E.2d 902 (1986).

For additional cases in which evidence of second-degree murder was held sufficient, see State v. Mooneyhan, 104 N.C. App. 477, 409 S.E.2d 700 (1991).

There is no "attempted second-degree murder" under North Carolina law; instead of seeking such a conviction, the prosecutor could have charged the defendant in a separate indictment with assault with a deadly weapon with intent to kill which requires proof of an element not required for attempted murder—use of a deadly weapon—and is not a lesser-included offense of attempted murder. State v. Coble, 351 N.C. 448, 527 S.E.2d 45, 2000 N.C. LEXIS 233 (2000).

An incorrect instruction on attempted second-degree murder was not prejudicial to the defendant where no such crime exists and the jury found defendant guilty of attempted first-degree murder; they would not have found him totally innocent had the instructions been correct. State v. Choppy, 141 N.C. App. 32, 539 S.E.2d 44, 2000 N.C. App. LEXIS 1275 (2000).

The trial court did not err or violate double jeopardy principles in sentencing the defendant for both impaired driving and second degree murder. Driving while impaired is not a lesser included offense of second degree murder. State v. McAllister, 530 S.E.2d 859, 2000 N.C. App. LEXIS 600 (2000).

VI. DEFENSES AND DENIALS.

A. In General.

The common law "year and a day rule" purports to bar a prosecution for a person's death where death actually occurs more than a year and a day after the time of the injuries inflicted by the defendant. The rationale for this rule was that causation was less certain when the victim's death occurred so long after the defendant's act, however, where there was sufficient evidence to support the conclusion that victim's death was the proximate result of injuries he received due to defendant's actions, the court would not apply that rule. State v. Vance, 98 N.C. App. 105, 390 S.E.2d 165, reversed on other grounds, State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991).

Defendant may rely on more than one defense. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Plea of not guilty to the felony of second degree murder entitles defendant to offer evidence that the killing was committed in self-defense, by accident, or both; no election is required. State v. Hayes, 88 N.C. App. 749, 364 S.E.2d 712, supersedeas dissolved, 322 N.C. 327, 368 S.E.2d 871 (1988).

For discussion of defense of habitation, see State v. Roberson, 90 N.C. App. 219, 368 S.E.2d 3, cert. denied, 322 N.C. 484, 370 S.E.2d 237 (1988).

B. Accident.

When Homicide Will Be Excused as Accidental. — A homicide will be excused as accidental where (1) the killing was unintentional, (2) the perpetrator acted with no wrongful purpose, (3) the killing occurred while the perpetrator was engaged in a lawful enterprise, and (4) the killing did not occur as a result of culpable negligence. State v. Knight, 87 N.C. App. 125, 360 S.E.2d 125 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 662 (1988).

A defendant's assertion of accidental killing is not an affirmative defense. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

But Rather, a Denial of Guilt. — The contention of a defendant charged with homicide that the killing was accidental is not an affirmative defense, but rather, a denial of guilt by denying the element of intent. State v. Jackson, 36 N.C. App. 126, 242 S.E.2d 891, cert. denied, 295 N.C. 470, 246 S.E.2d 11 (1978).

Misadventure or accident is not an affirmative defense but merely a denial that defendant intentionally shot the deceased. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another. It is not an affirmative defense, but acts to negate the mens rea element of homicide. State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987).

And Does Not Shift the Burden of Proof to Defendant. — The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant, because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Defendant's assertion that the killing of deceased with a deadly weapon was accidental is not an affirmative defense which shifts the burden of proof to him to exculpate himself from a charge of murder; it is merely a denial that the defendant committed the crime, and the burden remains on the State to prove a homicide resulting from the intentional use of a deadly weapon before any presumption arises against the defendant. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Assertion by an accused that a killing with a deadly weapon was accidental is a denial that he committed the crime charged and is in no sense an affirmative defense shifting the burden to him to satisfy the jury that death of the victim was in fact an accident. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

State's Burden of Proof Where Accidental Killing is Claimed. — The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

As to the burden of proof where the defendant asserts killing was accidental, see also State v. Fowler, 268 N.C. 430, 150 S.E.2d 731 (1966).

Accident Is Not a Defense to Felony Murder. — Accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Evidence of Accidental Discharge of Weapon. — When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired in a scuffle or by some other accidental means is competent to rebut an intentional shooting. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Evidence of Prior Assaults on Same Victim. — In defendant's trial on a charge of murder in the first degree, the trial court properly admitted testimony which showed that defendant assaulted the victim, his girlfriend, on prior occasions and that defendant's girlfriend had asked defendant to leave her residence on the day he shot her, because the testimony was relevant to defendant's claim that he discharged his gun accidentally and the prejudicial effect of the evidence did not outweigh its probative value. State v. Latham, 157 N.C. App. 480, 579 S.E.2d 443, 2003 N.C. App. LEXIS 743 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Instruction on "Accident" Need Not Define Term. — In a prosecution for murder and assault with a deadly weapon with intent to kill, where the trial judge instructs the jury on the defense of accident, it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Instruction Held Necessary. — Where both defendant's sister and mother were witnesses for the State and testified that defendant stated that the shooting was accidental, trial judge erred in not instructing jury on defense of accident since testimony gave rise to inference from which jury could find defendant accidentally shot and killed his brother. State v. Garrett, 93 N.C. App. 79, 376 S.E.2d 465, cert. denied, 324 N.C. 338, 378 S.E.2d 802 (1989).

Instruction Held Not Necessary. — In a prosecution for second-degree murder, where the victim died of drowning, it was not error for the court to fail to charge the jury on the defense of accident. If the victim died as the result of an accidental drowning, it was an accident with which the defendant had nothing to do. If the jury had accepted the defendant's version of the event, the jury should have found the defendant not guilty under the charge given to them by the court. It was not necessary for the court to charge on accident. State v. Willoughby, 58 N.C. App. 746, 294 S.E.2d 407, cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982).

Evidence Held Insufficient to Support Defense of Accidental Death. — Evidence in a prosecution for second-degree murder that defendant did not intend for the bullet to strike the victim but that he intended to fire to the right of his head for the purpose of scaring him did not present the defense of death by accident. State v. Walker, 34 N.C. App. 485, 238 S.E.2d 666 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

Where the evidence was uncontroverted that defendant was in a car driving away from the scene when the decedent called out, and that at that point defendant ordered the driver to stop, left the safety of the car with a loaded pistol in his hand, and approached the decedent, voluntarily placing himself in a volatile situation, the fact that he claimed that he did not intend the shooting would not cleanse him of culpability and thus give rise to a defense of accident. However, the defendant was entitled to have the jury consider whether he was guilty only of the offense of involuntary manslaughter. State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987).

Evidence held sufficient to show that individual was the victim of murder rather than the victim of an accident, and that defendant committed the crime. State v. Carroll, 85 N.C. App. 696, 355 S.E.2d 844, cert. denied, 320 N.C. 514, 358 S.E.2d 523 (1987).

Testimony of physician that 30-day-old victim sustained profound head injury indicating fracture of the skull bones, that it is hard to fracture a child's bones, and that it would take a considerable amount of torsion or force to cause the fractures he observed during the autopsy of the victim was sufficient to permit a jury to find that the victim's injuries were not the result of accident. State v. Perdue, 320 N.C. 51, 357 S.E.2d 345 (1987).

C. Insanity.

The jury should establish the defendant's guilt or innocence of the crime first and reach the insanity issue only if it first has found the defendant guilty of the crime. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

The test of insanity as a defense to a criminal charge in this State is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985).

Legal insanity requires that the accused be laboring under such defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act, or if he does know this, not to know right from wrong. State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267

(1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

The test of insanity as a defense to a criminal charge is whether the defendant was laboring under such a defect of reason from disease or deficiency of mind at the time of the alleged act as to be incapable of knowing the nature and quality of his or her act or, if the defendant did know this, was incapable of distinguishing between right and wrong in relation to such act. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

The M'Naghten test, which focuses on the defendant's capacity to distinguish between right and wrong at the time of and in respect to the crime in question, is the appropriate test for insanity. State v. Davis, 321 N.C. 52, 361 S.E.2d 724 (1987).

A defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication or some other cause. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Insanity Is an Affirmative Defense. — For case declining to change the longstanding common-law rule in North Carolina that insanity is an affirmative defense which must be proved by the defendant, see State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Burden of Proof on Defendant to Prove Insanity. — The presumption of sanity gives rise to the firmly established rule that the defendant has the burden of proving that he was insane during the commission of the crime. The defendant, however, unlike the State, which must prove his guilt beyond a reasonable doubt, is merely required to prove his insanity to the satisfaction of the jury. State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985); State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

The trial court's instruction to the jury that the defendant had the burden of proving his insanity to the jury's satisfaction was not error. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

In this jurisdiction every person is presumed sane until the contrary is shown, and the defendant has the burden of proving his insanity to the satisfaction of the jury. State v. Davis, 321 N.C. 52, 361 S.E.2d 724 (1987).

It is the defendant's burden to satisfy the jury of the existence of the insanity defense, even where the evidence of insanity presented by the defendant is uncontradicted by an offer of proof by the state. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Constitutionality of Placing Such Burden on Defendant. — The mens rea or the criminal intent required for first degree murder is proven through the elements of premeditation and deliberation. The State is not unconstitutionally relieved of any burden by the rule placing the burden of proof on the issue of insanity on defendant. State v. Mize, 315 N.C. 285, 337 S.E.2d 562 (1985).

Burden of Proving Unlawfulness Not Shifted to Defendant. — The defense of insanity is unrelated to the existence or nonexistence of the element of unlawfulness. To place the burden of persuasion on the insanity issue upon the defendant in a homicide case in no way lessens the state's burden to prove unlawfulness beyond a reasonable doubt, nor does it shift the burden of persuasion on this element to the defendant. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

Theory of Diminished Responsibility Not Adopted. — The Supreme Court has not adopted with respect to the specific intent to commit a crime such as first-degree murder what has been called the theory of diminished responsibility, under which some states hold that a defendant may offer evidence of an unusual or abnormal mental condition which is not sufficient to establish legal insanity, but tends to show that he did not have the capacity to premeditate or deliberate at the time of the murder. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

Diminished capacity not amounting to legal insanity is not a defense to the element of malice in second-degree murder. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

Admissibility of Evidence of Abnormal Mental Condition Not Amounting to Legal Insanity. — A defendant may offer evidence of an abnormal mental condition, although not sufficient to establish legal insanity, for the purpose of showing that he did not have the capacity to deliberate or premeditate at the time the homicide was committed, elements necessary for a conviction of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Admissibility of Expert Testimony as to Mental Capacity. — Since first-degree murder requires premeditation and deliberation, opinion testimony tending to show that a defendant did not have the capacity to premeditate or deliberate is testimony that embraces an ultimate issue to be decided by the trier of fact. Under G.S. 8C-1, Rule 704, however, such testimony is not thereby rendered inadmissible. State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

Section 8C-1, Rule 704 plainly provides that an expert witness is not precluded from testifying as to whether a defendant had the capacity to make and carry out plans, or was under the influence of mental or emotional disturbance, merely because such testimony relates to an ultimate issue to be decided by the trier of fact. State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988), overruling State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144 (1983), and State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981), insofar as they are inconsistent.

Trial court's instruction that voluntary intoxication would not support a defense of insanity was not erroneous, where there was no evidence tending to show that defendant was suffering any chronic or permanent insanity in consequence of his excessive ingestion of alcohol. State v. Austin, 320 N.C. 276, 357 S.E.2d 641, cert. denied, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

Instruction on Insanity Properly Refused. — In the absence of any evidence of insanity, it is not error for the trial judge to refuse the defendant's request that he instruct the jury upon the law relating to insanity as a defense to the charge of murder. State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977).

The trial court did not err by not charging the jury on the defense of insanity where the evidence only included testimony that defendant drove down the highway recklessly, that he woke his family up during the night to go "bird blinding," that he shot into the floor beside his wife a few times, that he beat his wife and children, and that he had a reputation in the community for being crazy. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

The trial court did not err in failing to direct verdicts of not guilty by reason of insanity, where although the defendant presented strong evidence that he was insane when he shot one victim and deprived her infant of liquids, the State presented evidence tending to controvert the defendant's evidence and to support the presumption of his sanity. State v. Evangelista, 319 N.C. 152, 353 S.E.2d 375 (1987).

Effect of Finding of Not Guilty by Reason of Insanity. — A finding of not guilty by reason of insanity is not the same as an acquittal, nor does it result in defendant's being found guilty of a lesser degree of homicide. It simply means that defendant is absolved from criminal responsibility for his act and cannot be punished for it. Instead, defendant, upon appropriate findings by the trial court, may be involuntarily committed to a state mental health facility. State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1988).

D. Intoxication.

Drunkenness May Negate Specific Intent to Kill. — Voluntary drunkenness is not a legal excuse for crime; but where a specific intent, or premeditation and deliberation, is essential to constitute a crime or a degree of crime, the fact of intoxication may negate its existence. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

The general rule that voluntary drunkenness is no legal excuse for crime does not obtain with respect to crimes where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature. Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. Intoxication which renders an offender utterly unable to form the required intent may be shown as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

While voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent such as the intent to kill. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Defendant's intoxicated condition went only to negate the specific intent necessary to find him guilty of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

And May Be Defense to First Degree Murder But Not to Second Degree Murder. — Voluntary drunkenness is a defense to the charge of first-degree murder to the extent that it precludes the mental processes of premeditation and deliberation, but voluntary drunkenness is no defense to murder in the second degree. State v. Couch, 35 N.C. App. 202, 241 S.E.2d 105 (1978); State v. King, 49 N.C. App. 499, 272 S.E.2d 26 (1980), cert. denied, 302 N.C. 220, 276 S.E.2d 917 (1981).

But Voluntary Intoxication Is Not a Defense to Felony Murder Based on Arson. — Since voluntary intoxication is not a defense to a charge of arson, it is not a defense to a charge of felony murder having as its underlying felony the crime of arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Where legal intoxication is shown, the offense is reduced to second-degree murder. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

No Inference Arises from Intoxication as Matter of Law. — Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication as a matter of law. State v. Hamby,

276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

Because an Intoxicated Person May Still Be Capable of Premeditation and Deliberation. — No inference of the absence of deliberation and premeditation arises from intoxication as a matter of law because intoxication does not necessarily render a person incapable of engaging in the thought processes of premeditation and deliberation. State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983); State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

Evidence of defendant's intoxication need only raise a reasonable doubt as to whether defendant formed the requisite intent to kill required for conviction of first-degree murder in order for defendant to prevail on this issue. State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

Degree of Intoxication Which Must Be Shown to Constitute a Defense. — To make the defense of intoxication available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. And where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970); State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

For intoxication to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and weigh it and understand the nature and consequence of his act. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

If at the time of the killing, defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill a person, he could not be guilty of murder in the first degree, for an essential element of that crime would be lacking. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976); State v. Locklear, 322 N.C. 349, 368 S.E.2d 377 (1988).

In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereupon. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill. State v. Mash, 323 N.C. 339, 372 S.E.2d 532 (1988).

Where, among other things, witness' testimony painted a vivid portrait of defendant coolly and coherently planning the murder with an accomplice, defendant had the presence of mind to realize the victim would not open the door for him and to communicate this problem to the accomplice, and was alert enough to compel the witness' participation in the crime, this evidence, viewed in the light most favorable to the State, was sufficient to support a finding that defendant was not so intoxicated as to be incapable of premeditation and deliberation. State v. Cummings, 323 N.C. 81, 372 S.E.2d 541 (1988), sentence vacated and remanded for further consideration at 494 U.S. 1021, 110 S. Ct. 1464, 108 L. Ed. 2d 602 (1990), in light of In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985).

Intent to Kill Formed When Sober and Executed When Drunk. — Where the facts show that the intent to kill was deliberately formed when sober and executed when drunk, intoxication is no defense to the capital charge of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Intoxication for Purposes of Motor Vehicle Laws Is Not Sufficient to Establish Defense. — A person may be "under the influence" of intoxicants in violation of the motor vehicle laws and yet be quite capable of forming and carrying out a specific intent to kill. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

And Breathalyzer Test Is Not Applicable in Homicides. — The chemical analysis (Breathalyzer) test authorized by G.S. 20-139.1 is, by its express terms, applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Effect of Intoxication Is Question for Jury. — It is for the jury to determine whether the mental condition of accused was so far affected by intoxication that he was unable to form a guilty intent to commit murder, unless the evidence is not sufficient to warrant the submission of the question to the jury. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Lowery, 309 N.C. 763, 309 S.E.2d 232 (1983).

Evidence Held Insufficient to Support Defense of Intoxication. — Where the evidence tended to show that defendant was drinking heavily but there was no evidence tending to show that defendant did not know what he was doing, both in the planning and the execution of the crime which he consummated, the evidence was not sufficient to make available to him the defense of intoxication. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

The trial court did not err in refusing to instruct on voluntary intoxication and to submit the possible verdict of second degree murder to the jury, where defendant did not show voluntary intoxication sufficient to negate specific intent. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

Evidence presented that defendant drank "about five or six" beers and consumed an indeterminate amount of marijuana and cocaine at some time earlier in the day was insufficient to show that defendant was so intoxicated that he was incapable of forming the intent necessary to commit first-degree premeditated and deliberated murder. State v. Baldwin, 330 N.C. 446, 412 S.E.2d 31 (1992).

Instruction on Intoxication Not Required. — Trial court did not err in charging that defendant's intoxication could have no bearing upon his guilt or innocence of the lesser included offenses in the charge of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

It would have been erroneous for the trial court to have given an instruction on voluntary intoxication; defendant had to produce substantial evidence which would have supported a conclusion by the trial court that the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated intent to kill; therefore, evidence tending to show only that the defendant drank some unknown quantity of beer over a period of several hours and claimed not to remember the killings did not meet the defendant's burden of production. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988). death sentence aff'd, cert. denied, rehearing denied.

Where the defendant did not make the requisite showing that he and co-conspirator was utterly incapable of forming the requisite intent, the trial court did not err in failing to give an instruction on voluntary intoxication. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

E. Provocation.

Provocation Is an Affirmative Defense. — The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Provocation never disproves malice, but only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. State v. Johnson, 23 N.C. 354 (1840).

Reduction of Killing in Heat of Passion Engendered by Provocation to Manslaughter. — In order to reduce second-degree murder to voluntary manslaughter, there must be some evidence that the defendant killed his victim in the heat of passion engendered by provocation which the law deems adequate to depose reason. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

To reduce the crime of murder to voluntary manslaughter, the defendant must either rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all the elements of heat of passion on sudden provocation. State v. Long, 87 N.C. App. 137, 360 S.E.2d 121 (1987).

For case defining the term "heat of passion," see State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

Abusive language will not serve as a legally sufficient provocation for a homicide in this State. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Nor Mitigate Homicide to Lesser Degree. — Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Words alone are never sufficient provocation to mitigate second degree murder to voluntary manslaughter. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

These facts do not show legal provocation: defendant prepared to shoot the victim by loading his gun and putting on the safety before he got out of his car; after the victim arrived, defendant removed the safety, knowing that shells were chambered and ready to be fired; defendant was approximately thirty feet from the victim when the victim directed a flashlight beam at defendant's face. The victim and defendant exchanged no words and had no physical contact. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Defendant's statement to the police, admitting that he shot victim for refusing to hand over money from cash register, constituted substantial evidence that defendant was not provoked. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Evidence that defendant found his estranged wife riding in a car with another man was not sufficient to show adequate cause for passion which would negate the malice of murder and reduce it to manslaughter. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

Evidence That Deceased Threw Cigarette Butt at Defendant. — The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser included offense of voluntary manslaughter. Evidence that the deceased threw a cigarette butt at defendant does not rise to the level of serious provocation required. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

The fact that defendant killed his father in order to end his suffering did not constitute adequate provocation to negate malice, since defendant, though clearly upset by his father's condition, indicated by his action and his statements that his crime was premeditated and deliberate. State v. Forrest, 321 N.C. 186, 362 S.E.2d 252 (1987).

"Aggressor Instruction". — Where state's witnesses testified defendant threatened shooting victim just seconds before the shooting — sufficiently close in time to the alleged crime to affect defendant's self-defense argument — and defendant disputed this evidence, testifying that he shot the man in self-defense after the man provoked him it was not error for the court to give an "aggressor instruction." Although defendant's evidence did not support the aggressor instruction, the state's evidence did. By instructing jurors on the aggressor qualification, the trial court allowed the triers of fact to determine which testimony to believe. Not only was this not plain error, it was not error at all. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

F. Self-Defense.

Elements of Perfect Self-Defense. — The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed: (1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Cooke, 306 N.C. 117, 291 S.E.2d 649 (1982); State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982); State v. Vaughan, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650; 461 U.S. 943, 103 S. Ct. 2120, 77 L. Ed. 2d 1301 (1983).

For a killing to be in self-defense, the perceived necessity must arise from a reasonable fear of imminent death or great bodily harm. State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989).

Perfect Self-Defense Requires Verdict of Not Guilty to All Offenses. — The existence of the elements of a perfect right of self-defense requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Vaughan, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650; 461 U.S. 943, 103 S. Ct. 2120, 77 L. Ed. 2d 1301 (1983).

"Without justification or excuse" as an element of murder in the first or second degree means the defendant did not believe it was necessary to kill the victim in order to save herself from death, or great bodily harm; or, if she did believe this, her belief under the circumstances as they appeared to her at that time was unreasonable. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Right Is Based on Real or Apparent Necessity. — The right to kill in self-defense of one's family or habitation, rests upon necessity, real or apparent. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965); State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973).

One may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm, or when it is not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where the jury finds that the defendant intended to kill and inflicted injuries, for defendant to be completely absolved, the jury must find that he acted in self-defense against actual or apparent danger of death or greater bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where the jury finds that the defendant did not intend to kill, the defendant is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Trial court did not err in instructing the jury that it could find that defendant acted in self-defense only if defendant reasonably believed that under the circumstances it was necessary "to kill" the victims. State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (1995).

Defendant Must Not Have Initiated or Provoked the Dispute. — Self-defense requires, among other things, that the one invoking the defense be without fault in initiating the affray. It must also be shown that the killing was necessary or appeared to be necessary to prevent death or great bodily harm to defendant. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (1972); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The right to kill another in self-defense may be forfeited not only by physical aggression on the accused's part but by conduct provoking the fatal encounter. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

And Must Not Be at Fault in Engaging in or Continuing the Difficulty. — A person is justified in defending himself if he is without fault in provoking, or engaging in, or continuing a difficulty with another. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Aggressor Is Guilty of Murder If He Intended to Kill or Seriously Injure. — If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Cooke, 306 N.C. 117, 291 S.E.2d 649 (1982).

Although a party is privileged to use deadly force to defend against an attack by unarmed assailants of vastly superior size, strength or number, if the defendant precipitated the altercation intending to provoke a deadly assault by the victim in order that he might kill him, his subsequent killing of the victim in response to the attack is murder. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Aggressor Loses Benefit of Perfect Self-Defense. — An accused who, though otherwise acting in self-defense, is the aggressor in bringing on the affray is guilty at least of voluntary manslaughter. The defendant, under such circumstances, "loses the benefit of perfect self-defense." State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

But Has an Imperfect Right of Self-Defense. — An imperfect right of self-defense is available to a defendant who reasonably believes it is necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so without murderous intent, and (2) might have used excessive force. State v. Mize, 316 N.C. 48, 340 S.E.2d 439 (1986).

Except in special circumstances, self-defense is not an available defense to felony murder. State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994).

Self-Defense and Felony Murder. — Absent (i) a reasonable basis upon which the jury may have disbelieved the prosecution's evidence of the underlying felony; (ii) a factual showing that defendant clearly articulated his intent to withdraw from the situation; or (iii) a factual showing that at the time of the violence the dangerous situation no longer existed, defendant has forfeited his right to claim self-defense as a defense to felony murder. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

And Is Guilty at Least of Manslaughter. — If defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the imperfect right of self-defense, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Vaughan, 59 N.C. App. 318, 296 S.E.2d 516 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 650; 461 U.S. 943, 103 S. Ct. 2120, 77 L. Ed. 2d 1301 (1983).

Where the issue in a homicide case narrows to the exercise of either the perfect or imperfect right of self-defense, as the jury may find, the question for the jury is not limited to whether defendant is guilty of first-degree murder or not guilty by reason of self-defense. When the defendant has exercised the imperfect right of self-defense, the homicide is reduced from murder to manslaughter. State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981).

Unless He Quits the Combat. — A defendant, prosecuted for homicide in a difficulty which he had himself wrongfully provoked, may not maintain the position of perfect self-defense unless, at a time prior to the killing, he had quitted the combat. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

A defendant, prosecuted for a homicide in a situation that he has provoked by the use of language "calculated and intended" to bring on the encounter, cannot maintain the position of perfect self-defense unless, at a time prior to the killing, he withdrew from the encounter within the meaning of the law. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Instruction as to Precipitation of Fight or Assault. — In a prosecution for the murder of a military policeman while defendant was in a holding cell after having been illegally arrested, trial court's instruction, dealing with the right to kill in self-defense, that "one enters a fight voluntarily if he uses toward his opponent such abusive language which considering all of the circumstances is calculated and intended to bring on a fight, and if a person precipitates an altercation or a fight with the intent to provoke a deadly assault by the victim in order that he might kill him the subsequent killing of the victim in response to the attack is murder" was a correct statement of the law and was supported by the evidence. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Amount of Force Used. — If the defendant in killing the deceased was acting in self-defense but used more force than was necessary or reasonably appeared necessary under the circumstances, he is guilty of voluntary manslaughter. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

The defense of habitation or domicile is limited to those cases where a defendant is attempting to prevent a forcible entry into his home. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

For a case reviewing the law of the defense of habitation, and the distinction between the defense of habitation and ordinary self-defense, see State v. McCombs, 297 N.C. 151, 253 S.E.2d 906 (1979).

Under the evidence, the trial court in a second-degree murder case erred in failing to charge the jury on defense of habitation. State v. Hedgepeth, 46 N.C. App. 569, 265 S.E.2d 413 (1980).

Neither permanency of residence nor a leasehold interest in the premises is required before a person is legally justified in standing her ground, rather than retreating, before using deadly force in self-defense. One must show only that she is a member of a household, however temporarily, and that she possesses an intent to reside in that particular place at the time of the attack. State v. Stevenson, 81 N.C. App. 409, 344 S.E.2d 334 (1986).

When a person who is free from fault in bringing on a difficulty is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self-defense, regardless of the character of the assault, but he is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm. This, of course, would not excuse the defendant if he used excessive force in repelling the attack and overcoming his adversary. This rule applies even when both defendant and victim reside in the same dwelling. State v. Hearn, 89 N.C. App. 103, 365 S.E.2d 206 (1988).

For discussion of defense of habitation, see State v. Roberson, 90 N.C. App. 219, 368 S.E.2d 3, cert. denied, 322 N.C. 484, 370 S.E.2d 237 (1988).

Once an assailant gains entry into an occupied dwelling, the usual rules of self-defense replace the rules governing defense of habitation. State v. Roberson, 90 N.C. App. 219, 368 S.E.2d 3, cert. denied, 322 N.C. 484, 370 S.E.2d 237 (1988).

Use of Force in Resisting Unlawful Arrest. — In a prosecution for the murder of a military policeman while defendant was in a holding cell after he had been unlawfully arrested, trial court did not err in failing to charge that defendant was entitled to use deadly force if such was required to prevent the arrest or to free himself from unlawful confinement, since the victim of an unlawful arrest is not ipso facto entitled to kill or to use deadly force against the person attempting arrest. State v. Sanders, 303 N.C. 608, 281 S.E.2d 7, cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Battered Spouse. — For case declining to expand the law of self-defense so as to entitle a battered spouse who killed her intoxicated husband while he slept to jury instructions on either perfect or imperfect self-defense, see State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989).

Evidence of Victim's Character. — When self-defense is raised as a defense, the defendant may produce evidence of the victim's character tending to show (1) that the victim was the aggressor, or (2) that defendant had a reasonable apprehension of death or bodily harm, or both. State v. Corn, 307 N.C. 79, 296 S.E.2d 261 (1982).

Evidence of the deceased's violent character, whether known to the defendant or not, is admissible in a homicide case where self-defense is in issue and the State's evidence is wholly circumstantial or the nature of the transaction is in doubt, in order to shed light on the question of which party was the first aggressor. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

It is true that upon a proper showing that the accused in a homicide case may have acted in self-defense, the jury is entitled to hear and evaluate evidence of uncommunicated threats and evidence of the general character of the victim as a violent and dangerous man; however, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of the self-defense. State v. Jones, 83 N.C. App. 593, 351 S.E.2d 122 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 9 (1987).

In defendant's murder trial, defendant was not required to make an offer of proof regarding testimony that her victim had told her former employee that he was going to "shoot up his house" that was excluded when the trial court granted the state's motion to strike the testimony. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

In defendant's trial ending in her conviction for second-degree murder, evidence of her prior conduct in shooting a dog was irrelevant under G.S. § 8C-1-401; the evidence was not necessary to show that defendant was knowledgeable about firearms or had used a gun in the past because defendant had admitted that she shot her victim and whether or not she knew how to use a pistol was not contested, and the evidence was irrelevant to her claim of self-defense. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Testimony from a witness who saw defendant's victim breaking car windows at an automobile dealership should have been admitted during her murder trial, which ended in her conviction for second-degree murder, as an essential element of her assertion of self-defense under G.S. 8C-1-405(b). State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Erroneous exclusion of testimony from a car dealership employee who saw defendant's victim breaking car windows at the dealership, which should have been admitted during defendant's murder trial as evidence of the victim's violent character, was prejudicial under G.S. 15A-1443(a) even though defendant testified to the same incident on direct and redirect examination. State v. Everett, 178 N.C. App. 44, 630 S.E.2d 703, 2006 N.C. App. LEXIS 1302 (2006).

Evidence of Acts of Violence Committed by Victim. — In a criminal prosecution for homicide, if there is a proper showing that the accused may have acted in self-defense or some comparable justification, evidence of specific acts of violence committed by the victim is admissible. However, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense. This logically extends to defense of others. State v. Stone, 73 N.C. App. 691, 327 S.E.2d 644, cert. denied, 313 N.C. 610, 330 S.E.2d 617 (1985).

If defendant seeks to offer evidence for the purpose of showing that the victim was the aggressor, it must be done through testimony concerning the victim's general reputation for violence, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide. State v. Corn, 307 N.C. 79, 296 S.E.2d 261 (1982).

Where the defendant in a homicide prosecution has offered evidence tending to show self-defense, testimony by him of specific acts of violence committed by the deceased in his presence or of which the defendant had knowledge prior to the homicide is admissible to show the deceased's character as a violent and dangerous fighting man, in order to permit the jury to determine whether the defendant acted under a reasonable apprehension of danger to his person or his life. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

The trial court's actions in excluding a witness's testimony regarding specific acts of violence by the deceased which were not shown to be within defendant's knowledge prior to the homicide and striking her statements as to the deceased's violent character based solely on her personal experience were correct, since specific acts and a witness's personal opinion are not admissible to show another person's character as evidence of his conduct on a particular occasion. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Evidence to Be Interpreted in Light Most Favorable to Defendant. — In determining whether there was any evidence of self defense presented, the evidence must be interpreted in the light most favorable to the defendant. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Error in Preventing Defendant from Testifying About Fear for Life. — In first-degree murder case where defendant was prevented from testifying to an essential element of self-defense, his fear for his life, this was error and the court granted a new trial. State v. Reed, 324 N.C. 535, 379 S.E.2d 828 (1989).

The State bears the burden of proving that defendant did not act in self-defense; to survive a motion to dismiss, the State must therefore present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that defendant did not act in self-defense. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

When the issue of self-defense is raised, the State continues to have the burden of proving each element of the crime of murder in the second degree beyond a reasonable doubt. Simultaneously, the additional burden is added of proving malice based on inferences rather than presumptions. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

The burden was on the State to prove beyond a reasonable doubt that defendant did not act in self-defense, there being evidence in the case that he did. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Such Burden May Not Be Shifted to Defendant. — On review of a conviction for second-degree murder the Supreme Court of North Carolina erred in declining to hold retroactive the rule in Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), which requires the State to establish all elements of a criminal offense beyond a reasonable doubt, and which invalidates presumptions that shift the burden of proving such elements, including self-defense, to the defendant. Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

Instruction Placing Burden of Proving Self-Defense on Defendant Unconstitutional. — In a prosecution for second-degree murder, an instruction placing the burden of proving self-defense upon the defendant was constitutionally infirm, since North Carolina considers unlawfulness, or the absence of self-defense, to be an element of murder. Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979), cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979).

When Defendant Is Entitled to Instruction on Self-Defense. — A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm. If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense. It is for the court to determine in the first instance as a matter of law whether there is any evidence that the defendant reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm. State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982).

When the State or defendant produces evidence that defendant acted in self-defense, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Where there is evidence that defendant acted in self-defense, the court must charge on this aspect, even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

If the court determines as a matter of law that there is no evidence in the record from which the jury could find that the defendant reasonably could have believed it to be necessary to kill to protect himself from death or great bodily harm, then the defendant is not entitled to an instruction on self-defense. State v. Hughes, 82 N.C. App. 724, 348 S.E.2d 147 (1986).

A defendant is entitled to an instruction on self-defense if there is any evidence in the record which establishes that it was necessary or that it reasonably appeared to the defendant to be necessary to kill in order to protect himself from death or great bodily harm. State v. Hughes, 82 N.C. App. 724, 348 S.E.2d 147 (1986).

When defendant's evidence is sufficient to support an instruction on self-defense, the instruction must be given, even though the State's evidence is contradictory. State v. Hughes, 82 N.C. App. 724, 348 S.E.2d 147 (1986).

A defendant is entitled to an instruction on perfect self defense as an excuse for a killing when evidence is presented tending to show that, at the time of the killing: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Where there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self defense. State v. Blankenship, 320 N.C. 152, 357 S.E.2d 357 (1987); State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Before defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there any evidence that the defendant in fact formed a belief that it was necessary to kill her adversary in order to protect herself from death or great bodily harm, and (2) If so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. State v. Hayes, 88 N.C. App. 749, 364 S.E.2d 712, supersedeas dissolved, 322 N.C. 327, 368 S.E.2d 871 (1988).

Request Is Unnecessary. — As the defense of self-defense was a substantial and essential feature of the case arising on defendant's evidence, no special prayers for instructions were required, and the judge's failure to charge with respect thereto was prejudicial error, and entitled defendant to a new trial. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

When Instruction on Imperfect Self-Defense to Be Given. — A defendant is entitled to an instruction on imperfect self defense only if the first two elements of perfect self defense are shown to exist. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Excessive Force Basis for Imperfect Self-Defense. — Whether defendant used excessive force is a question for the jury to determine; thus, the trial court properly instructed jury that if it found defendant to have used excessive force in defending himself, he was entitled, at most, to the defense of imperfect self-defense. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Instruction on Defense of Another. — North Carolina law recognizes that a person may not only take life in his own defense, but he may also do so in defense of another who stands in a family relation to him. The failure to instruct the jury on this fundamental issue constitutes prejudicial error. State v. Spencer, 21 N.C. App. 445, 204 S.E.2d 552 (1974).

Instruction on Self-Defense Required. — Where the State's evidence presented testimony which would have permitted, but not required, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by the deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Defendant on trial for second degree murder held entitled to an instruction on self-defense. State v. Hayes, 88 N.C. App. 749, 364 S.E.2d 712 (1988).

Where there was testimony that 1) defendant and decedent resided in the same house; 2) defendant loaded a gun in fear that decedent's father was coming to the house to "cut" her; 3) defendant saw decedent approaching the house with what appeared to her to be a pipe or tire iron in his hand; 4) decedent and defendant argued and decedent threatened defendant's life; and 5) defendant shot decedent as he was coming at her with a pipe raised in his hand, it was error for the court to fail to submit the question and to charge upon defendant's right to stand her ground without retreating. State v. Hearn, 89 N.C. App. 103, 365 S.E.2d 206 (1988), distinguishing State v. Bennett, 67 N.C. App. 407, 313 S.E.2d 277 (1984), which held that a trial court's refusal to instruct the jury that there was no duty to retreat was not in error because there was uncontradicted evidence that defendant was the initial aggressor.

Defendant who undeniably was the aggressor in the final confrontation when he went to victim's trailer about 3 a.m., woke him, and shot him to death, believing it necessary to kill victim before victim killed him, was not entitled to an instruction on the doctrine of imperfect self-defense, because he was the aggressor with murderous intent in the fatal confrontation. State v. Mize, 316 N.C. 48, 340 S.E.2d 439 (1986).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The trial court was correct in refusing to instruct the jury on either perfect or imperfect self defense, where the defendant's evidence tended to show that the shooting was an accident. State v. Blankenship, 320 N.C. 152, 357 S.E.2d 357 (1987).

Where evidence clearly tended to show that defendant was the aggressor the court did not err by instructing jury that self-defense would not be available to defendant if he were found to be aggressor. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Court did not err by refusing to give jury instruction concerning right of a person who is without fault in a situation to stand his ground, with no duty to retreat, when in his own home where there was no evidence suggesting that defendant was assaulted or attacked by victim at time of shooting. State v. Williams, 100 N.C. App. 567, 397 S.E.2d 364 (1990), cert. dismissed, 328 N.C. 576, 403 S.E.2d 520 (1991).

Defendant was awarded a new trail on charges of second degree murder because there was testimony from the prosecution's witnesses that defendant returned fire only after a person in the car shot at defendant. According to such evidence, defendant was not the initial aggressor and his right to stand his ground was at least a substantial feature of his defense of self-defense; because this instructional error had a probable impact on the jury's finding of guilt, the error was prejudicial, the trial court's failure to give the instruction was thus plain error. State v. Davis, 177 N.C. App. 98, 627 S.E.2d 474, 2006 N.C. App. LEXIS 696 (2006).

Instruction on Self-Defense Not Required. — Where defendant did not testify and presented absolutely no evidence, either circumstantial or direct, which would establish the necessity of his killing the victim but, instead, defendant relied on permissible inferences from testimony elicited on cross-examination of the State's witnesses; and where the evidence established that defendant, at some point, introduced a knife into the fight and stabbed the victim, the trial court's decision not to give an instruction on self-defense was proper. State v. Stone, 104 N.C. App. 448, 409 S.E.2d 719 (1991), cert. denied, 330 N.C. 617, 412 S.E.2d 94 (1992).

If there is no evidence from which a jury reasonably could find that the defendant in fact believed that it was necessary to kill to protect another from death or great bodily harm, the defendant is not entitled to have the jury instructed on either perfect or imperfect defense of another. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

Instructions as to Implication from Use of Deadly Weapon. — Jury instructions in a first degree murder case, that told the jury that if they found that defendant killed victim intentionally with a deadly weapon, it was "implied in law" that the killing was done with malice, constituted prejudicial error, as they essentially eliminated his defense of self-defense from trial. Bush v. Stephenson, 669 F. Supp. 1322 (E.D.N.C. 1986), aff'd without op., 826 F.2d 1059 (4th Cir. 1987).

Where jury could have logically deduced from instruction of self-defense that defendant was under a duty to retreat in his own home if the assault upon him was not murderous, defendant deserved a new trial due to error in the charge. State v. Boswell, 24 N.C. App. 94, 210 S.E.2d 129 (1974).

Questions for Jury. — The reasonableness of defendant's belief that self-defense is necessary is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The jury is permitted to consider all facts and circumstances, including evidence of self-defense, in determining whether a killing was unlawful. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

The evidence was not sufficient to warrant an instruction on either perfect or imperfect self-defense where defendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm, nor was there evidence that if defendant had formed such a belief, the belief was reasonable under the circumstances; defendant's own statement acknowledged that the victim was unarmed and walking away from defendant when defendant shot him in the back, and thus, defendant was not facing an imminent threat of death or great bodily harm from the victim when defendant fired the fatal shot. State v. Ross, 338 N.C. 280, 449 S.E.2d 556 (1994).

Defendant was not entitled to instruction on voluntary manslaughter based on imperfect self-defense where the evidence showed defendant shot the unarmed victim in the back as the victim was walking away from defendant. There was no evidence that defendant believed it necessary to kill the victim in order to save himself, and if defendant had presented evidence of such a belief, the belief would not have been reasonable under the circumstances. State v. Exxum, 338 N.C. 297, 449 S.E.2d 554 (1994).

VII. EVIDENCE.

A. In General.

Circumstantial Evidence Is Admissible. — Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

Circumstances immediately connected with the killing by the defendant, the viciousness and depravity of his acts and conduct attending the killing, are evidence of malice and are properly considered. State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

And May Be Used to Prove Corpus Delicti. — The death, the felonious cause of death, and the identification of an accused as the person who caused the death can all be shown by circumstances from which these facts might reasonably be inferred. If the evidence is only circumstantial, it should be so strong and cogent that there can be no doubt of the death. State v. Head, 79 N.C. App. 1, 338 S.E.2d 908, cert. denied, 316 N.C. 736, 345 S.E.2d 395 (1986).

But circumstantial evidence must exclude every reasonable hypothesis of innocence. See State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Applicability of Reasonable Doubt Standard to Circumstantial Evidence. — The convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence: the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely direct. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Defendant cannot deprive State of right to show all the circumstances of homicide by admitting the bare facts as to identity, the location where the body was found, its general condition and the cause of death. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Failure to Produce or Contradict Evidence. — Although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the state may properly be brought to the jury's attention by the state in its closing argument. State v. Taylor, 337 N.C. 597, 447 S.E.2d 360 (1994).

Improper Reference to Defendant's Silence. — Because the State wrongfully referred to the defendant's silence in the face of the agent's accusation of murder, and it allowed the jury to infer guilt and lack of remorse through defendant's exercise of his constitutional right to silence, the testimony should have been excluded. State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).

Proper Reference to Defendant's Silence. — The defendant's pre-Miranda right to counsel could be used against him in his murder trial; in other words, his refusal to speak with a youth detective without his lawyer could be used to rebut his earlier voluntary statement that he "didn't mean to do it." State v. Salmon, 140 N.C. App. 567, 537 S.E.2d 829, 2000 N.C. App. LEXIS 1242 (2000), cert. denied, 353 N.C. 394, 547 S.E.2d 424 (2001).

Where a prosecutor, during cross-examination in a second-degree murder trial, questioned defendant on the reason for omitting from a voluntary discussion with a deputy such important facts as that the victim had been drunk, was possibly on cocaine, and had threatened defendant's life several times prior to the shooting, defendant's right to remain silent was not violated, because the cross-examination questions did not constitute an impermissible comment upon the invocation of the right, and any error was harmless. State v. Ezzell, 182 N.C. App. 417, 642 S.E.2d 274, 2007 N.C. App. LEXIS 695 (2007), cert. denied, appeal dismissed, 361 N.C. 432, 649 S.E.2d 390 (2007).

Instruction as to Circumstantial Evidence. — While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Evidence Favorable to Defendant. — In defendant's trial on charges of conspiracy to commit first degree murder, attempted first degree murder, and assault with a deadly weapon with intent to kill, the State did not have a duty to locate evidence favorable to defendant and the trial court did not err by denying defendant's request that the State determine the identities of mental health professionals who were treating a prosecution witness and to provide defendant with that information, or by denying defendant access to mental health records concerning the witness that were made available to the court, after the court reviewed those records in camera and decided they did not contain exculpatory information. State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003).

Exculpatory Statements. — It is well established that when the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

A defendant's statement was not exculpatory where it in no way indicated that defendant was provoked to shoot or that his action was reflexive. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Inculpatory Statements Admitted Where Voluntarily Made. — Defendant's motion to suppress post-arrest inculpatory statements was properly denied in his trial for first-degree murder and for robbery with a dangerous weapon where the totality of the circumstances indicated that defendant had voluntarily made the statements, that his waiver of his Miranda rights was voluntary, intelligent, and knowingly made, that he never asked for counsel, that the conditions of the interview were of a non-coercive nature, that he was not on any substance or in need of food or bathroom breaks, and the fact that he had subnormal mental capacity did not, alone, render the statement incompetent; accordingly, there was no violation of his rights under U.S. Const. amend. V or N.C. Const. art. I, § 23 and suppression of his statements was not required. State v. Mahatha, 157 N.C. App. 183, 578 S.E.2d 617, 2003 N.C. App. LEXIS 539 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 773 (2003).

Expert Testimony. — Expert testimony was properly excluded where it would have directed the jury's attention away from defendant's actual conduct and confused it with evidence unrelated to the legality of the arrest or the force the officers used in attempting to apprehend defendant. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Expert Medical Testimony — Child Abuse. — Testimony of a physician in a prosecution for the murder of a two-year-old child that the bruises on the child's chest did not form the typical bruising pattern normally sustained by children in day-to-day activities, and the opinion of another physician that the child was a "battered" child, and his explanation of that term, were well within the bounds of permissible expert medical testimony. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

In a prosecution of defendant for the murder of his 18-month-old step-daughter, the trial court did not err in admitting the testimony of three doctors who opined that decedent's injury was probably not caused by a fall down a flight of stairs, since all three medical experts were in a better position to have an opinion on the cause of the deceased's injuries than the jury because of their medical training and their experience in observing and treating skull fractures; the witnesses stated only their opinions as to the possibilities, not the certainties, of the cause of deceased's injuries; and none of the three experts made any statement as to their opinion of defendant's guilt or innocence. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

Same — Bite Marks. — In a prosecution for first-degree murder, the trial court did not err in allowing an expert witness to testify that bite marks appearing on victim's body were made by defendant's teeth, since the expert witness did not rely on untested methods or unproved hypotheses, but applied scientifically established techniques of dentistry and photography to determine whether the bite marks were caused by defendant's teeth. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Same — Cause of Death. — In a prosecution for murder, the witness's position as assistant medical examiner and his testimony regarding the number of other cases he had seen indicated sufficient expertise such that the trial court did not err in admitting his opinion of the cause of death. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

Same — Intent to Kill. — Admission of psychiatrist's testimony with respect to defendant's specific intent to kill was reversible error. However, where the jury found that defendant was guilty of murder in the first degree both under the theory of premeditation and deliberation and under the theory of felony murder, only the jury's finding that defendant was guilty of murder based on premeditation and deliberation would be set aside. State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986), decided under the law as it obtained prior to the effective date of Chapter 8C.

Testimony of expert for the State that defendant was capable of forming the specific intent to kill was not error. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

Doctor's testimony regarding the manner and duration of death by strangulation was competent, admissible, and relevant to show the manner and means by which the killing was carried out, with respect to whether the killing was a premeditated and deliberate murder. State v. Drayton, 323 N.C. 585, 374 S.E.2d 262 (1988).

Evidence Sufficient to Prove Accessory Before the Fact. — Evidence held sufficient to convict defendant of being an accessory before the fact to murder committed by his teenage girlfriend by burning her grandparents' house. State v. Johnson, 340 N.C. 32, 455 S.E.2d 644 (1995).

Evidence of Killing in Perpetration of Felony. — In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946).

Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery is expressly made competent by this section and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

Proving Premeditation and Deliberation. — Premeditation and deliberation ordinarily must be proved by circumstantial evidence, such as the absence of provocation by the victim, the conduct of the defendant before and after the killing, ill will or other difficulties between the parties, or evidence that the killing was done in a brutal manner. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), in light of State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Premeditation and Deliberation Shown. — Fact that defendant carried a loaded .32-caliber pistol for several days prior to robbery and murder, and threatened two persons with this weapon during two armed robberies just days before he killed victim with it, supported inference of premeditation and deliberation, as did defendant's conduct in removing money and keys from victim and money from cash register after he shot the victim while he lay bleeding on the floor. State v. Miller, 339 N.C. 663, 455 S.E.2d 137, rehearing denied, 340 N.C. 118, 458 S.E.2d 183 (1995).

Evidence of premeditation and deliberation held sufficient to support first-degree murder conviction of 14 year old defendant who killed and robbed stepfather who drank and abused his family. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

Evidence held sufficient to permit a reasonable jury to find beyond a reasonable doubt that defendant shot the victim with premeditation and deliberation and was guilty of first-degree murder. State v. Baity, 340 N.C. 65, 455 S.E.2d 621 (1995).

The fact that one of two defendants drew his pistol, pointed it at victim, a pawnshop clerk and then told him, "Don't even try it," prior to shooting him was sufficient evidence of premeditation and deliberation to support a charge of first-degree murder. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Each element of first-degree murder, including premeditation and deliberation, was positively supported by the evidence where the day before child was killed, defendant grabbed the crying child, swung him out over the water and only when two fishermen spotted defendant did he put him down, remarking that he would finish what he wanted to do later and on the day of the murder, defendant threatened to kill both mother and child while he physically assaulted them. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), cert. denied, 517 U.S. 1197, 116 S. Ct. 1694, 134 L. Ed. 2d 794 (1996).

The evidence was sufficient to establish that the defendant acted with premeditation and deliberation where there was evidence of ill will between the defendant and the victim resulting from a previous altercation and the evidence showed that the defendant shot the victim six times, three of the wounds to the head, and at least one shot to the victim's head was fired with the muzzle of the gun pressed against the victim's skin, inflicted while the victim was lying helpless on the ground, thus showing a conscious decision on the part of the defendant to ensure that his victim was dead. State v. McCray, 342 N.C. 123, 463 S.E.2d 176 (1995).

Where defendant shot the victim as the victim moved toward his (victim's) truck, defendant then shot the victim several times while chasing him through the woods and shot him in the head a number of times at close range while he was helpless on the ground, and the victim was discovered face-down on the ground with his arms folded up under his face and upper body, the evidence was sufficient to warrant an instruction on premeditated and deliberate first-degree murder. State v. Gibson, 342 N.C. 142, 463 S.E.2d 193 (1995).

The State adequately established intent, malice, premeditation and deliberation where the defendant approached the victim several hours after the two had been involved in an altercation, got out of the car, pointed a gun at him, shot at the victim, first missing and then hitting him in the leg, and then continued to approach him with an angry look on his face, only retreating at the urging of his aunt. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

Evidence in attempted first-degree murder conviction was sufficient to show premeditation and deliberation on defendant's part when defendant refused to be handcuffed by an officer, struck the officer, struggled with the officer, took the officer's handgun out of its holster after repeated attempts, aimed the handgun at the officer, and shot the officer in the hand. State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103, 2001 N.C. App. LEXIS 990 (2001).

Deliberation and premeditation in the victim's murder were shown by the fact that defendant took a revolver to a meeting with the victim, indicative of some preparation and intent to do harm to the victim; his statement that "she was going to take my kids" demonstrated ill will or previous difficulties. State v. Williams, 151 N.C. App. 535, 566 S.E.2d 155, 2002 N.C. App. LEXIS 772 (2002), cert. denied, 356 N.C. 313, 571 S.E.2d 214 (2002).

In a murder prosecution, evidence of defendant's intent to kill was sufficient when it showed: (1) ill-will between defendant and the victim, based on the warrants they had obtained against each other, (2) defendant's statement to another that he was going to shoot the victim, (3) defendant's statement to another that he would rather see the victim dead than with another person, and (4) defendant shot the victim twice in the back as she was attempting to flee him. State v. McClary, 157 N.C. App. 70, 577 S.E.2d 690, 2003 N.C. App. LEXIS 378 (2003), appeal dismissed, cert. denied, 357 N.C. 466, 586 S.E.2d 466 (2003).

Although the trial court erred in admitting the hearsay statements of the witness, the error was harmless under G.S. 15A-1443(b) given the presence of overwhelming evidence of premeditation required for the conviction of first-degree murder; this evidence included the fact that defendant brought the murder weapon to the residence where the murder occurred, that defendant stabbed or lacerated the victim 51 times, and that the responding police officer saw that defendant's clothes were heavily blood stained. State v. Champion, 171 N.C. App. 716, 615 S.E.2d 366, 2005 N.C. App. LEXIS 1364 (2005).

Jury could determine deliberation and premeditation beyond a reasonable doubt to support defendant's convictions for attempted murder and assault with a deadly weapon with intent to kill or inflicting serious injury as: (1) defendant entered the victim's house without the victim's permission; (2) a fight resulted when defendant broke the victim's television, and defendant pulled a knife on the victim; (3) defendant's girlfriend testified that ill-will had developed between defendant and the victim; (4) defendant left his house with a gun in his truck; and (5) after shooting the victim in the shoulder yelled out, "I got one now and I got one more to go." State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Even assuming arguendo that an instruction on flight was improper, it did not prejudice defendant; evidence that a bullet from defendant's gun went through the victim's abdomen and lodged in his underwear, combined with defendant's own confession to law enforcement, provided overwhelming evidence that defendant committed a murder. In addition, the trial court's instruction correctly informed the jury that proof of flight was not sufficient by itself to establish guilt and would not be considered as tending to show premeditation and deliberation. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Evidence of Prior Crime as Indicative of Intent. — Evidence of the defendant's participation in a prior armed robbery is admissible for the purpose of showing intent in a prosecution for murder committed during the perpetration or attempted perpetration of a robbery. State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Evidence of Prior Abuse of Victim. — Evidence that, on various occasions during approximately three and one-half years prior to her death, defendant had intentionally inflicted personal injuries upon his wife was admissible as bearing on intent, malice, motive, premeditation and deliberation on the part of the prisoner. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

In a prosecution for second-degree murder, where the victim was a five-year-old child who died as a result of injuries to her head which could have been caused by a beating on one or several occasions by the defendant, previous acts of physical abuse were competent to show defendant's predisposition to commit the violent act complained of in the indictment. Moreover, the evidence of child abuse was competent to show the state of mind necessary to establish malice, an essential element of second-degree murder. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, appeal dismissed and cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

Witness' testimony that defendant told her he had exposed himself and masturbated in the presence of her three-year-old daughter was admissible as evidence of the defendant's felonious intent in kidnapping 10-year-old murder victim, and was sufficient evidence to support the defendant's conviction for first-degree murder under the felony murder theory. State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990), cert. denied, 421 S.E.2d 360 (1992).

North Carolina, to prove the disputed issue of defendant's intent to kill after defendant's forensic psychologist testified that defendant was unable to form the specific intent to kill, elicited testimony on defendant's prior misconduct toward his wife; thus, the psychologist's testimony regarding the statements of defendant's prior bad acts was properly admitted under G.S. 8C-1-404(b). State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Evidence of Prior Similar Act. — Where defendant was on trial for murdering his 21/2 year old niece, evidence that 6 months prior defendant became angry with girlfriend's 4 year old son and shook him and threw him into a chair which then slid and hit the wall was relevant to establish defendant's motive and intent in shaking niece and to show absence of mistake on defendant's part. State v. Pierce, 346 N.C. 471, 488 S.E.2d 576 (1997).

Evidence of threats is admissible and may be offered as tending to show premeditation and deliberation, and previous express malice, which are necessary to convict of murder in the first degree. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Evidence of threats against the victim are admissible in evidence to show premeditation and deliberation. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971), overruled on other grounds, State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

In homicide cases, threats by the accused have always been freely admitted either to identify him as the killer or to disprove accident or justification, or to show premeditation and deliberation. Remoteness in time of the threat does not render the evidence incompetent, but goes only to its weight. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated is admissible in evidence where other facts adduced give individuation to it. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Uncommunicated Threats. — Generally speaking, uncommunicated threats are not admissible in homicide cases. But there are exceptions to the rule which must be considered in light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

In trials for homicide uncommunicated threats are admissible where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

Defendant's conviction and sentence on a charge of first-degree murder pursuant to G.S. 14-17 was upheld; the trial court properly excluded the victim's uncommunicated threats to defendant into evidence, because defendant failed to put on evidence of self-defense as was required to admit such evidence pursuant to G.S. 8C-1, N.C. R. Evid. 803(3), and defendant did not suffer any prejudice pursuant to G.S. 15A-1443(a) because defendant testified to substantially the same evidence that was contained in the uncommunicated threat. State v. Messick, 159 N.C. App. 232, 585 S.E.2d 392, 2003 N.C. App. LEXIS 1493 (2003).

Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material when the punishment to be imposed is to be fixed by the jury in its discretion. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Brutal or Vicious Circumstances Permitting Inference of Premeditation. — It was not error to instruct jurors that they could infer premeditation and deliberation from the "brutal or vicious circumstances of the killing" and from defendant's use of "grossly excessive force" where there was evidence of defendant's use of grossly excessive force and he fired a semi-automatic rifle, fully loaded with 16 rounds, seven times at the victim, hitting his target twice. This is enough to show grossly excessive force. State v. Terry, 329 N.C. 191, 404 S.E.2d 658 (1991).

Evidence of Private Prosecution. — In first-degree murder prosecution, the court erred in excluding evidence that wife of deceased had employed private prosecution in the case. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Use of Admissions Regarding Second-Degree Murder to Prove First-Degree Murder. — Where defendant made affirmative admissions of the existence of malice and unlawfulness by admitting commission of two second-degree murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first-degree murder. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), cert. denied, 459 U.S. 1156, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Evidence of Malice from Defendant's Statements. — Statements by defendant that he believed the law in Anson County did not prevent the killing of blacks clearly tended to prove malice. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

Conviction Based Largely on Defendant's Own Statements. — Substantial evidence of first-degree murder was presented to sustain defendant's conviction where the forensic pathologist testified that the victim could only have survived a matter of minutes after the infliction of the head wounds and where the defendant stated that he did not see anyone else in the store on the morning of the murder, that the victim was still alive when he saw him lying behind the counter, and that he picked up the stick containing the victim's hair, blood and tissue; his own statements placed him as the person who had access to the victim, the victim's blood, and other physical evidence, making it unnecessary for the police to match fingerprints taken in the store to defendant. State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001).

Causal Connection Between Assault and Death. — Nonexpert testimony, even without an opinion as to the cause of death, can establish a causal connection between an assault and death sufficient to take the State's case to the jury. State v. Luther, 21 N.C. App. 13, 203 S.E.2d 343, aff'd, 285 N.C. 570, 206 S.E.2d 238 (1974).

Establishing Theory of Acting in Concert. — Where victim was murdered in her own home, evidence of an unidentified latent fingerprint in addition to those of defendant supported the jury instruction concerning the theory of acting in concert. State v. Smart, 99 N.C. App. 730, 394 S.E.2d 475 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 520 (1991).

Evidence of Conspiracy. — Motion to dismiss was properly denied where the evidence showed that defendant drove through an apartment complex in a borrowed car with victim's brother, exited the vehicle in a certain area and returned to the vehicle after gunshots, and the brother fabricated a story to police to avoid identification, there was sufficient evidence to support a finding of conspiracy to commit murder. State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Sufficiency of Evidence to Deny Motion to Dismiss. — Evidence tending to show defendant was the perpetrator of the homicide was sufficient to justify the trial court's denial of defendant's motion to dismiss. State v. Demery, 113 N.C. App. 58, 437 S.E.2d 704 (1993).

In an action in which defendants appealed from a judgment of the Wayne County Court which convicted defendants of first-degree murder, there was sufficient evidence to persuade a rational trier of fact of each essential element beyond a reasonable doubt regarding the first defendant; the introduction of evidence showing that defendant said "I'm going to kill this expletive," and that he had the gun when he pursued the victim's car, provided sufficient evidence to support a guilty verdict. State v. Sloan, 180 N.C. App. 527, 638 S.E.2d 36, 2006 N.C. App. LEXIS 2517 (2006), appeal dismissed, cert. denied, 361 N.C. 367, 644 S.E.2d 560 (2007), aff'd, 650 S.E. 2d 594, 2007 N.C. LEXIS 1011 (2007).

Defendant's motion to dismiss was properly denied as there was ample evidence that defendant shot the victim since: (1) defendant and the victim fought with each other before the shooting and defendant pulled a knife on the victim; (2) after the fight, defendant sat in defendant's truck and pointed a gun toward the victim's house; (3) the victim and the victim's brother identified defendant's voice as the voice they heard when the shooting occurred; (4) defendant's girlfriend saw defendant leave in defendant's truck shortly before the shooting; and (5) a .22 rifle and bullets were found in defendant's shop. State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

Testimony that defendant and the victim wrestled for a gun, which the witness was told was a nine-millimeter, in the victim's bedroom, that defendant was using a smaller gun to hit the victim, and the witness did not see who fired the gunshot that led to the victim's death, was sufficient to support the denial of defendant's motion to dismiss because it was sufficient for the jury to reasonably infer that defendant shot the victim, either with defendant's own gun or the victim's gun, and thus to allow the jury to conclude that defendant acted to cause the victim's death. State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896, 2007 N.C. App. LEXIS 1824 (2007), appeal dismissed, review denied, 362 N.C. 372 (2008).

As the State presented evidence that defendant retrieved a gun from his vehicle and intentionally fired the gun at defendant, killing him, the State presented sufficient evidence for the jury to infer malice on the part of defendant; thus, the trial court properly denied the motion to dismiss. State v. Ledarius Montreal Banks, 191 N.C. App. 743, 664 S.E.2d 355, 2008 N.C. App. LEXIS 1484 (2008).

Evidence that the victim was with defendant less than 10 minutes before the victim was found; defendant was driving the victim's car, which had blood in it; defendant bought bleach shortly after the body was found; the victim's broken cell phones were found behind the store where defendant bought the bleach; and defendant had money with the victim's blood on defendant was sufficient to support the denial of defendant's motion to dismiss the first-degree murder charge. State v. Dawkins, — N.C. App. —, 675 S.E.2d 402, 2009 N.C. App. LEXIS 513 (2009).

Sufficient Circumstantial Evidence. — The State presented sufficient evidence to the jury that the defendant committed the subject crime where the evidence showed that the victim knew his assailant; that the defendant had borrowed money from the victim before; that the defendant's behavior was suspicious to several witnesses, including his mother; that the defendant spent all his paycheck on beer and crack cocaine on the night of the murder; that, after the time of the murder, defendant returned to his friend's house with more cocaine than he possessed before leaving and also with his shirt covered with blood; that defendant related three different stories as to how his shirt got bloody; and that a shoeprint found on the scene could be a match to the defendant's shoe. State v. Brooks, 136 N.C. App. 124, 523 S.E.2d 704, 1999 N.C. App. LEXIS 1309 (1999), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000).

Admissible Evidence. — All statements made by defendant were fully authorized by the defendant and did not constitute a breach of the attorney-client privilege or any other right of the defendant and it was not error for the trial court to allow evidence of the defendant's statements to be admitted. State v. McIntosh, 336 N.C. 517, 444 S.E.2d 438 (1994).

In defendant's trial on charges of first degree murder, first degree burglary, second degree kidnapping, and robbery with a dangerous weapon, the trial court properly admitted the videotaped statement that defendant's wife gave to police, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(5), after defendant's wife refused to testify for the State at defendant's trial, properly admitted letters one of defendant's co-conspirators wrote to a girlfriend urging the girlfriend to lie about the girlfriend's involvement in the co-conspirator's attempt to conceal evidence of the crime, pursuant to G.S. 8C-1, N.C. R. Evid. 804(b)(3), (b)(5), and properly admitted evidence of similar crimes defendant committed shortly after the murder, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b). State v. Carter, 156 N.C. App. 446, 577 S.E.2d 640, 2003 N.C. App. LEXIS 178 (2003), cert. denied, 358 N.C. 547, — S.E.2d — (2004), cert. denied, — U.S. —, 125 S. Ct. 868, 160 L. Ed. 2d 784 (2005).

Evidence as to defendant's prior convictions for driving while impaired and driving while license revoked was properly admitted, under G.S. 8C-1, N.C. R. Evid. 404(b), as the evidence was relevant to show malice to support defendant's charge for second degree murder following an auto accident in which defendant was driving while impaired. Further, there was no plain error in the trial court admitting evidence of defendant's empty prescription pill bottle, testimony by an officer identifying the pills from the label, and testimony by a pharmacist about the interaction between the pills and alcohol, as the evidence was relevant to the charges against defendant. State v. Edwards, 170 N.C. App. 381, 612 S.E.2d 394, 2005 N.C. App. LEXIS 992 (2005).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because defendant's written waiver of his Miranda rights and written confession were made understandingly, knowingly, and voluntarily through a police officer that served as defendant's interpreter. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Evidence permitted the inference that defendant was the aggressor at the time he shot the victim, where, although the evidence showed that the victim initially went to defendant's home and began to argue with him, the evidence also showed that immediately before the victim was shot she was about to leave. State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Evidence of Prior Violent Behavior by Victim When an Accident Defense Used. — In Defendant's trial for second degree murder, trial court properly excluded evidence that defendant's wife had shot her former husband, as defendant relied on a defense of accident, and the wife's alleged violent character had no bearing on whether a rifle fired accidentally. State v. Crawford, 163 N.C. App. 122, 592 S.E.2d 719, 2004 N.C. App. LEXIS 307 (2004), cert. denied, 358 N.C. 734, 601 S.E.2d 867 (2004).

Evidence Held Sufficient to Support Conviction. — Evidence that defendant, a gang member, (1) on one night met with other gang members to participate in an initiation of gang members, (2) participated in obtaining bullets to support gang missions, (3) asked to be allowed to shoot a victim that was abducted by other gang members, and (4) grumbled when he was not chosen to shoot and kill the victim, was sufficient to show that defendant joined with one or more persons to kidnap, rob, assault with a deadly weapon, and attempt to murder the victim, and was constructively present when the crimes were carried out. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Evidence, including a history of violence and hostility between the parties, testimony from defendant's girlfriend that she thought defendant was going to shoot the victim, and defendant's DNA on a beer can, was sufficient to support defendant's conviction for first-degree murder. State v. Hocutt, 177 N.C. App. 341, 628 S.E.2d 832, 2006 N.C. App. LEXIS 966 (2006).

Sufficient evidence supported a murder conviction where testimony revealed that defendant attacked the victim after the victim had been knocked to the ground by another, that defendant then beat the victim with a rubber mallet, that defendant then stole the shoes off the victim's feet and fled the scene, and that during his flight, defendant stated to others "I killed him, I killed him." State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

There was sufficient evidence of malice to support defendant's second-degree murder conviction as: (1) there was evidence that defendant had consumed 9 to 12 beers in a two-hour timeframe; (2) defendant's blood alcohol content was well-above the threshold for driving while impaired; (3) defendant got into a truck, ran over a sign and continued driving; and (4) defendant eventually ran off the road and crashed into the victims' truck. State v. Davis, — N.C. App. —, 678 S.E.2d 385, 2009 N.C. App. LEXIS 1080 (July 7, 2009).

Error in admission of victim's statements without cross-examination was harmless. — Defendant's conviction for first-degree murder was upheld on appeal, despite that the trial court erring by admitting the statements of two unavailable robbery victims with regard to their statements to police after the crime, which identified and implicated defendant and three others, without affording defendant the right to confrontation, because the evidence of defendant's guilt was overwhelming, which rendered the trial court's error harmless. State v. Allen, 171 N.C. App. 71, 614 S.E.2d 361, 2005 N.C. App. LEXIS 1186 (2005), cert. dismissed, 360 N.C. 66, 621 S.E.2d 875 (2005), cert. denied, appeal dismissed, 360 N.C. 66, 621 S.E.2d 878 (2005).

B. Physical Evidence.

Real Evidence Must Be Properly Identified. — Any evidence which is relevant to the trial of a criminal action is admissible but when real evidence (i.e. the object itself) is offered into evidence, it must be properly identified and offered. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Analysis by Expert Witness. — In defendant's trial on a charge of first degree murder, the trial court erred by denying defendant's motion for a continuance so she could find an expert to analyze the State's expert's conclusion that there was blood splatter on defendant's clothes which suggested that defendant was present when a victim was struck; the appellate court ordered a new trial because the State did not carry its burden of showing that the trial court's ruling was harmless beyond a reasonable doubt. State v. Barlowe, 157 N.C. App. 249, 578 S.E.2d 660, 2003 N.C. App. LEXIS 536 (2003).

When Clothing Is Admissible. — In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Clothing of Victim. — The admission into evidence of the articles of clothing found upon a murder victim's body was not error, where the location of the bullet holes in her dress and the presence thereon of stains, identified by an expert witness as powder burns, were material and tended to show that when the shots were fired the pistol was held close to the victim's body. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408

U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In a prosecution for first-degree murder, the clothing of deceased is admissible if its appearance throws any light on the circumstances of the crime. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Fingerprints of Codefendant. — In the prosecution of two defendants for armed robbery and murder, there was no merit to one defendant's contention that the trial court erred in admitting evidence of fingerprints of a codefendant found on the murder weapon as well as cards containing his fingerprints which were never linked to the murder weapon, since the evidence of the fingerprints was relevant because the State proceeded upon a theory of acting in concert, and, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Fruits of Plain View Seizure. — In a prosecution of first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Nontestimonial Identification. — In a prosecution for first-degree murder, the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; and defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provision of Chapter 15A, Article 14, by not procuring an express waiver from defendant, as the statute does not require an express waiver of the right to have counsel present at a nontestimonial identification procedure. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Photographs — Scene of the Crime. — In a prosecution under this section, where photographs are identified as accurate representations of the scene of the crime by the witness, the photographs are competent in evidence for the purpose of enabling the witness to explain his testimony, and a general objection to the admission of the photographs in evidence cannot be sustained. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

Same — Body of Victim. — There was no error in the admission of the two photographs of the body of a murder victim, the court instructing the jury that they were to be considered solely for the purpose of illustrating the testimony of the witness. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In a prosecution for first-degree murder, a photograph is admissible for the purpose of illustrating the testimony of the doctor who examined the deceased. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Photographs and videotape used to illustrate testimony as to the location and condition of victim's body, where each photograph showed something different, none was especially inflammatory, and the total amount of photographic evidence was not excessive, did not prejudice defendant, in light of the overwhelming evidence of defendant's guilt, and in light of his receiving a sentence of life imprisonment, the minimum sentence for first-degree murder. State v. Murphy, 321 N.C. 738, 365 S.E.2d 615 (1988).

Properly authenticated photographs of a homicide victim may be introduced into evidence even if they are gory, gruesome, horrible or revolting, so long as they are used by a witness to illustrate his testimony and so long as an excessive number of photographs are not used solely to arouse the passions of the jury. State v. Murphy, 321 N.C. 738, 365 S.E.2d 615 (1988).

Same — Body in Casket. — The trial court erred in a first-degree murder case in allowing the jury to be shown certain photographs of the victim's body lying in a casket, but such error was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Same — Effect of Defendant's Admissions. — Photographs of the victim's body and articles of clothing found upon it were competent notwithstanding the admission by the defendant, through his counsel, in open court, that the body was that of the victim, that it was discovered in a wooded area, partially hidden under boards and an old quilt and in a state of decomposition, and that the cause of death was five gunshot wounds in the abdomen. Notwithstanding these admissions, the circumstances with reference to the shooting of the deceased and the disposition of her body were material upon the question of the degree of the homicide and the decision as to the punishment to be inflicted, if the jury should find the defendant guilty of murder in the first degree. State v.

Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In a prosecution for first-degree murder, photographs of deceased and the clothing of deceased are admissible despite defendant's contention that since he did not controvert the killing, the photographs and clothing were prejudicial and inflammatory, since the burden was still on the State to prove its case beyond a reasonable doubt so as to convince the jury that there had been an unlawful killing with malice and that the circumstances of the killing justified a finding of premeditation, deliberation and a specific intent to kill. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Same — Gruesome Character. — If a photograph is relevant and material, the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

In a prosecution for homicide, photographs showing the condition of the body when found, the location where found, and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence rev'd, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

In a prosecution for second-degree murder or involuntary manslaughter photographs depicting the way deceased looked at the hospital the night he died are not inadmissible because they were not made at the time of the event, or because they were gory or gruesome. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

In a prosecution for first-degree murder the fact that a photograph depicts a gruesome scene does not render it incompetent. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Same — Excessive Repetition. — Where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

Map. — In a murder trial where guilt was based on circumstantial evidence, the trial court committed reversible error in refusing to admit into evidence defendant's proposed exhibit, a drawing found by law enforcement officers among victim's personal effects, which included a rough map of the area surrounding defendant's North Carolina home and numerous written notations indicating a possible larceny scheme. The exhibit was clearly relevant to a crucial issue in the case, namely, whether this defendant, and not some other person, was in fact the perpetrator of the crime, and it therefore should have been admitted into evidence at trial. State v. McElrath, 322 N.C. 1, 366 S.E.2d 442 (1988).

Victim's Medical Records. — The court examined sealed medical records of the victim, which the victim's hospital asserted as privileged under G.S. 8-53, and concluded that they contained no information exculpatory of defendant's guilt or material to her defense or punishment. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

VIII. INSTRUCTIONS.

A. In General.

Degree of Proof. — No set formula is required to convey to the jury the fixed principle relating to the degree of proof required for conviction. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

A trial judge is not required to define "reasonable doubt" without a request to do so, but if he does undertake to define it, the definition should be in substantial accord with the definitions of this court. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

The defining of "reasonable doubt" as a possibility of innocence not only was not reversible error but constituted an instruction more favorable to the defendant than the usual definitions such as "fully satisfied," "entirely convinced," or "satisfied to a moral certainty." State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

Reasonable Doubt as "Honest, Substantial Misgiving". — Instruction in murder trial which read in part "A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving," was not error. State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), cert. denied, 506 U.S. 1055, 113 S. Ct. 983, 122 L. Ed. 2d 136, rehearing denied, 507 U.S. 967, 113 S. Ct. 1404, 122 L. Ed. 2d 776 (1993).

Ability to Form Specific Intent. — The trial court committed reversible error in refusing to instruct the jury to consider the defendant's mental condition in connection with his ability to form a specific intent to kill and instead gave the pattern instruction which explains intent as a state of mind or mental attitude which may be inferred from surrounding circumstances rather than by direct evidence. State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994), cert. denied and appeal dismissed, 339 N.C. 741, 454 S.E.2d 661 (1995).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because the trial court did not error in giving a jury instruction which limited the purpose of evidence that was introduced regarding defendant's prior bad acts to the determination of defendant's intent. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Inability to Form Specific Intent. — The trial court did not err in instructing the jury that in order to find that defendant could not form a specific intent to commit a felony or that the defendant was mentally incapable of premeditation and deliberation they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Killing Must Have Been Intentional. — While it was error for the trial court to omit the word "intentionally" before the word "killed" in each instance that the court instructed on the inference of malice from use of a deadly weapon, the omission did not constitute plain error where the instructions, taken as a whole, made it clear that the killing must have been intentional in order for defendant to be convicted of first-degree murder, and essentially all the evidence, both that of the State and defendant, showed that the killing was intentional. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

A charge, in the court's final mandate, that the jury had to be satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation, also charged that the killing had to be intentional. State v. Larrimore, 340 N.C. 119, 456 S.E.2d 789 (1995).

With respect to jury instructions, the phrase "that he intended to kill" is self-explanatory, and absent a special request for instructions from the defendant, the presiding judge was not required to supply its definition. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976).

Instruction Held to Relieve State's Burden of Proving Specific Intent. — Trial court's instruction to the jury that "[t]he phrase intentionally killed refers not to the presence of a specific intent to kill; the sense of the expression is that the act that resulted in death is intentionally committed," entirely relieved the State of its burden of proving the specific intent required for first-degree murder, and was, therefore, error. State v. Keel, 333 N.C. 52, 423 S.E.2d 458 (1992).

Instruction Held Not to Relieve State's Burden of Proving Malice. — Instruction stating that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the deceased's death, the law requires, first, that the killing was unlawful and, second, that it was done with malice, the use of the word "requires" did not create a mandatory presumption of malice. The instruction was more likely to be interpreted by lay jurors as creating additional requirements for the State's proof, by depriving the State of any permissible inference of malice from an intentional killing with a deadly weapon. Therefore, the instruction did not relieve the State of its burden to prove malice beyond a reasonable doubt. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of 316 N.C. 382, 342 S.E.2d 901 (1986), death sentence aff'd, cert. denied, rehearing denied.

Instruction on Inference of Premeditation and Deliberation. — In trial for first-degree murder and robbery, evidence of lack of provocation, including victim's weakened condition and defendant's physical integrity on examination, and of defendant's conduct in leaving the scene of the assault and callously selling victim's personal belongings constituted evidence from which premeditation could be inferred; therefore, instruction regarding proof from which premeditation and deliberation could be inferred was supported by the evidence. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

"Lack of provocation by the victim," "use of grossly excessive force," and "infliction of lethal wounds after the victim is felled," as cited in the North Carolina Pattern Jury Instructions, N.C.P.I.-Crim. 206.10 are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation.

State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Failure to give defendant's requested instruction on the felled victim theory of premeditation and deliberation was not error because the State established the elements of premeditation and deliberation by evidence other than the number of shots fired; the State presented evidence that defendant walked away from the argument with the victim, entered his house, retrieved a firearm from a closet, exited the house, and then shot the victim, forming intent sometime within that timeframe. State v. Snider, 168 N.C. App. 701, 609 S.E.2d 231, 2005 N.C. App. LEXIS 395 (2005).

Instruction on Premeditation Not Plain Error Where Defense Was Total Innocence. — Where, upon defendant's trial for murder, he did not attempt to establish that he shot victim in an unpremeditated manner, but rather, his defense, presented by the testimony of several alibi witnesses, was total innocence, the trial court's failure to elucidate the meaning of premeditation in its instructions to the jury did not constitute plain error. State v. Brown, 327 N.C. 1, 394 S.E.2d 434 (1990).

Alibi Instruction Not Required. — In prosecution for first-degree murder, where the record showed that the crime was committed on a certain corner at a specified time, and defendant testified that he was on that corner at that time, there was insufficient evidence to require an instruction on alibi, even had there been a special request for it. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Instruction on accident not required. — Defendant was not entitled an instruction on the defense of accident, despite defendant's claim to have abandoned the burglary before shooting the murder victim, because defendant was engaged in misconduct, breaking and entering into a home with the intent to commit robbery, at the time of the shooting. State v. Yarborough, — N.C. App. —, 679 S.E.2d 397, 2009 N.C. App. LEXIS 1078 (July 7, 2009).

Guilt of Accomplice. — In a prosecution for murder where an accomplice testified for the State, the trial court did not err in failing to instruct the jury that the accomplice was guilty, as an accomplice, of the crime charged against defendant. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741, appeal dismissed, 302 N.C. 400, 279 S.E.2d 354 (1981).

Instruction as to Aiding and Abetting. — Defendant's conviction for first-degree murder, under a theory of aiding and abetting, was affirmed because the trial court's clarifying instructions properly set out the elements of the crime and did not lessen the state's burden of proof. State v. Glynn, 178 N.C. App. 689, 632 S.E.2d 551, 2006 N.C. App. LEXIS 1676 (2006), appeal dismissed, cert. denied, 637 S.E.2d 180 (N.C. 2006).

Instruction as to Accessory Before the Fact. — Where the trial court's instructions made no mention of the necessary causal connection between defendant's alleged statements and principal's actions, simply stating that defendant should be found guilty if the jury found that principal murdered victim, and that defendant "knowingly instigated, counseled or procured" the murder, the jury was not adequately instructed with respect to the chain of causation necessary to a conviction of accessory before the fact to murder. State v. Davis, 319 N.C. 620, 356 S.E.2d 340 (1987).

Instruction Permitting Verdict of Guilty as Accessory to Second-Degree Murder. — In a prosecution of a defendant as an accessory before the fact to the murder of her husband, defendant was not prejudiced by an instruction which would permit the jury to return a verdict of guilty as an accessory to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It was not plain error for a trial court to instruct on the offense of accessory after the fact to second-degree murder because the state presented no evidence about what may have transpired between the victim and the principal offender before the principal shot the victim, and while physical evidence could have supported a finding of premeditation and deliberation, there was also testimony that the witness thought the victim had been "jumped," supporting a reasonable inference that the attack was spontaneous. State v. Brewington, — N.C. App. —, 635 S.E.2d 512, 2006 N.C. App. LEXIS 2133 (2006).

Instruction Permitting Verdict of Guilty of Voluntary Manslaughter. — Where the jury was instructed that it could find defendant guilty of first-degree murder, second-degree murder, or not guilty, and the jury returned a verdict of guilty of first-degree murder, any error in the trial court's failure to instruct the jury on voluntary manslaughter was harmless. State v. Bunnell, 340 N.C. 74, 455 S.E.2d 426 (1995).

The court did not commit "plain error" in failing to charge the jury on involuntary manslaughter, where the only possible evidentiary support for an involuntary manslaughter verdict was defendant's statement to the police to the effect that he did not stab the victim and that she twice ran onto his knife, because defendant did not rely upon the statement in the trial court, but repudiated it as a lie. State v. Pulley, 90 N.C. App. 673, 369 S.E.2d 634 (1988).

Judge's failure to give instruction on accident in a murder prosecution was error; however, where defendant's testimony was contradicted by State's witness, defendant was impeached by his prior inconsistent statements and his past criminal activity, and defendant's story completely lacked the ring of truth, no plain error was found. See State v. Loftin, 322 N.C. 375, 368 S.E.2d 613 (1988).

Instruction on Acting in Concert. — as a permissible basis for finding defendant guilty of first-degree murder was properly given in view of the evidence, and where defendant himself struck the fatal blow. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Although evidence adduced at trial would support a jury finding that the defendant acted in perfect defense of another, as it also would support a finding that the defendant and another acted in concert to commit first-degree murder, the trial court properly gave an instruction on the acting in concert theory. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

District court did not abuse its discretion by instructing the jury where it gave the definition of conspiracy four times and gave a long instruction on the definition of murder under North Carolina law. United States v. Celestine, — F.3d —, 2002 U.S. App. LEXIS 16140 (4th Cir. Aug. 9, 2002), cert. denied, 537 U.S. 1061, 123 S. Ct. 644, 154 L. Ed. 2d 546 (2002), cert. denied, 537 U.S. 1094, 123 S. Ct. 706, 154 L. Ed. 2d 642 (2002), cert. denied, 537 U.S. 1095, 123 S. Ct. 708, 154 L. Ed. 2d 644 (2002), cert. denied, 537 U.S. 1144, 123 S. Ct. 944, 154 L. Ed. 2d 843 (2003).

Finding of "an agreement to kill" is equivalent to finding an agreement to commit an intentional murder, even in the absence of an instruction requiring the latter finding, and the finding of an agreement to kill is equivalent to the finding of an agreement to premeditate and deliberate. State v. Brewton, 173 N.C. App. 323, 618 S.E.2d 850, 2005 N.C. App. LEXIS 2027 (2005).

Instruction on action in concert was erroneously given regarding defendant's first-degree murder charge, as the State failed to present any evidence that defendant acted with another; moreover, the error was not harmless, as contended by the State, because the trial court also erroneously informed the jury in its instructions that it could convict defendant of first-degree murder on the basis of acting in concert under both felony murder and premeditation and deliberation theories. State v. Windley, 173 N.C. App. 187, 617 S.E.2d 682, 2005 N.C. App. LEXIS 1927 (2005).

Instructions Permitting Conviction of Both Defendants If One Found Guilty. — Where the jury instructions in a case in which two defendants were jointly tried for rape and murder were susceptible of the construction that the jury should convict both defendants if it found one of them guilty, defendants would be granted a new trial as to the charges against them. State v. McCollum, 321 N.C. 557, 364 S.E.2d 112 (1988).

Characterization of Deceased Held Harmless Error. — In a prosecution for first-degree murder, the trial judge's characterization of deceased as the common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Instruction as to Definition of Life Imprisonment in First-Degree Murder Case. — When jurors sent a question regarding the definition of life imprisonment in a first-degree murder case, the trial judge erred by adding a statement to the definition of life in prison without parole that the jurors should decide punishment "wholly uninfluenced by consideration of what another arm of the government might or might not do in the future"; that extraneous language contained the suggestion that "life without parole" was not the only alternative to the death sentence and was, therefore, erroneous. State v. Boggess, 358 N.C. 676, 600 S.E.2d 453, 2004 N.C. LEXIS 912 (2004).

Instruction as to Right to Consider Eligibility to Parole. — When, in a prosecution for murder in the first degree, the question of eligibility for parole arises spontaneously during the deliberations of the jury and is brought to the attention of the court by independent inquiry of the jury and request for information, the court should instruct the jury that the question of eligibility for parole is not a proper matter for the jury to consider and should be eliminated entirely from their deliberations, and the action of the court in merely telling the jury that it cannot answer the inquiry must be held for prejudicial error upon appeal from conviction of the capital felony without recommendation of life imprisonment. State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

Aggravating Factor of Pecuniary Gain. — Submission to the jury of the aggravating factor of pecuniary gain does not relitigate the question of intentional killing or any element of the offense of first-degree murder under the felony-murder rule. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Flight. — So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, an instruction of flight is properly given. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

The fact that there may be other reasonable explanations for defendant's conduct does not render an instruction on flight improper. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Instruction on Flight Held Warranted. — As an escape from custody constitutes evidence of flight, evidence of defendant's attempt to escape from custody following his arrest provided support for the trial court's instruction on flight. State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990).

Where following the shooting, defendant first attempted to conceal victim's body by ordering accomplice to drag it further into the woods by the roadside where the shooting had occurred, ordered accomplice to wipe the fingerprints off the gun and then to throw the murder weapon into a nearby river from which it was never recovered, tried to throw victim's clothes and personal effects into a dumpster and eventually threw the items over the guard rail along a major highway, his actions were sufficient to support the trial court's instruction on flight, despite fact defendant returned to his home following shooting and approached five law enforcement officers within 48 hours of victim's murder. State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990).

Trial court properly refused to instruct that the automatism/unconsciousness defense applied to charges of felony murder, G.S. 14-17, because the underlying kidnapping of the victim and the killing of the victim were a single transaction, and thus the kidnapping provided the voluntary act for purposes of the felony murder rule; although a psychiatrist testified that defendant was in a dissociative state when he actually killed the victim, there was no evidence that defendant was in a dissociative state when he kidnapped the victim. State v. Boggess, — N.C. App. —, 673 S.E.2d 791, 2009 N.C. App. LEXIS 257 (2009).

Voluntary Intoxication. — There was no prejudicial error in refusing to instruct the jury on voluntary intoxication as it related to the burning of defendant's dwelling in a felony murder case, where the court did so charge the jury in the murder part of the case. State v. Hales, 344 N.C. 419, 474 S.E.2d 328 (1996).

Defendant's conviction of first-degree murder under G.S. 14-17, was affirmed; the trial court properly denied defendant's requested jury instructions on voluntary intoxication and second-degree murder, as defendant showed no signs of intoxication when he committed the crime, and the evidence of premeditation was very strong, and the trial court did not abuse its authority to question witnesses under G.S. 8C-1, N.C. R. Crim. P. 614(b), as the trial court only questioned jurors to focus the witness, or to clarify the testimony. State v. Rios, 169 N.C. App. 270, 610 S.E.2d 764, 2005 N.C. App. LEXIS 685 (2005), appeal dismissed, cert. denied, — N.C. —, 623 S.E.2d 37 (2005).

Robbery Occurring after Murder. — Where a jury could reasonably infer that murder and subsequent robbery were all part of one continuous transaction, the trial court's instructions on this issue were properly supported by the evidence. State v. Morganherring, 350 N.C. 701, 517 S.E.2d 622, 1999 N.C. App. LEXIS 881 (1999), cert. denied, 529 U.S. 1024, 120 S. Ct. 1432, 146 L. Ed. 2d 322 (2000).

Inaccurate Statements of Law. — The court did not err in refusing to give defendant's requested instruction where it was not an accurate statement of the law. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Double Jeopardy. — Trial court did not err by submitting to the jury both attempted first-degree murder and assault with a deadly weapon inflicting serious injury, and by imposing consecutive sentences for the offenses, because each offense contained at least one element not included in the other; therefore, defendants were not been subjected to double jeopardy. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

B. Degree of Offense.

When Jury May Be Instructed to Find Defendant Guilty of First-Degree Murder or Not Guilty. — It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936).

Where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of "guilty of murder in the first degree," if they are satisfied beyond a reasonable doubt, or of "not guilty." State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978).

If the evidence is sufficient to fully satisfy the state's burden of proving each and every element of the offense of first-degree murder and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, second-degree murder should not be submitted to the jury. State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994), cert. denied, 513 U.S. 1120, 115 S. Ct. 923, 130 L. Ed. 2d 802 (1995).

The absence of self-defense is not an "element" of murder, nevertheless, upon the particular evidence presented, the trial court correctly instructed the jury that to convict the defendant of murder in the first degree the jury must find that he did not act in self-defense. State v. Keel, 337 N.C. 469, 447 S.E.2d 748

(1994), cert. denied, 513 U.S. 1198, 115 S. Ct. 1270, 131 L. Ed. 2d 147 (1995).

Murder by Means of Lying in Wait. — When the evidence supports a finding that the murder was perpetrated by means of lying in wait and there is no conflict in the evidence, the trial court is not required to instruct the jury on second-degree murder. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

The trial court may not give an instruction on second-degree murder when the state's evidence supports a jury finding of each element of lying in wait and when there is no conflict with respect to such evidence. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Where there was a conflict in the evidence regarding whether the defendant lay in wait, the evidence supported submission to the jury of second-degree murder and voluntary manslaughter. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

For all murder cases prosecuted under this section, when there is a conflict in the evidence regarding whether defendant committed the underlying felony or was lying in wait, all lesser degrees of homicide charged in the indictment pursuant to G.S. 15-144 and supported by the evidence must be submitted to the jury. State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (1994).

Where there was abundant evidence that homicide was committed in the perpetration of rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Where all the evidence is to the effect that murder was committed in the perpetration of a robbery, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty under this section. State v. Gosnell, 208 N.C. 401, 181 S.E. 323 (1935); State v. Matthews, 226 N.C. 639, 39 S.E.2d 819 (1946).

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. State v. Donnell, 202 N.C. 782, 164 S.E. 352 (1932). See also, State v. Brown, 231 N.C. 152, 56 S.E.2d 441 (1949).

In a case of murder in the first degree committed in the perpetration of, or attempt to perpetrate, a robbery, instruction that the jury should return a verdict of guilty as charged, guilty as charged with a recommendation for life imprisonment, or not guilty is a proper instruction. When the indictment and evidence disclose a killing in the perpetration of a robbery, only one of such verdicts may be returned. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

Where the evidence permits a legitimate inference that a murder was committed in perpetration of a robbery, it is not prejudicial error for the court to give the State's contentions and to charge the jury that a murder committed in the perpetration of a robbery will be deemed murder in the first degree. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

A murder committed in the perpetration or attempted commission of kidnapping or holding a human being for ransom constitutes murder in the first degree and an instruction to this effect upon supporting evidence cannot be held for error. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

Any error of trial judge in failing to instruct on involuntary manslaughter was harmless where the jury specifically found that the underlying felony of kidnapping was committed, which supported defendant's conviction of murder in the first degree on the basis of felony murder. State v. Woods, 316 N.C. 344, 341 S.E.2d 545 (1986).

Murder Committed in Course of Burglary. — In a prosecution where defendants were charged with first-degree murder and the evidence tended to show that defendants killed decedent in the perpetration of the underlying felony of burglary, but there was no evidence that decedent was killed other than in the course of the commission of burglary, the trial court was not required to submit lesser included offenses of second-degree murder and voluntary manslaughter to the jury. State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981).

Murder Committed in Course of Robbery. — Trial court erroneously instructed the jury it could convict defendant of second-degree murder if it found he acted in concert with co-felon "with a common purpose to commit robbery"; a conviction for second-degree murder requires a finding that defendant acted intentionally and with malice to kill the victim; therefore the erroneous instruction given by the trial court could have allowed defendant to be convicted of second-degree murder based on the defendant's mens rea for robbery. State v. Hunt, 91 N.C. App. 574, 372 S.E.2d 744 (1988), cert. denied, 325 N.C. 430, 383 S.E.2d 656 (1989).

Murder Committed in Course of Kidnapping. — The court properly instructed the jury on the theory of felony murder based on the underlying felony of kidnapping, while applying the theory of acting in concert. State v.

Roseborough, 344 N.C. 121, 472 S.E.2d 763 (1996).

Duty of Judge to Determine If Instruction on Lesser Offense Is Warranted. — It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it was the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

When Lesser Included Offense May Be Submitted to Jury. — Defendant is entitled to have a lesser included offense submitted to the jury under the proper instructions, but only when there is evidence to support that lesser included offense. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

It is a well-established rule that when the law and evidence justify the use of the felony-murder rule, the court is not required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it. State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977).

An indictment in the form prescribed by G.S. 15-144 will support a verdict finding the defendant guilty of first-degree murder upon any of the theories set forth in this section or guilty of any lesser offense included within any of those theories. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the state's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Same — Second-Degree Murder. — In all cases in which the State relies upon premeditation and deliberation to support a first-degree murder conviction, the court must submit the issue of second-degree murder. State v. Hammond, 34 N.C. App. 390, 238 S.E.2d 198 (1977); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

A trial judge is not required to give an instruction on second-degree murder in all first-degree cases, but may only instruct on second-degree murder when the evidence supports such a charge. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

A plea of not guilty to first degree murder does not, by itself, entitle a defendant to an instruction on second-degree murder. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Only where defendant has brought forth evidence to negate premeditation and deliberation, or where the evidence is equivocal as to premeditation and deliberation, is defendant entitled to an instruction on second-degree murder. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

An instruction on murder in the second degree is required only when there is evidence to sustain such a verdict. State v. Bullock, 326 N.C. 253, 388 S.E.2d 81 (1990).

Where a defendant is charged with premeditated and deliberate first degree murder, an instruction on the lesser included offense of second degree murder need be given only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

A court should instruct on murder in the second degree only when the evidence would permit a reasonable finding that the defendant's anger and emotion were strong enough to disturb the defendant's ability to reason. State v. Perry, 338 N.C. 457, 450 S.E.2d 471 (1994).

Same — Manslaughter. — The trial judge is required to instruct the jury on the lesser included offense of manslaughter only where there is evidence which would sustain such a verdict. It is not error to omit a charge on manslaughter where there is no evidence of manslaughter. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (1972).

The necessity for instructing the jury as to an included crime of lesser degree, such as manslaughter, than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977).

In a prosecution for first-degree murder, instructions on a lesser included offense of manslaughter are required only when there is evidence from which the jury could find that such included crime of lesser degree was committed. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

It is difficult to imagine a homicide case in which the evidence supports an instruction on self-defense but not an instruction on voluntary manslaughter based upon an excessive force theory. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

A defendant is entitled to an instruction on voluntary manslaughter based on imperfect self-defense only if evidence is introduced from which the following may be found: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable, in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

To have been properly entitled to a jury instruction on voluntary manslaughter, defendant was required either to offer his own evidence or to rely upon the State's evidence to show (1) that he stabbed his wife in the heat of passion, (2) that his passion was provoked by acts of his wife which the law regards as adequate provocation, and (3) that the stabbing occurred immediately after the provocation. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Evidence of several steps taken by two men shot by the defendant, who were admittedly the defendant's friends, did not amount to evidence of either an assault or a threatened assault that would rise to the level of provocation which would "render the mind incapable of cool reflection," and therefore, did not warrant the requested instruction on voluntary manslaughter. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

Trial court did not err by failing to instruct the jury on involuntary manslaughter because defendant did not object to the trial court's instructions during trial. State v. McCollum, 157 N.C. App. 408, 579 S.E.2d 467, 2003 N.C. App. LEXIS 747 (2003), cert. denied, 357 N.C. 466, 586 S.E.2d 467 (2003), aff'd, without op., 358 N.C. 132, 591 S.E.2d 519 (2004).

When Instruction on Lesser Included Offense Should Be Omitted. — Where the evidence tends to show that the defendant committed the crime charged and there is no evidence of a lesser included offense, the trial court is correct in not charging on the lesser included offense. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

Second-Degree Murder Instruction Required. — In a prosecution for first-degree murder, where there was some evidence from which the jury could have inferred that the defendant killed the victim without premeditation and deliberation, it was error for the trial court not to instruct on second-degree murder, since the jury should be instructed on a lesser included offense when there is evidence from which the jury could find that such lesser included offense was committed. State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

While the evidence was sufficient to support the theory of murder committed in the attempted perpetration of the felony of rape and also supported the inference that defendant did not intend to commit rape but sought to have intercourse with his victim on a voluntary basis and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house, it was the duty of the court upon such evidence to submit the question of defendant's guilt of murder in the second degree, in addition to the question of defendant's guilt of murder in the first degree, or not guilty. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

The trial court should have instructed the jury on voluntary intoxication as well as the lesser included offense of second-degree murder, where the defendant produced enough evidence of his intoxication for a reasonable juror to find that defendant neither had the capacity to form the specific intent to rob the victim nor the capacity to commit first-degree murder. State v. Golden, 143 N.C. App. 426, 546 S.E.2d 163, 2001 N.C. App. LEXIS 299 (2001).

Expert testimony finding that defendant was unable to distinguish right from wrong did not negate defendant's ability to premeditate and deliberate, and thus a jury instruction on second-degree murder was not required. State v. Erickson, 181 N.C. App. 479, 640 S.E.2d 761, 2007 N.C. App. LEXIS 262 (2007), review improvidently granted, 2007 N.C. LEXIS 1102 (N.C. Nov. 9, 2007).

Second-Degree Murder Instruction Not Required. — Defendant was not entitled to an instruction on second-degree murder where the State's evidence showed that defendant and daughter of victim had discussed killing victim in order to collect her life insurance and that victim was severely beaten about the head and was strangled with a telephone cord, and the only evidence tending to negate the required elements of first-degree murder was defendant's silent, yet implicit, denial that he committed the crime. State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986).

When all of the evidence tended to show that defendant killed deceased in the perpetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrained from submitting the question of defendant's guilt of murder in the second degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Where the evidence supported each element of the charged crime of first-degree murder by means of poison, and the only evidence to negate these elements was the defendant's denial that he had committed the offense, the trial court did not err by refusing to instruct the jury on second-degree murder or involuntary manslaughter. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

Evidence that defendant, jealous of his ex-lover's relationship with victim, threatened to kill the victim, and that he obtained a rifle and after calling his ex-lover several times on the night of the shooting, entered her apartment with a key he had managed to obtain, shot the victim once, and while the unarmed victim staggered out of bed, shot him again with the fatal shot, belied anything other than a premeditated and deliberate killing, and an instruction on second-degree murder was not required. State v. Davis, 317 N.C. 315, 345 S.E.2d 176 (1986).

Where the evidence showed that defendant either premeditated and deliberated and then murdered her husband, or accidentally shot her husband as she contended throughout her trial, the trial court properly refused to submit the lesser included offenses of second degree murder and involuntary manslaughter to the jury. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Where State adequately established all the elements of first-degree murder, including premeditation and deliberation, and defendant produced no evidence sufficient to negate these elements, the mere possibility that the jury could return with a negative finding did not, without more, require the submission of the lesser included offense, murder in the second degree. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990).

Where defendant repeatedly threatened the victim on the day she was killed, concealed a small pistol in one of his pockets and waited in the victim's apartment until her arrival, had a brief argument with her and as she attempted to leave, pulled out his gun and fired two shots at the back of her head, and the victim died as a result of a gunshot wound to the back of her head, such evidence unequivocally tended to show an intentional killing with malice, premeditation and deliberation, and defendant was not entitled to an instruction on the lesser included offenses of second-degree murder. State v. Stevenson, 327 N.C. 259, 393 S.E.2d 527 (1990).

Where the evidence, viewed as a whole, was insufficient to negate the elements of premeditation and deliberation, the trial court did not err in failing to instruct the jury on second-degree murder and only charging on possible verdicts of guilty of murder in the first degree or not guilty. State v. Arrington, 336 N.C. 592, 444 S.E.2d 418 (1994).

Where the State offered evidence that the murder was premeditated and deliberate, and defendant offered no evidence to negate these elements, the trial court's refusal to give the second-degree murder instruction was proper. State v. Lane, 344 N.C. 618, 476 S.E.2d 325 (1996).

The trial court was not required to instruct on second-degree murder where the State presented positive, uncontradicted evidence of each element of first-degree murder. State v. Leazer, 353 N.C. 234, 539 S.E.2d 922, 2000 N.C. LEXIS 908 (2000).

Habeas relief for death row petitioner was not warranted where trial court's instruction on aggravation was proper, and the court's refusal to instruct the jury on the lesser-included offense of second degree murder did not violate established federal law. Bates v. Lee, 308 F.3d 411, 2002 U.S. App. LEXIS 22094 (4th Cir. 2002), cert. denied, 538 U.S. 1061, 123 S. Ct. 2223, 155 L. Ed. 2d 1113 (2003).

Regardless of whether defendant was the first to fire his weapon, the State presented uncontroverted evidence from which the jury could rationally infer that defendant formed the requisite intent for first-degree murder at some point during the period in which he heard shots erupt in the front of the store, stepped around the corner to observe the action, and fired his weapon multiple times. Defendant's conduct before, during, and after the murder provided sufficient positive evidence of premeditation and deliberation; accordingly, he was not entitled to an instruction on second-degree murder as the lesser included offense of first-degree murder. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Defendant's admission that he fired three times in the victim's direction supported a finding of premeditation and deliberation because premeditation and deliberation may be inferred from the multiple shots fired by defendant; accordingly, defendant was not entitled to an instruction on second-degree murder as the lesser included offense of first-degree murder. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Statements indicated that it was only after defendant fired multiple shots in the front of a store that he ran back towards the witnesses and appeared to a witness to be focused on leaving the store. Neither the witness's testimony nor defendant's leaving the store after shooting the victim negated premeditation and deliberation such that an instruction on second-degree murder as a lesser included offense of first-degree murder was warranted. State v. Taylor, 362 N.C. 514, 669 S.E.2d 239, 2008 N.C. LEXIS 986 (2008).

Where the jury had the right to convict defendant of second-degree murder, but convicted defendant of first-degree murder based on felony murder, the failure to instruct them that they could convict of voluntary manslaughter could not have harmed defendant. State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996).

Where there was ample evidence to support a finding that defendant premeditated and deliberated a murder, the trial court did not err in refusing to instruct on second-degree murder. State v. Geddie, 345 N.C. 73, 478 S.E.2d 146

(1996), cert. denied, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997).

Premise for Instruction Held Improper. — A trial court may not premise a second-degree murder instruction on the possibility that the jury will accept some of the state's evidence while rejecting other portions of the state's case. State v. Leroux, 326 N.C. 368, 390 S.E.2d 314, cert. denied, 498 U.S. 871, 111 S. Ct. 192, 112 L. Ed. 2d 155 (1990).

Voluntary Manslaughter Instruction Not Required. — There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case, and the trial court did not err in failing to instruct on manslaughter as a lesser included offense. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

Where, in a prosecution for second-degree murder, there is no evidence that defendant killed under the heat of passion raised by sudden provocation and nothing that raises the issue of self-defense, a possible verdict of voluntary manslaughter should not be submitted. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

In a prosecution for second-degree murder involving the death of a child from the so-called "battered child" syndrome, where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood in loco parentis with the child, as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter where the evidence showed that the defendant beat and abused the child unto its death. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, appeal dismissed and cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

The trial court in a second-degree murder case did not err in failing to charge the jury that it might find defendant, who offered no evidence in his own behalf, guilty of voluntary manslaughter, since evidence presented by the State tended to show that defendant was guilty of murder if he was guilty of anything, and evidence presented by a codefendant tended to show that defendant was not guilty of anything. State v. Gadsden, 300 N.C. 345, 266 S.E.2d 665 (1980).

Trial judge properly refused to submit voluntary manslaughter as an alternative verdict, where the State's evidence tended to show a cold, calculated premeditated shooting by defendant, and defendant's evidence, on the other hand, tended to show that he did not shoot victim intentionally and never intended to harm him, and that his gun accidentally discharged as he struggled with victim over the gun, which defendant had picked up to convince victim to stop choking him. State v. Blake, 317 N.C. 632, 346 S.E.2d 399 (1986).

Where the jury did not find defendant was in the grip of sufficient passion to reduce a charge of murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter; therefore, the trial court did not err in failing to give the jury an instruction on voluntary manslaughter. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Where defendant's stabbing of his wife occurred more than eight hours after the alleged incident of provocation, the trial court was not required to charge the jury on a lesser included offense of voluntary manslaughter. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Evidence that defendant believed it necessary to kill victim before victim killed him is not sufficient to justify an instruction as to voluntary manslaughter based on imperfect self-defense. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Involuntary Manslaughter Instruction Required. — Where the evidence offered by defendant, if believed by the jury, was sufficient to support a verdict of involuntary manslaughter, which was a lesser degree of the crime charged in the bill of indictment, the court erred in excluding it from the list of permissible verdicts. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

In a prosecution for first-degree murder in which the defendant was found guilty of voluntary manslaughter, the trial judge erred in failing to instruct the jury on involuntary manslaughter where the defendant's testimony was, in its entirety, an account of an unintentional killing. State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978).

Trial court should have given an involuntary manslaughter jury instruction where defendant requested such an instruction and there was evidence that tended to show that the victim was shot after she pointed a gun at defendant, that defendant attempted to knock the gun out of the victim's hand, and that the gun discharged in a struggle between the victim and defendant to gain control of it.

Involuntary Manslaughter Instruction Not Required. — Court's failure to instruct the jury that involuntary manslaughter was one of their possible verdicts was not error where all of the evidence showed that defendant took a pistol from his back pocket and shot his victim twice after the defendant, a customer, had gotten into a dispute with the victim, a storekeeper, during the course of which the victim ordered defendant out of his store, advanced upon defendant, and hit him with a "billy club," and where none of the evidence suggested that the two shots fired by defendant were fired involuntarily or by reason of culpable negligence. State v. Credle, 18 N.C. App. 142, 196 S.E.2d 289 (1973).

When all the evidence tended to show that the accused committed second-degree murder and there was no evidence of guilt of involuntary manslaughter, the court correctly refused to charge on the unsupported lesser offense. The presence of such evidence is the determinative factor. State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976).

Under the evidence, the trial judge in murder trial did not err in failing to instruct on involuntary manslaughter. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

In trial for first-degree murder by reason of killing during the perpetration of a felony, evidence was sufficient to support a finding that defendant intended to shoot into residence within the meaning of G.S. 14-34.1, and since defendant presented no evidence of involuntary manslaughter, trial judge did not err in failing to submit involuntary manslaughter as a possible verdict. State v. Clark, 325 N.C. 677, 386 S.E.2d 191 (1989).

Assuming error in court's failure to give a charge on involuntary manslaughter, it was harmless in view of the verdict of first-degree murder on the theory of premeditation and deliberation. State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990).

Where a jury is properly instructed on the elements of first and second degree murder and thereafter returns a verdict of guilty of first degree murder based on premeditation and deliberation, any error in the trial court's failure to instruct the jury on involuntary manslaughter is harmless even if the evidence would have supported such an instruction. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Instructions on Involuntary Manslaughter and Second-Degree Murder Not Required. — Neither involuntary manslaughter nor second-degree murder are applicable when a victim is killed in the course of a felony set forth in G.S. 14-17, so no lesser-included offense instruction on those offenses is required. State v. Ray, 149 N.C. App. 137, 560 S.E.2d 211, 2002 N.C. App. LEXIS 130 (2002), aff'd, 356 N.C. 665, 576 S.E.2d 327 (2003).

Failure to Submit Lesser Offenses Not Prejudicial Where Defendant Is Convicted of Felony Murder. — Where defendant was found guilty of murder in the first degree on theory of felony murder and was found not guilty on charge of first-degree murder with premeditation and deliberation, no prejudice resulted from the court's failure to submit second-degree murder or involuntary manslaughter as possible verdicts. State v. Vines, 317 N.C. 242, 345 S.E.2d 169 (1986).

Failure to Charge on Voluntary Manslaughter Not Prejudicial. — Where the court submitted to the jury possible verdicts of first-degree murder, second-degree murder, and not guilty, and the jury convicted the defendants of first-degree murder, even if there was sufficient evidence to support an instruction on voluntary manslaughter, in light of the jury's verdict, the trial court's failure to give an instruction was thereon harmless error. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995), cert. denied, 516 U.S. 994, 116 S. Ct. 529, 133 L.E.2d 435 (1995), State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).

Where the trial court instructed the jury that it could find defendant guilty of first-degree murder, based either on the theory of premeditation and deliberation or the theory of felony murder, guilty of second-degree murder, or not guilty, and the jury returned a verdict of first-degree murder on both theories submitted, even if it was error to fail to instruct the jury regarding voluntary manslaughter, such error was harmless. State v. Leach, 340 N.C. 236, 456 S.E.2d 785 (1995).

Submission of Lesser Offense as Prejudicial Error. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second-degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

Submission of Lesser Offense Not Error. — Even though the evidence established all the elements of first-degree murder, it was not error to submit a charge of second-degree murder to the jury because the trial court submitted only second-degree murder and the jury could only find defendant guilty or not guilty of that offense. State v. Spivey, 102 N.C. App. 640, 404 S.E.2d 23 (1991).

Evidence that defendant and a person he killed were drinking and arguing before the victim was stabbed was sufficient to negate premeditation and malice, and the trial court properly instructed the jury on second-degree murder and voluntary manslaughter as lesser-included offenses of first-degree murder, even though defendant asked the court not to give those instructions. State v. Beck, 163 N.C. App. 469, 594 S.E.2d 94, 2004 N.C. App. LEXIS 405

(2004), appeal dismissed, 358 N.C. 546, 599 S.E.2d 558 (2004).

Conviction of Lesser Offense Renders Error in Submission of Greater Offense Harmless. — Where the jury convicts the defendant of murder in the second degree, asserted error in submitting the question of defendant's guilt of murder in the first degree is rendered harmless. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

The submission of a question regarding the guilt of a defendant of murder in the second degree becomes harmless when the jury returns a verdict of manslaughter. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691; 410 U.S. 987, 93 S. Ct. 1516, 36 L. Ed. 2d 184 (1973); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976), cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

Defendant's conviction of voluntary manslaughter would render harmless an error, had error been committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby. State v. McLamb, 20 N.C. App. 164, 200 S.E.2d 838 (1973).

Error in Instruction on Manslaughter — Held Harmless. — Where a jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, error in the charge on manslaughter was harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Same — Not Harmless. — When the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

It was not error to refuse to charge the jury on the lesser included offenses of voluntary and involuntary manslaughter, where there was no evidence that defendant was guilty of manslaughter. The State's evidence indicated only a deliberate, intentional homicide, while defendant's evidence was that he fled the scene before victim was shot and killed by somebody else. State v. Burge, 100 N.C. App. 671, 397 S.E.2d 760 (1990).

The elements of violence and taking were so joined in time and circumstances that the trial court did not err by refusing to instruct the jury on the lesser included offenses. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Instruction on Second Degree Murder Properly Denied. — No rational juror could have convicted defendant of second degree murder, and the trial court did not err in denying defendant's request for such an instruction, because the evidence did not support an alcohol impairment defense, and because any conduct by defendant indicating remorse in the hours after the offense was more than outweighed by his words and actions during and immediately after the killings. Skipper v. Lee, — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21347 (E.D.N.C. Nov. 30, 1999), aff'd, 238 F.3d 414 (4th Cir. 2000).

Instruction on Lesser-Included Offense Properly Not Given. — Trial court properly refused to submit a lesser-included offense charge of misdemeanor death by vehicle in defendant's criminal trial on charges of second degree murder, as the jury chose to convict defendant of second degree murder rather than involuntary manslaughter, such that providing the additional misdemeanor death option would not have made a difference; any such error was harmless. State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299, 2007 N.C. App. LEXIS 2253 (2007).

IX. CHARGE AND INDICTMENT.

Constitutionality of Short Form Indictment. — The defendant's "short-form" first degree murder indictment complied with the state and federal Constitutions although it failed to charge in the indictment the elements of the crime or aggravating circumstances as "facts (other than prior conviction) that increase the maximum penalty for the crime." State v. Smith, 352 N.C. 531, 532 S.E.2d 773, 2000 N.C. LEXIS 617 (2000), cert. denied, 532 U.S. 949, 121 S. Ct. 1419, 149 L. Ed. 2d 360 (2001).

Court declined to find the short-form indictment authorized by G.S. 15-144 unconstitutional in light of Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) for failing to allege all essential elements of first-degree murder. State v. Parker, 2000 N.C. App. LEXIS 1107 (N.C. App. Oct. 3, 2000).

Prisoner's short-form murder indictment provided constitutionally adequate notice because it cited to both the statute authorizing the short-form, pursuant to G.S. 15-144, and to the state's murder statute, pursuant to G.S. 14-17, thus notifying the prisoner that he needed to defend against a charge of first degree murder on any or all grounds, including murder by torture. Stroud v. Polk, 466 F.3d 291, 2006 U.S. App. LEXIS 26216 (4th Cir. 2006).

Short-Form Indictment Held Sufficient. — Premeditation and deliberation did not have to be separately alleged in defendant's short-form indictment which charged him with first-degree murder, and since the death penalty is the prescribed statutory maximum punishment for first-degree murder in North Carolina, no additional facts had to be charged in the indictment to provide defendant with notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death. State v. Braxton, 352 N.C. 158, 531 S.E.2d 428, 2000 N.C. LEXIS 524 (2000), cert. denied, 531 U.S. 1130, 121 S. Ct. 890, 148 L. Ed. 2d 797 (2001).

Murder indictments that comply with G.S. 15-144 are sufficient to charge first-degree murder on the basis of any theory set forth in G.S. 14-17, which included the charge of felony murder based on attempted rape. State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004), cert. denied, — U.S. —, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005).

Defendant's conviction for first degree murder, pursuant to a theory of aiding and abetting under G.S. § 14-5.2, was affirmed because: (1) the short form indictment properly apprised defendant of the charges against him under G.S. 15-144; and (2) there was no variance with the evidence as the state's evidence presented supported the indictment for first degree murder. State v. Glynn, 178 N.C. App. 689, 632 S.E.2d 551, 2006 N.C. App. LEXIS 1676 (2006), appeal dismissed, cert. denied, 637 S.E.2d 180 (N.C. 2006).

Short-Form Indictments Did Not Have to Allege Aggravating Factors. — Where defendant pled guilty to second-degree murder, the trial court did not err in finding the fact that the victim was eight months pregnant to be an aggravating factor and in sentencing him in the aggravated range; as defendant was indicted using a short-form murder indictment, the aggravating factors were not required to be alleged. State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94, 2007 N.C. App. LEXIS 33 (2007).

The State is not generally required to elect between legal theories in a murder prosecution prior to trial. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

The State is not required at any time to elect a theory upon which it will proceed against defendant on a charge of first degree murder, and it is proper for the trial court to submit the issue of defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial; rather than have the jury render a general verdict if it finds defendant guilty of first degree murder, the better practice is for the trial court to have the jury specify the theory or theories upon which it finds first degree murder to have been established beyond a reasonable doubt. State v. Clark, 325 N.C. 677, 386 S.E.2d 191 (1989).

Allegation of Means. — This section does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943).

An indictment under § 15-144 will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The murder indictment which complied with G.S. 15-144 was sufficient and did not violate the defendant's due process and equal protection rights under the United States Constitution. State v. Barnett, 141 N.C. App. 378, 540 S.E.2d 423, 2000 N.C. App. LEXIS 1397 (2000), appeal dismissed and cert. denied, 353 N.C. 527, 549 S.E.2d 552 (2001).

Short-form indictment under § 15-144 is sufficient to charge murder in the first degree under a theory of lying in wait, just as it is sufficient to charge murder in the first degree on the theory of felony murder or premeditation and deliberation. State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987).

Including Verdict of Felony Murder. — A felony murder may be proven by the State although the bill of indictment charges murder in the statutory language of G.S. 15-144. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Allegation of Underlying Felony Unnecessary. — Nothing contained in the Act of 1893 required any alteration or modification of the existing form of indictment for murder. Therefore, it was not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said Act of 1893. State v. Covington, 117 N.C. 834, 23 S.E. 337 (1895).

An indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under G.S. 15-144. It is not required that the indictment allege that the murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1973).

Separate Indictment Not Required for Underlying Felony. — When the State prosecutes a defendant for first-degree murder under the felony-murder rule, the solicitor need not secure a separate indictment for the underlying felony. State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982), rehearing denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031.

The better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration of or attempt to perpetrate a felony under this section would be that the district attorney should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and the judgment will be arrested for the felony under the merger rule. If the separate felony indictment is treated as surplusage only and the murder charge is submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Specific Allegation of Underlying Felony Constitutes Election by State. — By specifically alleging that the offense was committed in the perpetration of rape the State confined itself to that allegation in order to show murder in the first degree. Without a specific allegation, the State could show murder by any of the means embraced in the statute. State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

Election by State of Felony Murder or Premeditation Theory. — The State is not required to elect prior to the introduction of evidence as to whether it will proceed under the felony-murder rule or on the basis of premeditation and deliberation. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Remedy for Alternative Indictment. — After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment because the indictment was alternative, indefinite, and uncertain. It was held that although the indictment was alternative, either charge constituted murder in the first degree under this section, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars under G.S. 15-143 (now G.S. 15A-925). State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Waiver by State of First-Degree Murder Charge. — The district attorney during the trial of defendant on a capital offense, and when defendant was voluntarily absent, could properly elect to waive the charge of first-degree murder and proceed with the prosecution of a noncapital offense, second-degree murder. State v. Mulwee, 27 N.C. App. 366, 219 S.E.2d 304, cert. denied, 288 N.C. 732, 220 S.E.2d 622 (1975).

Effect of Announcement That State Would Not Prosecute for First Degree Murder. — A solicitor's (district attorney's) announcement that the State would not prosecute for the capital felony of first degree murder, but for a lesser included offense, did not render incompetent any pertinent evidence bearing on the defendant's guilt. State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119 (1971).

Trial on Second-Degree Charge Not Grounds for Quashing Bill. — A defendant who was tried on a bill of indictment returned by the grand jury charging him with murder in the first degree could not quash the bill on the ground that, following a preliminary hearing, he was bound over for trial on the lesser charge of second degree murder. State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972).

Indictment held sufficient to charge conspiracy to murder. See State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

Juvenile Delinquency Petition Properly Alleged Murder. — Petition alleging that "juvenile was delinquent as defined by former G.S. 7A-517(12) [see now G.S. 7B-101] in that in Durham County and on or about December 30, 1997, the above named juvenile unlawfully, willfully and feloniously did of malice aforethought kill and murder victim" properly alleged first degree murder under G.S. 14-17, satisfied the requirements of former G.S. 7A-560 [see now G.S. 7B-402], and made transfer of case to Superior Court mandatory under former G.S. 7A-608 [see now G.S. 7B-2200]. In re K.R.B., 134 N.C. App. 328, 517 S.E.2d 200, 1999 N.C. App. LEXIS 744 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 713 (1999).

A charge of murder in the first degree includes murder in the second degree and manslaughter. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).

Charges of child abuse and child neglect

were not merged into a charge of second-degree murder, as the elements of child abuse and neglect are distinct and independent of the elements constituting second-degree murder. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Presence at Murder Scene. — The evidence of defendant's actual or constructive presence at the scene of the murder was sufficiently substantial that a charge on this feature of the case was not necessary. State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1994).

X. PLEAS OF GUILTY AND NOT GUILTY.

Defendant's plea of not guilty puts in issue every essential element of the crime of first-degree murder, and the State must satisfy the jury from the evidence beyond a reasonable doubt that defendant unlawfully killed the deceased with malice and in execution of an actual, specific intent to kill formed after premeditation and deliberation. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Defendant's plea of not guilty puts into issue all of the elements of the charges against him and the burden remains on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the lesser offense of second-degree murder. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

And Entitles Him to Show Both Self-Defense and Accident. — The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both; election is not required. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The fact that the law imposed the threat of the gas chamber did not render plea of guilty to second degree murder involuntary. Petitioner entered his plea to a lesser offense of murder and was not exposed to the defect which prompted the holding in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968); Pickett v. Henry, 315 F. Supp. 1138 (E.D.N.C. 1970).

There is no rule which precludes a plea of guilty to a crime for which the maximum punishment is life imprisonment. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Premeditation and Deliberation as Aggravating Factors in Sentencing Defendant Who Pleads Guilty to Second-Degree Murder. — As premeditation and deliberation are not elements of murder in the second degree, if a defendant charged with murder in the first degree pleads guilty to murder in the second degree, the sentencing judge may conclude that for purposes of sentencing premeditation and deliberation have been established by a preponderance of the evidence and therefore may be used as an aggravating factor. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Effect of Principal's Guilty Plea to Voluntary Manslaughter on Charges Against Accessory. — Principal's guilty plea to voluntary manslaughter did not determine that the crime of second degree murder had not been committed, thus barring trial of one who aided and abetted. State v. Cassell, 24 N.C. App. 717, 212 S.E.2d 208, appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

Defendant's Consent to Plea. — Just prior to closing arguments defendant consented on the record to his attorney's decision to concede guilt to second-degree murder or voluntary manslaughter. As per se error is based on a defendant not consenting to his counsel's admission of his guilt, defendant's consent prior to the closing arguments amounted to ratification of defense counsel's earlier statement and cured any possible error. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, 515 U.S. 1152, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

Guilty Plea Voluntary. — Although the inmate claimed that his guilty pleas were not voluntary and intelligent, in violation of his Sixth and Fourteenth Amendment rights, as he did not know he was admitting guilt of premeditated and deliberate murder, the inmate voluntarily pled with full knowledge of the charges against him and the consequences of his pleas and since the State possessed overwhelming evidence that the inmate acted with premeditation and deliberation, his pleas made premeditation and deliberation an admitted fact. The inmate also argued he was unaware of the consequences of his plea, as he did not know his admission of guilt would permit the State to submit his underlying felonies as aggravating factors during his sentencing, but this argument was rejected because, even if true, it did not entitle the inmate to relief. Meyer v. Branker, 506 F.3d 358, 2007 U.S. App. LEXIS 26335 (4th Cir. 2007).

XI. VERDICT.

Degree of Murder Must Be Determined. — Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895); State v. Truesdale, 125 N.C. 696, 34 S.E. 646 (1899).

Requisites of First-Degree Murder Verdict. — For a conviction of murder in the first degree under this section and G.S. 15-172, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, N.C. Const., Art. I, § 13, 17, which right may not be waived. State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

Sufficient Evidence to Support Jury Verdict. — Defendant's convictions for first-degree murder and conspiracy to commit first-degree murder were affirmed because no improper promises were made to defendant in order to induce an involuntary confession and the medical evidence, along with defendant's confession, were sufficient to support the jury's verdict. State v. Shelly, 181 N.C. App. 196, 638 S.E.2d 516, 2007 N.C. App. LEXIS 71 (2007).

Verdict of Second-Degree Murder in Prosecution for First-Degree Murder. — In a case of first-degree murder, committed after premeditation and deliberation, a verdict of second-degree murder is permissible if the jury should fail to find premeditation and deliberation. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

Manslaughter Is Necessarily Disproved on Verdict of First-Degree Murder. — In proving the elements of first-degree murder beyond any reasonable doubt in the jurors' minds, the State necessarily disproved manslaughter beyond a reasonable doubt. State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982).

As Is Heat of Passion. — When the jury finds beyond a reasonable doubt that the defendant killed his victim with premeditation, they also necessarily find beyond a reasonable doubt that the State has shown that the defendant did not act in the heat of passion. State v. Bush, 307 N.C. 152, 297 S.E.2d 563 (1982).

Defendant was not prejudiced by the court's submission to the jury of the charge of first degree murder on the theory of premeditation and deliberation where the jury found defendant guilty of first-degree murder only on the theory of felony murder. State v. Price, 344 N.C. 583, 476 S.E.2d 317 (1996).

XII. CAPITAL PUNISHMENT.

Editor's Note. — For additional cases regarding capital punishment, see the case notes under G.S. 15A-2000.

Legislature May Constitutionally Impose Death as Punishment. — Just as the legislature acts within its constitutional power in defining first-degree murder to include felony murder, it is also within its constitutional power to determine that first-degree murder, including felony murder, may be punished by death, provided that the death penalty statute itself is constitutional. State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982), cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983).

The imposition of the death penalty upon a conviction of murder is expressly authorized by N.C. Const., Art. XI, § 2. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence rev'd, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Judgment and sentence of death upon conviction of first-degree murder is not unconstitutional. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Imposition of death penalty for first-degree murder is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Retroactive Applicability of Invalidity of Unanimity Requirement. — The 1990 case of McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990), which invalidated the unanimity requirement of North Carolina's capital sentencing scheme, should be applied retroactively to capital cases which became final before McKoy was decided. State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994).

Effect of Furman v. Georgia. — Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), holds that the Eighth and Fourteenth Amendments of the U.S. Constitution will no longer tolerate the infliction of a death sentence where either the jury or the judge is permitted to impose that sentence as a matter of discretion. State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973); State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Where the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional, that decision did not affect the conviction but only the death sentence. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Former Mandatory Death Penalty Pro-

vision of Section Held Unconstitutional. — North Carolina's mandatory death penalty statute for first-degree murder contained in this section as amended in 1973 and before its amendment in 1977 departed markedly from contemporary standards respecting the imposition of the punishment of death and could not be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish be exercised within the limits of civilized standards, since it provided no objective standards for the jury and failed to allow for consideration of the particular character and record of each defendant with a view toward mitigation of the offense. Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Same — The Effect of Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), was to return the construction of this statute to its post-Furman (Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)), pre-Waddell (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)) status. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978), State v. Waddell having held that provisions giving the jury discretion to impose sentences of life imprisonment in capital cases were unconstitutional, but were severable, with the result that the death penalty would become mandatory in such cases.

Notice of Penalty Is Not Constitutionally Required. — The United States Constitution does not require that notice be given that the first-degree murder charge carried with it the possibility that defendant might receive the death penalty upon conviction. State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982).

Retention, etc., of Death Penalty Is Legislative Question. — The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Standing to Challenge Constitutionality. — Furman v. Georgia is without significance when the jury in a murder trial returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

A defendant may not be subject to a potential death sentence absent a showing of actual intent to commit one or more of the underlying felonies delineated or described in this statute. State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000).

Cases in Which Defendants Received Death Sentence Remanded Pursuant to Mandate of United States Supreme Court. — Pursuant to mandates of the Supreme Court of the United States in Hill v. North Carolina, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); Williams v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 860 (1971); Sanders v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); and Roseboro v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971), first-degree murder cases in which the defendants received the death sentence were remanded to the superior court with direction that the defendants be sentenced to life imprisonment in the State's prison. State v. Hill, 279 N.C. 371, 183 S.E.2d 97, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); State v. Atkinson, 279 N.C. 386, 183 S.E.2d 106 (1971); State v. Williams, 279 N.C. 388, 183 S.E.2d 106 (1971); State v. Sanders, 279 N.C. 389, 183 S.E.2d 107 (1971); State v. Roseboro, 279 N.C. 391, 183 S.E.2d 108 (1971).

Resentencing Convicted Murderer Not Ex Post Facto Application of Law. — Where an individual was convicted of murder and sentenced to death, which sentence was later invalidated, resentencing the convicted murderer to life imprisonment did not violate the due process clause as an ex post facto application of the law, especially since before the time of the convicted murderer's June 19, 1973, offense, North Carolina had given notice in the 1969 version of this section that it intended to exact the maximum possible penalty for first-degree murder. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

When Murder Considered Committed for Purposes of Ex Post Facto Punishment Prohibition. — For purposes of the prohibition against ex post facto legislation, a murder was committed when the murderous acts were performed, and not when death resulted. Therefore, where defendant administered poison to her husband on three occasions, all before June 1, 1977, at a time when the maximum punishment for first-degree murder was life imprisonment, imposition of the death sentence under G.S. 15A-2002 would violate the prohibition against imposition of an ex post facto punishment. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Prosecutor's Argument. — Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor in other cases, for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved, his argument was improper. State v. Smith, 279 N.C. 163, 181 S.E.2d 458 (1971).

Argument not improper where the prosecutor argued the only way the jury could prevent defendant from killing again was to give him the death penalty. State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994), cert. denied, 515 U.S. 1152, 115 S. Ct. 2599, 132 L. Ed. 2d 845 (1995).

The prosecutor's argument that the death penalty would prevent the defendant from killing again was a proper argument and his argument that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death, were reasonable arguments in light of the evidence of the defendant's pattern of violent and deadly behavior. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

Although the State Supreme Court cautioned counsel against using Biblical arguments when arguing to the jury that a defendant deserved the death penalty, the court held that the prosecutor's use of Biblical references during an argument to the jury in defendant's case were not so grossly improper that the trial court erred by failing to intervene ex mero motu, and the court upheld defendant's convictions for first-degree murder and robbery with a firearm based on evidence which showed that defendant shot a victim twice in the face with a shotgun and took the victim's car and other personal property. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Sentence Not Disproportionate. — Where defendant was convicted of three first-degree murders and the record established a cold-blooded, calculated course of conduct on the part of defendant which amounted to a wanton disregard for the value of human life, the two death sentences were not excessive or disproportionate. State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), cert. denied, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995).

Trial court's judgment sentencing defendant to death was justified by evidence which showed that defendant and an accomplice forced their way into the victim's house, and that the victim died after her throat was cut, she was stabbed multiple times, and she was shot twice in the head. State v. Watts, 357 N.C. 366, 584 S.E.2d 740, 2003 N.C. LEXIS 827 (2003), cert. denied, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370 (2004).

Capital sentence for a death resulting from the attempted sale of crack cocaine was affirmed because the sentence was not disproportionate. State v. Squires, 357 N.C. 529, 591 S.E.2d 837, 2003 N.C. LEXIS 1265 (2003), cert. denied, 541 U.S. 1088, 124 S. Ct. 2818, 159 L. Ed. 2d 252 (2004).

Several factors supported the determination that imposition of the death penalty was neither excessive nor disproportionate where the evidence indicated that defendant began planning to kill the victim as soon as their telephone conversation ended the day before the murder; that defendant urged the victim to walk into the field for the ostensible purpose of setting up targets, then shot him without provocation; that the victim asked defendant not to shoot him again; that defendant fired three spaced shots into the victim; that the third shot was fired into the victim's head as the victim lay helpless watching defendant; that defendant took the victim's keys from his body after shooting him; and that defendant felt no remorse. State v. Hurst, 360 N.C. 181, 624 S.E.2d 309, 2006 N.C. LEXIS 7 (2006).

The State was entitled to present witnesses in the capital sentencing proceeding to prove the circumstances of prior convictions. State v. Harden, 344 N.C. 542, 476 S.E.2d 658 (1996).

Demonstration of Murder for Personal Gain Not Required. — In defendant's trial on two counts of first-degree murder, the trial court erred by instructing jurors that they had to find defendant committed murder for personal gain, as an aggravating factor for purposes of determining if defendant should be sentenced to death, if they found that he was committing robbery with a dangerous weapon at the time a person who lived in the house and one of defendant's accomplices were shot. State v. Jones, 357 N.C. 409, 584 S.E.2d 751, 2003 N.C. LEXIS 828 (2003).

Use of Prior Murder for Sentencing Aggravator Not Double Jeopardy. — Trial court's denial of defendant's pretrial motion to dismiss two murder charges against him in violation of G.S. 14-17, based on double jeopardy pursuant to G.S. 15A-954, was proper because the fact that in a prior murder case against defendant, the State had introduced evidence of the two murders in support of the aggravating circumstance described in G.S. 15A-2000(e)(11) was not tantamount to the State putting defendant on trial for those crimes; the jury's consideration of defendant's "other crimes of violence" in making its penalty recommendation on one murder was not logically equivalent to defendant receiving multiple punishment for the same crime. State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C.

LEXIS 832 (2003), cert. denied, 541 U.S. 943, 124 S. Ct. 1670, 158 L. Ed. 2d 368 (2004).

XIII. APPEAL.

Failure to Assign Error Precludes Review of Instructions. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the questions of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

Failure to Preserve Evidence for Review. — The trial court erred by not allowing the defendant to make an offer of proof and depriving her from preserving the proposed witness testimony in the record for the purpose of appellate review. State v. Brown, 116 N.C. App. 445, 448 S.E.2d 131 (1994).

Error in Allowing New Trial. — In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule, see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), was applicable in his case, where the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Finding as to Mental Capacity Held Conclusive on Appeal. — Where the jury, by its verdict, established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts, that finding, supported as it was by ample evidence, was conclusive on appeal. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

Review of State's Argument in Capital Case. — Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters ex mero motu. State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1983), overruled on other grounds, State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988); State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), cert. denied, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), cert. denied, 516 U.S. 832, 116 S. Ct. 107, 133 L. Ed. 2d 60 (1995), overruled in part on other grounds by State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006).

Ineffective Assistance of Counsel Claims. — Where a state prisoner, who was convicted of first-degree murder, in violation of G.S. 14-17, argued that his attorneys were ineffective because they failed to assert a diminished capacity defense, the prisoner was not entitled to federal habeas corpus relief because (1) the prisoner directed the attorneys to pursue the theory that another individual committed the murder; (2) the attorneys' strategic decision to argue that the prisoner did not commit the murder was objectively reasonable; (3) the fact that the attorneys met with the prisoner only five times before trial did not establish their ineffectiveness; and (4) the state court reasonably held that asserting a diminished capacity defense would not have led to a different outcome. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Defendant's first degree murder conviction for stabbing his wife to death was affirmed because defendant failed to show ineffective assistance of counsel as he did not meet his burden of showing a reasonable probability that, but for defense counsel's failure to raise an issue at trial, the result of his proceedings would have been different. State v. Nguyen, 178 N.C. App. 447, 632 S.E.2d 197, 2006 N.C. App. LEXIS 1571, appeal dismissed, cert. denied, 360 N.C. 653, 637 S.E.2d 189 (2006).

Where a prosecutor, during cross-examination in a second-degree murder trial, questioned defendant on the reason for omitting certain important facts from a voluntary discussion with a deputy, counsel's failure to object did not constitute ineffective assistance. State v. Ezzell, 182 N.C. App. 417, 642 S.E.2d 274, 2007 N.C. App. LEXIS 695 (2007), cert. denied, appeal dismissed, 361 N.C. 432, 649 S.E.2d 390 (2007).

§ 14-17.1. Crime of suicide abolished.

The common-law crime of suicide is hereby abolished as an offense. (1973, c. 1205.)

CASE NOTES

Cited in State v. Hunt, 305 N.C. 238, 287 S.E.2d 818 (1982).

§ 14-18. Punishment for manslaughter.

Voluntary manslaughter shall be punishable as a Class D felony, and involuntary manslaughter shall be punishable as a Class F felony. (4 Hen. VII, s. 13; 1816, c. 918, P.R.; R.C., c. 34, s. 24; 1879, c. 255; Code, s. 1055; Rev., s. 3632; C.S., s. 4201; 1933, c. 249; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 112; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(q).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

For note on the burden of proof for affirmative defense in homicide cases, see 12 Wake Forest L. Rev. 423 (1976).

For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

For note discussing the availability of imperfect right of self-defense in homicide cases in light of State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981), see 4 Campbell L. Rev. 427 (1982).

For note on the battered woman syndrome, see 11 Campbell L. Rev. 263 (1989).

CASE NOTES

I. General Consideration.
II. Manslaughter.
  A. In General.
  B. Voluntary.
  C. Involuntary.
III. Heat of Passion.
IV. Reckless Use of Firearms.
V. Culpable Negligence.
VI. Self-Defense.
VII. Instructions to Jury.
VIII. Sufficiency of Evidence.

I. GENERAL CONSIDERATION.

Burden of Proof. — When the State undertakes a prosecution for unlawful homicide, it assumes the burden of producing evidence sufficient to prove that the deceased died as the result of a criminal act committed by the defendant. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

In a prosecution for manslaughter, the state must produce evidence sufficient to establish beyond a reasonable doubt that the death proximately resulted from defendants' unlawful acts. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Brown, 80 N.C. App. 307, 342 S.E.2d 42 (1986).

The act of the accused need not be the immediate cause of death; he is legally accountable if the direct cause is the natural result of the criminal act. State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

Nor the sole proximate cause of the death, nor the last act in sequence of time. There may be more than one proximate cause of the death in question. It is enough if defendants' unlawful acts join and concur with other causes in producing the result. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980); State v. Brown, 80 N.C. App. 307, 342 S.E.2d 42 (1986).

Use of Pistol as Aggravating Factor. — Where defendant was convicted of involuntary manslaughter based on evidence that he had shot and killed victim outside nightclub, defendant's possession and use of a pistol could not be used as a factor in aggravation of the crime of voluntary manslaughter. However, the trial court could properly have found as a nonstatutory aggravating factor that defendant returned to the nightclub carrying a loaded pistol after an earlier encounter with the owner. State v. McKinney, 88 N.C. App. 659, 364 S.E.2d 743 (1988).

Use As Prior Conviction For Violent Habitual Felon Charge. — There was substantial evidence that defendant had two prior felony convictions because, even though one of the judgments listed the convicted person's race as black while defendant was white, G.S. 14-7.10 created the requirements for a statutory prima facie case, and since the prosecution met that standard, any discrepancies in the details contained in the judgments were for the jury to consider in weighing the evidence; the trial court also declined to dismiss the charge on grounds that one of the convictions did not qualify for use as an underlying felony, as voluntary manslaughter was a superseded offense pursuant to G.S. 14-7.7(b)(2) where the offense had been upgraded by the General Assembly to a class D felony. State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003), State v. Wolfe, 157 N.C. App. 22, 577 S.E.2d 655, 2003 N.C. App. LEXIS 373 (2003), appeal dismissed, review denied, 357 N.C. 255, 583 S.E.2d 289 (2003).

Reversal for Improper Argument. — Conviction was reversed and the defendant was granted a new trial where the prosecutor improperly argued that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." The argument went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents; such statements could only be construed as telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant. State v. Scott, 314 N.C. 309, 333 S.E.2d 296 (1985).

Trial court erred in failing to submit aggravating factors to the jury before imposing an aggravated sentences on defendant for his two manslaughter convictions; as defendant was entitled to a jury trial on the charge, any aggravating factor had to be submitted to the jury before an aggravated sentence could be imposed. State v. Speight, 359 N.C. 602, 614 S.E.2d 262, 2005 N.C. LEXIS 645 (2005), vacated, remanded, North Carolina v. Speight, 126 S. Ct. 2977 (U.S. 2006) (as to Blakely error being subject to harmless review).

Applied in State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972); State v. Wallace, 16 N.C. App. 647, 192 S.E.2d 642 (1972); State v. Harrington, 286 N.C. 327, 210 S.E.2d 424 (1974); State v. Honeycutt, 21 N.C. App. 342, 204 S.E.2d 238 (1974); State v. Chappell, 24 N.C. App. 656, 211 S.E.2d 828 (1975); State v. Allmond, 27 N.C. App. 29, 217 S.E.2d 734 (1975); State v. Rivers, 64 N.C. App. 554, 307 S.E.2d 588 (1983).

Cited in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977); Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978); Reeves v. Reed, 596 F.2d 628 (4th Cir. 1979); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980); State v. Milam, 65 N.C. App. 788, 310 S.E.2d 141 (1984); State v. Mitchell, 67 N.C. App. 549, 313 S.E.2d 201 (1984); State v. Scott, 71 N.C. App. 570, 322 S.E.2d 613 (1984); State v. Green, 77 N.C. App. 429, 335 S.E.2d 176 (1985); State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399 (1987); State v. Brown, 87 N.C. App. 13, 359 S.E.2d 265 (1987); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004); In re K.T.L., 177 N.C. App. 365, 629 S.E.2d 152, 2006 N.C. App. LEXIS 965 (2006).

II. MANSLAUGHTER.

A. In General.

Definitions. — Manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury. State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Benge, 272 N.C. 261, 158 S.E.2d 70 (1967); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); State v. Richardson, 14 N.C. App. 86, 187 S.E.2d 435 (1972), cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Spencer, 27 N.C. App. 301, 219 S.E.2d 231 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978); State v. Marshall, 304 N.C. 167, 282 S.E.2d 422

(1981); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982).

Intentional or Unintentional Killing. — Voluntary manslaughter is the intentional killing of a person without malice, while involuntary manslaughter is the unintentional killing of a person without malice. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973).

Adequate Provocation. — A killing is without malice if the defendant acts in the heat of passion upon adequate provocation so that the defendant's state of mind overcomes his ability to reason and to control his actions. The act of provocation must be such, however, that it would naturally and reasonably arouse the passions of an ordinary man beyond his power of control. State v. Mathis, 105 N.C. App. 402, 413 S.E.2d 301, cert. denied, 331 N.C. 289, 417 S.E.2d 259 (1992).

Killing Must Be Unintentional. — Where defendant was convicted of involuntary manslaughter as a lesser included offense of second degree murder, and the evidence showed without contradiction that defendant intentionally killed at close range, the judgment would be vacated and defendant discharged, since conviction of involuntary manslaughter required that the killing not be intentional. State v. Benge, 87 N.C. App. 282, 360 S.E.2d 701 (1987).

Manslaughter is a lesser included offense of murder in the second degree. State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978); State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Distinguished by Presence or Absence of Malice. — The difference between second-degree murder and manslaughter is that malice, express or implied, is present in the former and not in the latter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

It is the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury that separates involuntary manslaughter from murder and voluntary manslaughter. State v. Greene, 314 N.C. 649, 336 S.E.2d 87 (1985).

Proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

But specific intent to kill is not. — The specific intent to kill is not an essential element of either second degree murder or involuntary manslaughter; however, neither crime exists in the absence of some intentional act in the chain of causation leading to death. State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985), cert. denied, 316 N.C. 196, 341 S.E.2d 579 (1986).

Involuntary homicide is also "manslaughter." United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

When a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of manslaughter: A willful violation of G.S. 20-138 (now G.S. 20-138.1) and the causal link between that violation and the death. If these elements are present, the State need not demonstrate that defendant violated any other rule of the road, nor that his conduct was in any other way wrongful. State v. McGill, 314 N.C. 633, 336 S.E.2d 90 (1985).

B. Voluntary.

Definitions. — Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973); State v. Christopher, 29 N.C. App. 231, 223 S.E.2d 835 (1976); State v. Foust, 32 N.C. App. 301, 232 S.E.2d 276 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978); Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979); State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980); State v. King, 49 N.C. App. 499, 272 S.E.2d 26 (1980), cert. denied, 302 N.C. 220, 276 S.E.2d 917 (1981); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985); State v. Brown, 80 N.C. App. 307, 342 S.E.2d 42 (1986).

Generally voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980).

One who kills a human being under the influence of sudden passion, produced by adequate provocation sufficient to negate malice, is guilty of manslaughter. State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702

(1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Malice is not a necessary element of voluntary manslaughter. Reeves v. Reed, 452 F. Supp. 783 (W.D.N.C. 1978), rev'd on other grounds, 596 F.2d 628 (4th Cir. 1979).

Theory of voluntary manslaughter is supported where the victim used words and threatening behavior toward defendant, thereby causing him to feel anger, rage, or furious resentment which rendered his mind incapable of cool reflection. State v. Mathis, 105 N.C. App. 402, 413 S.E.2d 301, cert. denied, 331 N.C. 289, 417 S.E.2d 259 (1992).

Adequate Provocation to Negate Malice. — The crime of second degree murder may be reduced to voluntary manslaughter upon a showing that defendant killed his victim in the heat of passion caused by provocation adequate to negate the element of malice. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Words alone are never sufficient provocation to mitigate second-degree murder to voluntary manslaughter. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

In order for an accused to reduce the crime of second-degree murder to voluntary manslaughter, he must rely on evidence presented by the State or assume a burden to go forward with or produce evidence of heat of passion on sudden provocation. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987); State v. Long, 87 N.C. App. 137, 360 S.E.2d 121 (1987).

Issue of Proximate Cause Properly Submitted to Jury. — In prosecution for voluntary manslaughter, issue of proximate cause of victim's death was properly submitted to the jury, where pathologist testified that victim died as a result of complications from the bullet wound to his chest and abdomen inflicted by defendant, even though victim's death was precipitated by his decision against medical advice to undergo colostomy reversal surgery. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

Lesser Included Offense of Second Degree Murder Premised on Acting in Concert. — Voluntary manslaughter can be a lesser included offense of second degree murder when premised on the doctrine of acting in concert. State v. McCoy, 122 N.C. App. 482, 470 S.E.2d 542 (1996).

Defendant's convictions on both assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter for shooting a person were mutually exclusive offenses and the trial court's consolidation of the offenses into a single judgment was error that mandated a new trial; for the jury to convict on both offenses, it had to find either that defendant did not have the intent to kill, which would support the assault offense, or that he had the intent to kill, but that such intent was negated by sudden provocation, which would support the attempted manslaughter charge. State v. Hames, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005).

C. Involuntary.

Definitions. — Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972); State v. Robinson, 15 N.C. App. 542, 190 S.E.2d 427 (1972); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976); State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976); State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977); State v. Waite, 32 N.C. App. 279, 232 S.E.2d 278 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980); State v. McAdams, 51 N.C. App. 140, 275 S.E.2d 500 (1981); State v. Martin, 52 N.C. App. 373, 278 S.E.2d 305, cert. denied, 303 N.C. 549, 281 S.E.2d 399 (1981); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Flaherty, 55 N.C. App. 14, 284 S.E.2d 565 (1981); State v. Atkins, 58 N.C. App. 146, 292 S.E.2d 744, cert. denied and appeal dismissed, 306 N.C. 744, 295 S.E.2d 480 (1982); State v. Matthis, 59 N.C. App. 233, 296 S.E.2d 20 (1982); State v. Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985); State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985); State v. Greene, 314 N.C. 649, 336 S.E.2d 87 (1985); State v. McGill, 314 N.C. 633, 336 S.E.2d 90 (1985); State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986); State v. Daniels, 87 N.C. App. 287, 360 S.E.2d 470, cert. denied, 321 N.C. 122, 361 S.E.2d 91 (1987).

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, appeal dismissed, 301 N.C. 403, 273 S.E.2d 449 (1980); State v. Norris, 303 N.C. 526, 279 S.E.2d 570 (1981); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982); State v. Daniels, 87 N.C. App. 287, 360 S.E.2d 470, cert. denied, 321 N.C. 122, 361 S.E.2d 91 (1987).

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Knight, 87 N.C. App. 125, 360 S.E.2d 125 (1987), cert. denied, 321 N.C. 476, 364 S.E.2d 662 (1988).

Involuntary Manslaughter of Children By Starvation or Malnutrition. — In cases of starvation or malnutrition of children by their parents or guardians, three elements must exist: (1) the defendant must have a duty to adequately feed and nourish the child; (2) the defendant must refuse to feed and nourish the child, either willfully or by his/her culpable negligence; and (3) the defendant's actions, or inactions, must proximately result in the child's death. State v. Fritsch, 132 N.C. App. 262, 511 S.E.2d 325, 1999 N.C. App. LEXIS 120 (1999), cert. granted, 350 N.C. 841, 538 S.E.2d 576 (1999), aff'd in part and rev'd in part, 351 N.C. 373, 526 S.E.2d 451 (2000).

Homicide Must Have Been Unintentional and Without Malice. — To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Unintentional Killing by Intentional Act. — While involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is accomplished by means of some intentional act. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Although involuntary manslaughter does not concern intent to kill, it does connote an intentional act, like the defendant voluntarily drawing his gun. State v. Boyd, 61 N.C. App. 238, 300 S.E.2d 578, cert. denied, 308 N.C. 545, 304 S.E.2d 238 (1983).

A death that occurs as a result of constituting involuntary manslaughter, driving while impaired, although perhaps unintentional, is not an accident, because this result is reasonably foreseeable. Baker v. Provident Life & Accident Ins. Co., 171 F.3d 939 (4th Cir. 1999).

An intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death can support a conviction of involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Violation of "Safety" Statute or Ordinance. — The intentional, willful, or wanton violation of any "safety" statute or ordinance, which proximately results in death, can support a conviction of involuntary manslaughter. State v. Powell, 109 N.C. App. 1, 426 S.E.2d 91 (1993).

Same — Illustrative Case. — Where evidence was presented, including physical evidence, that defendant's dogs, running loose, attacked and killed the victim, and that the dogs weighing one hundred pounds and eighty pounds, respectively, were trained by defendant to be aggressive and to scare people, there was substantial evidence that defendant intentionally violated a safety ordinance, and that such violation was the proximate cause of the victim's death; therefore, the trial court properly submitted the charge of involuntary manslaughter to the jury. State v. Powell, 109 N.C. App. 1, 426 S.E.2d 91 (1993).

Instruction on involuntary manslaughter is not required, regardless of whether the actual killing was intentional or unintentional, when the intentional act leading to death was naturally dangerous to human life. State v. Lawrance, 94 N.C. App. 380, 380 S.E.2d 156, cert. denied, 325 N.C. 548, 385 S.E.2d 506 (1989).

Evidence Held Not to Support Involuntary Manslaughter Instruction. — Where defendant was convicted of suffocating his seven-month-old son, trial court correctly determined that the evidence presented at trial did not support an involuntary manslaughter instruction; although defendant might not have intended to actually kill his son, the evidence certainly tended to show that he intended to press the child's face into the mattress. State v. Lawrance, 94 N.C. App. 380, 380 S.E.2d 156, cert. denied, 325 N.C. 548, 385 S.E.2d 506 (1989).

Defendant was not entitled to a jury instruction on involuntary manslaughter where the State's evidence showed that the defendant had knowledge of and experience with farm pesticides; that he went to a farm to obtain the deadly pesticide used in the murder; that he concocted a story as to why he needed the poison; that he showed the poison to two people; that he put it in his children's Kool-Aid; that he failed to say anything at the hospital as to the real reason his children were sick; and where no evidence except the defendant's denial negated the State's evidence. State v. Smith, 351 N.C. 251, 524 S.E.2d 28 (2000), cert. denied, 531 U.S. 862, 121 S. Ct. 151, 148 L. Ed. 2d 100 (2000).

A mere assault which proximately results in death, but which does not indicate a total disregard for human life and is committed with no intent to kill or to inflict serious bodily injury, will support, at most, a verdict of involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Punishment for involuntary manslaughter may be by fine or imprisonment or both in the discretion of the court. The imprisonment, however, may not exceed ten years. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

Defendant's contention that involuntary manslaughter was a misdemeanor for which punishment could not exceed two years was not sustained in State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967); State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

Involuntary manslaughter is a lesser included offense of murder and of voluntary manslaughter. State v. Greene, 314 N.C. 649, 336 S.E.2d 87 (1985); State v. Mecado, 314 N.C. 659, 336 S.E.2d 87 (1985).

Conviction for Involuntary Manslaughter Upheld. — Defendant's conviction of involuntary manslaughter under G.S. 14-18, was affirmed; the trial court properly refused to admit a synopsis of defendant's statement given to police officer, as the synopsis did not did not fall within the recorded recollection hearsay exception under G.S. 8C-1, N.C. R. Evid. 803(5), because there was no showing that defendant had an insufficient recollection of events, and the trial court properly denied defendant's motion to dismiss pursuant to G.S. 15A-954, because the state adequately proved the elements of the crime of voluntary manslaughter. State v. Alston, 161 N.C. App. 367, 588 S.E.2d 530, 2003 N.C. App. LEXIS 2185 (2003), aff'd, 359 N.C. 61, 602 S.E.2d 674 (2004).

Blakely Errors Were Harmless. — Blakely errors committed by the trial court in sentencing defendant for involuntary manslaughter were harmless as defendant knowingly created a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to more than one person since: (1) defendant operated defendant's vehicle in a reckless manner by speeding, driving while intoxicated and with THC and morphine in defendant's blood, and weaving in and out of traffic; (2) a reasonable person would have known that a great risk of death had been created; (3) defendant's blood alcohol concentration was 0.10 two hours after the collision; (4) defendant acknowledged that the two involuntary manslaughter convictions showed that in the course of conduct as to each offense defendant killed another; and (5) since there were two involuntary manslaughter convictions, the evidence used to prove an element of one offense could be used to support an aggravating factor of a separate joined offense. State v. Speight, 186 N.C. App. 93, 650 S.E.2d 452, 2007 N.C. App. LEXIS 1983 (2007).

For discussion of involuntary manslaughter, see State v. Crisp, 64 N.C. App. 493, 307 S.E.2d 776 (1983); State v. Allen, 77 N.C. App. 142, 334 S.E.2d 410 (1985).

III. HEAT OF PASSION.

Heat of Passion Defined. — See State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975); State v. Long, 87 N.C. App. 137, 360 S.E.2d 121 (1987).

Heat of passion is defined as rage, anger, hatred or furious resentment rendering the mind incapable of cool reflection. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

A killing is without malice if the one who kills acted while under the influence of passion or in the heat of blood produced by adequate provocation. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely proximate," and the killing follows immediately, it is manslaughter. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976); State v. Long, 87 N.C. App. 137, 360 S.E.2d 121 (1987).

A mere suspicion, belief or knowledge of past adultery will not change the character of a homicide from murder to manslaughter. State v. Long, 87 N.C. App. 137, 360 S.E.2d 121 (1987).

IV. RECKLESS USE OF FIREARMS.

Deaths Caused by Wanton or Reckless Use of Firearms. — With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Adcock, 24 N.C. App. 102, 210 S.E.2d 127 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982); State v.

Robbins, 309 N.C. 771, 309 S.E.2d 188 (1983).

One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975); State v. Boyd, 61 N.C. App. 238, 300 S.E.2d 578, cert. denied, 308 N.C. 545, 304 S.E.2d 238 (1983).

Ordinarily an unintentional homicide resulting from the reckless use of firearms "in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under the circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." When the circumstances do show a heart devoid of a sense of social duty, the homicide cannot be involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

An unintentional killing with a firearm resulting from culpable negligence is ordinarily involuntary manslaughter, unless the defendant acts with a heart devoid of a sense of social duty, or with a depravity of mind and disregard for human life. State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987).

At common law and under this section one who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, commits manslaughter. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Facts Supporting Charge Concerning Negligent Handling of Gun. — The showing that defendant was seated at a table, deceased was standing near him, defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally. There were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

V. CULPABLE NEGLIGENCE.

Definitions. — Culpable negligence in the law of involuntary manslaughter is something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others. State v. Gainey, 29 N.C. App. 653, 225 S.E.2d 843 (1976), rev'd on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. State v. Newcomb, 26 N.C. App. 595, 216 S.E.2d 730, cert. denied, 288 N.C. 249, 217 S.E.2d 680 (1975); State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Flaherty, 55 N.C. App. 14, 284 S.E.2d 565 (1981).

Violation of Safety Statute or Ordinance. — In a prosecution for involuntary manslaughter, the violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, willful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which death or injury to others might have been reasonably anticipated. State v. Gainey, 29 N.C. App. 653, 225 S.E.2d 843 (1976), rev'd on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

An intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977); State v. Jones, 32 N.C. App. 408, 232 S.E.2d 475, cert. denied, 292 N.C. 643, 235 S.E.2d 63 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Atkins, 58 N.C. App. 146, 292 S.E.2d 744, cert. denied and appeal dismissed, 306 N.C. 744, 295 S.E.2d 480 (1982).

Where defendant's dog attacked and killed jogger, the state presented substantial evidence of each element of the offense of involuntary manslaughter based on culpable negligence where a city safety ordinance was involved. State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (1994).

Deaths Resulting from Culpable Negligence. — Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances, guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

A death which is proximately caused by culpable negligence is involuntary manslaughter. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Culpable Negligence Not Sufficient to Support Murder Charge. — Since the distinction between manslaughter and murder in the second degree is malice, culpable negligence will not support a murder charge unless there are sufficient facts to support a finding of malice. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Both involuntary manslaughter and second-degree murder can involve an act of "culpable negligence" that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, an act of culpable negligence also imports danger to another and is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life, it will support a conviction for second-degree murder. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Intentional Shooting Can Be Culpable Negligence. — It is not true that in order to entitle defendant to an instruction on involuntary manslaughter, the discharge of a weapon must necessarily be unintentional. An intentional shooting at an object can amount to culpable negligence, which is one of the states of mind required for an instruction on involuntary manslaughter. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Involuntary Manslaughter While Operating Motor Vehicle. — A defendant may be convicted of involuntary manslaughter in connection with the operation of a motor vehicle upon proof by the State that defendant (1) violated a safety statute, (2) in a culpably negligent manner, and (3) that such violation was a proximate cause of the victim's death. State v. Bailey, 76 N.C. App. 610, 334 S.E.2d 266 (1985), overruled on other grounds, State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992).

Trial court did not err in denying defendant's motion to dismiss the charges because, although defendant's actions while driving were not impaired by alcohol, they were still sufficient to establish the culpable negligence needed to support both involuntary manslaughter and assault with a deadly weapon inflicting serious injury. A witness noticed inappropriate driving by both defendant and the decedent prior to their vehicles approaching a sharp curve, as they approached the curve, defendant attempted to pass the decedent and the witness despite having no visibility around the curve, and defendant's attempt to pass the vehicles at that particular time was in blatant disregard of safety concerns associated with that portion of the highway and a violation of G.S. 20-150. State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379, 2003 N.C. App. LEXIS 2268 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 33 (2004).

Death by Vehicle as Lesser Included Offense. — Death by vehicle under G.S. 20-141.4(a), repealed and revised as G.S. 20-141.4(a2), is a lesser included offense of the common law felony of involuntary manslaughter, made punishable by G.S. 14-18. The distinction is that the lesser offense does not depend upon the presence of culpable or criminal negligence, it being enough to convict if death proximately results from the violation of a traffic statute or ordinance. State v. Lackey, 71 N.C. App. 581, 323 S.E.2d 32 (1984).

Evidence tending to show that the deceased said, "Don't shoot me," standing alone, was not sufficient to raise an inference that the defendant intentionally pointed the weapon at her, or that he handled it in such a careless and reckless manner as to amount to culpable negligence. State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972).

Evidence that death was caused by defendant inadvertently stabbing victim in the chest while not attempting or intending to do so clearly met the requirement that the act be done in a culpable or criminally negligent way. State v. Daniels, 87 N.C. App. 287, 360 S.E.2d 470, cert. denied, 321 N.C. 122, 361 S.E.2d 91 (1987).

VI. SELF-DEFENSE.

For a killing to be in self-defense, the perceived necessity must arise from a reasonable fear of imminent death or great bodily harm. State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989).

Killing in Self-Defense May Be Voluntary Manslaughter. — Under given circumstances a person may be justified in intentionally killing when he acts in self-defense, yet such person may be guilty of voluntary manslaughter when an intentional killing results from excessive use of force while he is acting in self-defense. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Locklear, 25 N.C. App. 74, 212 S.E.2d 404 (1975); State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

A killing in the exercise of self-defense, but which fails to meet the standard of perfect self-defense, is voluntary manslaughter. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

Voluntary Manslaughter Based on Imperfect Self-Defense. — A defendant is entitled to an instruction on voluntary manslaughter based on imperfect self-defense only if evidence is introduced from which the following may be found: (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. State v. Battle, 322

N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Reduction of Second-Degree Murder to Voluntary Manslaughter. — Second degree murder may be reduced to voluntary manslaughter if a killing results from the use of excessive force in the exercise of self-defense. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Excessive force in the exercise of self-defense is that force used by a defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Right Not Absolute. — The right to kill in defense of one's self or a family member is not absolute. When one uses excessive force in the exercise of his right of self-defense, he loses the benefit of perfect self-defense and is guilty at least of voluntary manslaughter. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

Battered Spouse. — For case declining to expand the law of self-defense so as to entitle a battered spouse who killed her intoxicated husband while he slept to jury instructions on either perfect or imperfect self-defense, see State v. Norman, 324 N.C. 253, 378 S.E.2d 8 (1989).

Defense Unavailable for Involuntary Manslaughter. — In a prosecution for second-degree murder in which all the evidence showed that the defendant intentionally shot deceased and thereby caused his death, and the defendant relied on the defense of self-defense which is unavailable for a charge of involuntary manslaughter, the trial court committed prejudicial error in submitting involuntary manslaughter to the jury, and where the jury found the defendant guilty of involuntary manslaughter and acquitted the defendant of all other degrees of homicide, the defendant was entitled to be discharged. State v. Cason, 51 N.C. App. 144, 275 S.E.2d 221 (1981).

Neither permanency of residence nor a leasehold interest in the premises is required before a person is legally justified in standing her ground, rather than retreating, before using deadly force in self-defense. One must show only that she is a member of a household, however temporarily, and that she possesses an intent to reside in that particular place at the time of the attack. State v. Stevenson, 81 N.C. App. 409, 344 S.E.2d 334 (1986).

Charge of Self-Defense Not Erroneous. — See State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887, aff'd, 288 N.C. 34, 215 S.E.2d 598 (1975).

Trial court's charge that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault, standing alone, unduly restricted defendant's plea of self-defense. However, any error committed was completely removed by the subsequent instruction detailing what defendant had to show to excuse his act on the ground of self-defense. State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887, aff'd, 288 N.C. 34, 215 S.E.2d 598 (1975).

Evidence that defendant believed it necessary to kill victim before victim killed him is not sufficient to justify an instruction as to voluntary manslaughter based on imperfect self-defense. State v. Battle, 322 N.C. 69, 366 S.E.2d 454, cert. denied, 487 U.S. 1220, 108 S. Ct. 2876, 101 L. Ed. 2d 911 (1988).

Evidence of Previous Assaults Properly Excluded. — Exclusion of evidence of previous assaults by the deceased on the defendant was proper, where there was no evidence that the defendant acted in self-defense. State v. Matthis, 59 N.C. App. 233, 296 S.E.2d 20 (1982).

Punishment Following Plea of Nolo Contendere. — Notwithstanding evidence that defendant shot in self-defense, a plea of nolo contendere permitted the court to impose a sentence of not more than ten years for involuntary manslaughter. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

VII. INSTRUCTIONS TO JURY.

Charge as to Lesser Degrees of Same Crime. — While under the provisions of G.S. 15-170 the trial judge was required to charge upon evidence on the lesser degrees of the same crime for which the prisoner was being tried, it was not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner was charged with murder, and the killing of the deceased by him had been admitted, and the judge had correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of human being. State v. Lutterloh, 188 N.C. 412, 124 S.E. 752 (1924).

The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser included offense of voluntary manslaughter. Evidence that the deceased threw a cigarette butt at defendant does not rise to the level of serious provocation required. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

When Supported by the Evidence. — A proper charge on the issue of voluntary manslaughter is required when the evidence would support a finding either (a) that the defendant acted properly in self-defense except for the use of excessive force in repelling the assailant, or

(b) that the defendant killed while in the heat of passion brought on by adequate provocation, amounting to an assault or threatened assault, not originating with the defendant. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

Because involuntary manslaughter is a lesser included offense of the indicted crime of murder, an instruction on its elements is proper only if there is evidence to support it. State v. Boyd, 61 N.C. App. 238, 300 S.E.2d 578, cert. denied, 308 N.C. 545, 304 S.E.2d 238 (1983).

The submission to the jury of a possible verdict of involuntary manslaughter when defendant has been charged with murder is necessary only when there is evidence from which jury could find that such an included crime was committed. State v. Bullard, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

In a murder trial, the sole factor determining the judge's obligation to give an instruction on voluntary manslaughter is whether there is any evidence in the record which might support a conviction for the less grievous offense. State v. Sullivan, 86 N.C. App. 316, 357 S.E.2d 414, cert. denied, 321 N.C. 123, 361 S.E.2d 602 (1987).

Evidence Sufficient to Go to Jury. — Where there was no real evidence of malice, but the jury could reasonably find from the evidence that deceased's death had to be ascribed to the defendant's unlawful and culpably negligent conduct, which it could reasonably have been foreseen was likely to result in serious injury, the evidence was sufficient to go to the jury on a charge of involuntary manslaughter. State v. Trueblood, 39 N.C. App. 459, 250 S.E.2d 666 (1979).

Evidence Requiring Instruction on Proximate Cause. — In a prosecution of a motorist for manslaughter in the deaths of two small boys who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hard surface when they were struck and that the preceding car speeded up as defendant attempted to pass it, required the court to instruct the jury upon the conduct of the children in walking on the hard surface and the conduct of the other driver in increasing his speed, as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths. State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963).

Evidence of Heat of Passion Required for Instruction on Voluntary Manslaughter. — Voluntary manslaughter is defined as unlawful killing of a human being without malice, in the heat of passion as a result of legally sufficient provocation. Therefore, to warrant an instruction on voluntary manslaughter, there must be evidence that the killing occurred while the defendant was in heat of passion caused by legally sufficient provocation. State v. Upright, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 513, 313 N.C. 610, 329 S.E.2d 400, 332 S.E.2d 82, 329 S.E.2d 400, 332 S.E.2d 82 (1985).

Absent any evidence to show heat of passion on sudden provocation, the trial court did not err by failing to submit possible verdicts of voluntary manslaughter. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

If there is any evidence of heat of passion on sudden provocation, either in the state's evidence or offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury. State v. Weeks, 322 N.C. 152, 367 S.E.2d 895 (1988).

To have been properly entitled to a jury instruction on voluntary manslaughter, defendant was required either to offer his own evidence or to rely upon the State's evidence to show (1) that he stabbed his wife in the heat of passion, (2) that his passion was provoked by acts of his wife which the law regards as adequate provocation, and (3) that the stabbing occurred immediately after the provocation. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Failure to Instruct as to Causal Connection Between Defendant's Act and Death. — Trial judge's failure to instruct jury that a verdict of a guilty of manslaughter required proof beyond a reasonable doubt that defendant's act proximately caused the death charged was error, despite plenary evidence upon which the jury could find death was the proximate result of defendant's act. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Failure to Instruct on Involuntary Manslaughter. — In a prosecution for first-degree murder in which the defendant was found guilty of voluntary manslaughter, the trial judge erred in failing to instruct the jury on involuntary manslaughter where the defendant's testimony was, in its entirety, an account of an unintentional killing. State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978).

Failure to Instruct Defendant Had No Duty to Retreat. — Where the evidence showed that the victim of a fatal shooting was using deadly force, defendant was permitted to stand his ground and kill the victim if defendant believed it necessary and had a reasonable ground for such belief; therefore, as the trial court erred in failing to instruct that defendant had no duty to retreat defendant was entitled a new trial. State v. Nixon, 117 N.C. App. 141, 450 S.E.2d 562 (1994).

Instruction on Excessive Force. — It is difficult to imagine a homicide case in which the evidence supports an instruction on self-defense but not an instruction on voluntary

manslaughter based upon an excessive force theory. State v. Best, 79 N.C. App. 734, 340 S.E.2d 524 (1986), overruled on other grounds, State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992).

Failure to Instruct on Involuntary Manslaughter Upheld. — Assuming error in court's failure to give a charge on involuntary manslaughter, it was harmless in view of the verdict of first-degree murder on the theory of premeditation and deliberation. State v. Hardison, 326 N.C. 646, 392 S.E.2d 364 (1990).

Proof of Self-Defense. — Instruction sufficient to apprise jury that defendant did not have the burden of proving self-defense. State v. Sprinkle, 30 N.C. App. 383, 226 S.E.2d 827 (1976).

Question for the Jury. — Where the evidence is conflicting with respect to the issue of whether the force used by a defendant was excessive under the circumstances, the question is properly submitted to the jury. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

Trial judge properly refused to submit voluntary manslaughter as an alternative verdict, where the State's evidence tended to show a cold, calculated premeditated shooting by defendant, and defendant's evidence, on the other hand, tended to show that he did not shoot victim intentionally and never intended to harm him, and that his gun accidentally discharged as he struggled with victim over the gun, which defendant had picked up to convince victim to stop choking him. State v. Blake, 317 N.C. 632, 346 S.E.2d 399 (1986).

Where the jury did not find defendant was in the grip of sufficient passion to reduce a charge of murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter; therefore, the trial court did not err in failing to give the jury an instruction on voluntary manslaughter. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Where defendant's stabbing of his wife occurred more than eight hours after the alleged incident of provocation, the trial court was not required to charge the jury on a lesser included offense of voluntary manslaughter. State v. Tidwell, 323 N.C. 668, 374 S.E.2d 577 (1989).

Mental Illness and Alcoholism Held Insufficient to Entitle Defendant to Voluntary Manslaughter Instruction. — In a second degree murder case, evidence of a defendant's mental illness and alcoholism will not rebut the presumption of malice where the killing was accomplished by the intentional use of a deadly weapon so as to entitle defendant to an instruction on the lesser-included offense of voluntary manslaughter. State v. Adams, 85 N.C. App. 200, 354 S.E.2d 338 (1987).

In order for an instruction on voluntary manslaughter based on imperfect self-defense to be required, the first two elements of perfect self defense must be shown to exist. State v. Gappins, 320 N.C. 64, 357 S.E.2d 654 (1987).

Correction of Prosecutor's Improper Statement of Law. — Where during closing argument, prosecutor said, "Kind of like, I didn't mean to do it, but, if I did, I'm sorry I did it. That's what voluntary manslaughter is," the prosecutor's explanation of voluntary manslaughter was inadequate but not so grossly improper as to require the trial court to intervene ex mero motu; the trial court's subsequent correct charge on the law of voluntary manslaughter provided adequate correction to any possible confusion created by the prosecutor's language. State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1022, 110 S. Ct. 1465, 108 L. Ed. 2d 603 (1990), in light of State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930), death sentence aff'd, cert. denied, rehearing denied.

Instruction on Manslaughter Held Proper. — Where the trial court instructed that defendant would be guilty of manslaughter if "he intentionally and unlawfully stabbed and killed" the victim, any possibility of prejudice in the defective charge was removed where prior to giving the above instruction, the court properly defined manslaughter as "the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation," and when the jury later requested repeated instructions on the offenses charged, the court again gave a proper definition of manslaughter. State v. Edwards, 24 N.C. App. 303, 210 S.E.2d 273 (1974).

There was no error in submitting to the jury an issue as to defendant's guilt of manslaughter where the evidence would support a finding that defendant unlawfully killed, but without express or implied malice, or that he acted in self-defense but used excessive force, because either finding would warrant a verdict of manslaughter. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

Definitions of second-degree murder and voluntary manslaughter in the instructions to the jury in a prosecution for second-degree murder were not prejudicially deficient in that they did not require that the killings be intentional since specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978).

Since involuntary manslaughter is a lesser-included offense of voluntary manslaughter and the record contained evidence from which a jury could find that defendant committed involuntary manslaughter, it is proper to submit involuntary manslaughter as a possible verdict charge in defendant's trial for voluntary manslaughter, even though defendant argued self defense and used a knife. The evidence was sufficient for the jury to find defendant acted without any intent to kill or inflict serious injury where it could have concluded defendant either panicked or reacted instinctively upon discovering a man in his bathroom after he was told no one else was in the house. State v. Drew, 162 N.C. App. 682, 592 S.E.2d 27, 2004 N.C. App. LEXIS 247 (2004).

Instruction on Voluntary Manslaughter Held Improper. — Voluntary manslaughter is the intentional unlawful killing of a human being, and therefore an instruction incorporating culpable negligence as an alternative finding is improper, since it does not require intent as a necessary element. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

In a prosecution for second-degree murder involving the death of a child from the so-called "battered child" syndrome, where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood in loco parentis with the child, as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter where the evidence showed that the defendant beat and abused a child unto its death. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, appeal dismissed and cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

Evidence held insufficient to support an instruction on voluntary manslaughter. State v. Sullivan, 86 N.C. App. 316, 357 S.E.2d 414, cert. denied, 321 N.C. 123, 361 S.E.2d 602 (1987).

Instruction on Involuntary Manslaughter Held Proper. — The trial judge, in a prosecution for second-degree murder, properly instructed the jury as to involuntary manslaughter where, in stating that if defendant while caring for his child "intentionally inflicted injury upon that child ... under the age of sixteen years, and if his death directly resulted ... defendant ... would be guilty of involuntary manslaughter," he was referring to an intentional violation of G.S. 14-318.2. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Evidence was insufficient to be submitted to the jury on charges of second-degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaughter, where the evidence tended to show that defendant, a 16 year old boy, shot his 10 year old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing; defendant was "messing around with a shotgun"; and the gun accidentally went off. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Where the evidence was uncontroverted that defendant was in a car driving away from the scene when the decedent called out, and that at that point defendant ordered the driver to stop, left the safety of the car with a loaded pistol in his hand, and approached the decedent, voluntarily placing himself in a volatile situation, the fact that he claimed that he did not intend the shooting would not cleanse him of culpability and thus give rise to a defense of accident. However, the defendant was entitled to have the jury consider whether he was guilty only of the offense of involuntary manslaughter. State v. Lytton, 319 N.C. 422, 355 S.E.2d 485 (1987).

Failure to Instruct on Involuntary Manslaughter Upheld. — Under the evidence, the trial judge in murder trial did not err in failing to instruct on involuntary manslaughter. State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986).

Where the evidence showed that defendant either premeditated and deliberated and then murdered her husband, or accidentally shot her husband as she contended throughout her trial, the trial court properly refused to submit the lesser included offenses of second degree murder and involuntary manslaughter to the jury. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

Where the defendant admitted that he knowingly slashed and stabbed the deceased with a hunting knife, the defendant's use of such knife indicated a clear intent to inflict great bodily harm or death on the deceased; thus, the defendant's actions would not fit within the definition of involuntary manslaughter, and therefore, the defendant would not qualify for such an instruction. State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986).

Defendant was not entitled to a jury instruction on manslaughter where the evidence for the State tended to show defendant and the victim dated periodically during the year preceding the victim's death, defendant was jealous of other men and did not want the victim to see them, defendant stated he loved the victim but had threatened to kill both the victim and her ex-husband if he caught them together, defendant later followed the victim home from a motel and after the victim told defendant she did not want to see him again, defendant led the victim to a flower bed a few feet away, grabbed her arm, and as she turned her back to defendant, defendant shot the victim in the back of the head killing her. State v. Woodard, 324 N.C. 227, 376 S.E.2d 753 (1989).

In felony murder trial for murder committed during the act of discharging a firearm into an occupied building, a felony under G.S. 14-34.1, where defendant's sole and unequivocal defense was that he was nowhere near the area on the night in question, an instruction on the offense of involuntary manslaughter was not warranted by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Failure to Instruct on Involuntary Manslaughter Held Harmless Error. — Trial court's failure to instruct the jury to consider a possible verdict for the lesser included offense of involuntary manslaughter was harmless error because the trial court gave correct instructions as to possible verdicts on murder in the first and second degrees and the jury found the defendant guilty of the greater crime of murder in the first degree upon a theory of premeditation and deliberation. State v. Young, 324 N.C. 489, 380 S.E.2d 94 (1989).

Failure to Instruct on Involuntary Manslaughter Held Not Plain Error. — The court did not commit "plain error" in failing to charge the jury on involuntary manslaughter, where the only possible evidentiary support for an involuntary manslaughter verdict was defendant's statement to the police to the effect that he did not stab the victim and that she twice ran onto his knife, because defendant did not rely upon the statement in the trial court, but repudiated it as a lie. State v. Pulley, 90 N.C. App. 673, 369 S.E.2d 634 (1988).

Charge of Involuntary Manslaughter Held Error. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second-degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

Where the record in a first-degree murder prosecution contained no evidence which tended to show that the victim died as the result of an unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life, it was error to permit the jury to consider the issue of involuntary manslaughter, and since it appeared that there was a reasonable possibility that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error had to be held prejudicial. State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

The appellate courts of this State have consistently held that it would be error to instruct on involuntary manslaughter when the only evidence of accident has been oral assertions by the defendant, especially where the defense has relied on self-defense. State v. Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985).

VIII. SUFFICIENCY OF EVIDENCE.

The jury is required to find that defendant committed either an unlawful or a culpably negligent act before it can convict him of involuntary manslaughter. State v. Walker, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

In a manslaughter case arising from an automobile accident, evidence is sufficient to submit the case to the jury if it tends to show: (1) That the defendant was guilty of an intentional, wilful or wanton violation of a statute designed for the protection of human life and limb, or guilty of an inadvertent violation of such statute accompanied by recklessness of probable consequences of a dangerous nature amounting altogether to a thoughtless disregard of consequences, or heedless indifference to the safety and rights of other, and (2) that such violation and conduct was the proximate cause of the injury and resulting death of deceased. State v. Hillard, 81 N.C. App. 104, 344 S.E.2d 54 (1986).

Evidence tending to show that defendant admitted drinking beer and taking Valium on the morning of the accident, that there were two empty beer cans and one half-empty beer can in his car, that blood analysis indicated the presence of .07% Valium in his blood after the accident, and that in the opinion of several witnesses he smelled of alcohol, had red, glassy eyes, and appeared to be impaired raised an inference from which the jury could find that defendant operated his vehicle after consuming alcohol and Valium, and when combined with evidence that immediately before the fatal accident defendant forced four cars other than the victim's off the road by driving on the wrong side of the road, this evidence was sufficient to permit the jury to find that defendant operated his vehicle recklessly and in heedless disregard of the safety and rights of others, and that this conduct proximately caused the death of the victim. State v. Hillard, 81 N.C. App. 104, 344 S.E.2d 54 (1986).

A plea of guilty or nolo contendere to automobile manslaughter does not establish intentional homicide. United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

Evidence did not justify a charge on involuntary manslaughter where defendant intentionally discharged the gun under circumstances naturally dangerous to human life. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976).

Insufficient Evidence of Sudden Provocation. — In a prosecution for murder while there was evidence that defendants' mother may have been assaulted, there was no evidence whatsoever as to who may have assaulted her and, furthermore, the evidence was clear that the events giving rise to defendants' mother's wounds were considerably removed in time from the events surrounding the death of the victim; therefore, accepting, arguendo, that an assault or threatened assault on a close relative may provide adequate or legal provocation to arouse heat of passion, the evidence did not show anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521, appeal dismissed, 302 N.C. 401, 279 S.E.2d 356 (1981).

Use of Excessive Force in Self-Defense. — Where the evidence permitted an inference that defendant shot victim in the back as he was retreating with an empty pistol, and twice more through a closed door, the evidence was sufficient to carry the case to the jury on the question of whether defendant used excessive force in self-defense. State v. Rathbone, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

Motion to Dismiss Properly Overruled. — Where the evidence tended to show that victim was kicked, stomped and struck with various objects by between 6 and 15 people, and that defendant's subsequent kicking of victim several times in the abdominal area caused or contributed to the victim's death, the trial court properly overruled defendant's motion to dismiss. State v. Brown, 80 N.C. App. 307, 342 S.E.2d 42 (1986).

Evidence Sufficient to Sustain Conviction. — Evidence that defendant was handling gun in a culpably negligent manner at the time it fired and killed another was sufficient to support a conviction of involuntary manslaughter. State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (1963), overruled on other grounds, 318 N.C. 457, 349 S.E.2d 566 (1986).

Evidence that a nephew badly beat his uncle with a stove-lid lifter and, at the instance of a third person, desisted and left, that the uncle stated that if the nephew came back he was going to shoot him, and that when the nephew returned the uncle shot the unarmed nephew as the nephew stepped in the door, inflicting fatal injury, was sufficient to sustain conviction of manslaughter. State v. Dunlap, 268 N.C. 301, 150 S.E.2d 436 (1966).

Although there was a conflicting version of the shooting from defense witnesses, the State's evidence was clearly sufficient to sustain a verdict of voluntary manslaughter. State v. Carver, 22 N.C. App. 674, 207 S.E.2d 299, rev'd on other grounds, 286 N.C. 179, 209 S.E.2d 785 (1974).

In a prosecution for manslaughter, evidence was sufficient to show that the assault by defendants was a proximate cause of the victim's death where the victim was knocked to the sidewalk on his back and, because of his intoxicated condition, was unable to expel vomitus from his mouth and died as a result of aspiration of vomitus. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923, aff'd, 301 N.C. 374, 271 S.E.2d 277 (1980).

Testimony of defendant which showed that he pointed a pistol toward victim, which fired when he tried to pull it back, and that he fired second shot in an effort to scare victim away from him was sufficient to show culpable negligence on the part of defendant which proximately caused the death of victim. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Evidence held sufficient to permit the jury to conclude that defendant was guilty of voluntary manslaughter and assault with a deadly weapon inflicting serious injury. State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

In a prosecution for involuntary manslaughter, evidence was sufficient to permit the jury to find beyond a reasonable doubt that death resulted from two-year-old victim having been violently handled or shaken, an act which produced both pattern-type bruises and abrasions and a subdural hematoma. State v. Evans, 317 N.C. 326, 345 S.E.2d 193 (1986).

Evidence was sufficient to permit a reasonable jury to conclude that the victim died as a result of the defendant's culpably negligent handling of a loaded firearm. State v. Benjamin, 83 N.C. App. 318, 349 S.E.2d 878 (1986).

Jury could reasonably have found from the evidence that defendant's continuing to drive while passenger repeatedly discharged his gun amounted to a disregard for the rights and safety of others that proximately caused victim's death, and could, therefore, based on this evidence, have reasonably found her guilty of involuntary manslaughter. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

The facts indicated that when defendant got into the truck to drive off his wife was yelling at him, leaning on the driver's side rear view mirror and reaching into the truck in an attempt to turn off the ignition and stop the truck. Defendant found it necessary to push his wife away from the truck in order to leave. Under these facts, the victim's yelling and threatening behavior would have a natural tendency to arouse the passions of an ordinary person. Insofar as there was evidence before the court to support a conviction of voluntary manslaughter, it was proper to submit that issue to the jury. State v. Mathis, 105 N.C. App. 402, 413 S.E.2d 301, cert. denied, 331 N.C. 289, 417 S.E.2d 259 (1992).

Evidence, although mostly circumstantial, in the form of defendant trying to break up the victim and the man she was dating, the victim using defendant's cell phone on the night she disappeared, a bullet hole in the wall of defendant's house trailer, and defendant not having an alibi, was sufficient to support the conviction for voluntary manslaughter. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

Admissible testimony and opinions of woman who, with victim who died from smoking methamphetamine and defendant, smoked an eight-ball of meth was sufficient evidence to convict defendant of possession and its sale, by exchange for work, under G.S. 90-95 and involuntary manslaughter under G.S. 14-18. State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594, 2006 N.C. App. LEXIS 44 (2006).

Insufficient Evidence to Sustain Verdict of Manslaughter. — See State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768, aff'd, 286 N.C. 327, 210 S.E.2d 424 (1974).

Evidence would not support a verdict of voluntary manslaughter where the killing did not result from the use of excessive force in the exercise of the right of self-defense, nor was it the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976).

Evidence would not support verdict of involuntary manslaughter where there was no evidence tending to show defendant was negligent in firing his gun and no evidence that a bullet from defendant's gun was the proximate cause of victim's death. State v. Meadlock, 95 N.C. App. 146, 381 S.E.2d 805, cert. denied, 325 N.C. 434, 384 S.E.2d 544 (1989).

§ 14-18.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 73.

§ 14-18.2. Injury to pregnant woman.

(a) Definitions. — The following definitions shall apply in this section:

(1) Miscarriage. — The interruption of the normal development of the fetus, other than by a live birth, and which is not an induced abortion permitted under G.S. 14-45.1, resulting in the complete expulsion or extraction from a pregnant woman of the fetus.

(2) Stillbirth. — The death of a fetus prior to the complete expulsion or extraction from a woman irrespective of the duration of pregnancy and which is not an induced abortion permitted under G.S. 14-45.1.

(b) A person who in the commission of a felony causes injury to a woman, knowing the woman to be pregnant, which injury results in a miscarriage or stillbirth by the woman is guilty of a felony that is one class higher than the felony committed.

(c) A person who in the commission of a misdemeanor that is an act of domestic violence as defined in Chapter 50B of the General Statutes causes injury to a woman, knowing the woman to be pregnant, which results in miscarriage or stillbirth by the woman is guilty of a misdemeanor that is one class higher than the misdemeanor committed. If the offense was a Class A1 misdemeanor, the defendant is guilty of a Class I felony.

(d) This section shall not apply to acts committed by a pregnant woman which result in a miscarriage or stillbirth by the woman. (1998-212, s. 17.16(b).)

Legal Periodicals. — For article, "The Prospect of Enacting An Unborn Victims of Violence Act in North Carolina," see 28 N.C. Cent. L.J. 127 (2006).

§ 14-19: Repealed by Session Laws 1979, c. 760, s. 5.

§ 14-20: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 29(1).

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§§ 14-21 through 14-23: Repealed by Session Laws 1979, c. 682, s. 7.

Cross References. — As to rape and other sex offenses, see now G.S. 14-27.1 et seq.

ARTICLE 7.

Rape and Kindred Offenses.

§§ 14-24, 14-25: Repealed by Session Laws, 1975, c. 402.

Cross References. — As to rape and other sex offenses, see now G.S. 14-27.1 et seq.

§§ 14-26, 14-27: Repealed by Session Laws 1979, c. 682, s. 7.

ARTICLE 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Mentally disabled" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

(5) "Sexual contact" means (i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) a person touching another person with their own sexual organ, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person.

(6) "Touching" as used in subdivision (5) of this section, means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. (1979, c. 682, s. 1; 2002-159, s. 2(a); 2003-252, s. 1; 2006-247, s. 12(a).)

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Clause (iii) of subdivision (5), as added by Session Laws 2006-247, s. 12(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For note discussing "serious personal injury" in rapes and sexual offenses in light of State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982), see 19 Wake Forest L. Rev. 881 (1983).

For note, "The 'Outer Limits' of the Right of Privacy: Bowers v. Hardwick," see 22 Wake Forest L. Rev. 629 (1987).

For note that addresses the effect of a recent United States Supreme Court decision on sodomy laws and the manner in which society may shape its characterization of Acquired Immune Deficiency Syndrome (AIDS) and homosexuality, see 66 N.C.L. Rev. 226 (1987).

For note, "The General Fear Theory and Intrafamilial Sexual Assault," see 66 N.C.L. Rev. 1177 (1988).

For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

For note, "Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-penetration Rape Should Be a Crime in North Carolina," see 82 N.C.L. Rev. 1258 (2004).

CASE NOTES

"Oral Sex" by Female on Male Construed. — The term "oral sex" is recognized as describing a sexual act involving contact between the mouth of one party and the sex organs of another. When a female is said to perform oral sex on a male the term is reasonably taken to mean fellatio. State v. Goodson, 313 N.C. 318, 327 S.E.2d 868 (1985).

"Analingus" does not require penetration by the tongue, but requires only the stimulation of the anal opening by the tongue or lips. State v. White, 101 N.C. App. 593, 401 S.E.2d 106, cert. denied, 329 N.C. 275, 407 S.E.2d 852 (1991).

Penetration by the penis is not an element of "analingus." State v. White, 101 N.C. App. 593, 401 S.E.2d 106, cert. denied, 329 N.C. 275, 407 S.E.2d 852 (1991).

"Any Object" Includes Parts of Human Body. — In defining a "sexual act" in subdivision (4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

"Substantially Incapable" of Resisting. — The element of "substantially incapable of ... resisting the act of vaginal intercourse or sexual act" is not negated by the victim's ability to verbally protest or even to engage in some physical resistance of the abuse. The words "substantially incapable" show the legislature's intent to include within the definition of "mentally defective" those persons who by reason of their mental retardation or disorder would give little or no physical resistance to a sexual act. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64, supersedeas denied, 320 N.C. 174, 358 S.E.2d 65 (1987).

Evidence was sufficient to show that the injuries to the vagina were inflicted on the victim by defendant in an attempt to commit anal intercourse or in furtherance of the anal intercourse, and therefore, as part of one continuous transaction, the rape and the ensuing serious injuries the victim suffered as a result of the rape wore down the victim's resistance and contributed to her submission so that defendant was able to inflict further personal injury on the victim with the sexual offense of anal intercourse. State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994), aff'd, 342 N.C. 409, 464 S.E.2d 42 (1995).

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence and in convicting him of second-degree rape in violation of G.S. 14-27.3(a)(2) because given the evidence of the victim's age, frailty, and physical limitations, there was evidence from which the jury could reasonably conclude that the victim was not able to actively oppose or resist her attacker; the victim was 83 years of age, suffered from severe arthritis, and normally walked with the assistance of a walker, and because of the victim's physical condition, it was impossible for her to travel down the front steps of her house without assistance. State v. Atkins, — N.C. App. —, 666 S.E.2d 809, 2008 N.C. App. LEXIS 1743 (2008).

The statutory definition of "sexual act" does not create disparate offenses; rather it enumerates the methods by which the single wrong of engaging in a sexual act with a child may be shown. Thus, the jury need not be instructed that it must be unanimous as to which sex act the defendant committed in order to convict him of first-degree sexual offense. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

A "sexual act" includes anal intercourse, which requires penetration of the anal opening by the penis. State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987).

Instruction on "Sexual Act" Sufficient. — Trial court did not err in its jury instruction on one of the elements of second-degree statutory sex offense, namely, the requirement that defendant commit some "sexual act"; although technically incomplete, its instructions were sufficient to differentiate between the two offenses, so that the jury understood it was to consider the vaginal intercourse for purposes of the rape charge and the digital penetration for purposes of the sex offense charge. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

An instruction setting forth the elements for first degree sexual offense that defines a sexual act as "any penetration, however slight, by an object into the genital opening of a person's body," comports with G.S. 14-27.1, which defines a sexual act as "penetration, however slight, by any object into the genital or anal opening of another person's body." State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

"Committed Upon." — Although the words "committed upon" the victim in G.S. 14-27.1(2) could extend to acts committed by someone other than the person accused of a rape, this phrase connotes an action committed upon the victim and not a voluntary act by the victim. Thus, the protection afforded by statute does not serve to negate the consent of a person who voluntarily and as a result of his or her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined by G.S. 14-27.1(3). State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Subdivision (4) of this section requires only slight penetration of the genital opening. State v. Watkins, 318 N.C. 498, 349 S.E.2d 564 (1986).

Penetration is not a necessary element of cunnilingus as the term is used in subdivision (4) of this section; rather, cunnilingus means stimulation by the tongue or lips of any part of a female's genitalia, and the required stimulation is accomplished when there has been the slightest touching by the lips or tongue of another to any part of the female's genitalia. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Degradation to the person of a woman forced to submit or to a small girl incapable of consent is complete in the case of cunnilingus once the perpetrator's lips or tongue have touched any part of her genitalia, whether or not any actual "penetration" of the genitalia takes place. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Legislature intended by its use of the word cunnilingus in G.S. 14-27.1(4) to mean stimulation by the tongue or lips of any part of a woman's genitalia; the legislative intent is borne out by the context in which the word is used in G.S. 14-27.1(4) and the overall statutory scheme, N.C. Gen. Stat. Art. 7A, Ch. 14, by which this kind of act is made punishable. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203, 2002 S.C. App. LEXIS 201 (2002).

Proof of Penetration. — To prove a case of first-degree sexual offense, the State must prove there was "penetration, however slight, by any object into the genital or anal opening of another person's body"; that the victim was a child under the age of 13 years old; and the defendant is at least 12 years old and is at least four years older than the victim. State v. Huntley, 104 N.C. App. 732, 411 S.E.2d 155 (1991), cert. denied, 331 N.C. 288, 417 S.E.2d 258 (1992).

Circumstantial evidence of defendant's penetration of child victim's anus with a foreign object held sufficient. State v. Santiago, 148 N.C. App. 62, 557 S.E.2d 601, 2001 N.C. App. LEXIS 1281 (2001), cert. denied, 355 N.C. 291, 561 S.E.2d 499 (2002).

Where the evidence showed that defendant ordered the victim to drop her pants and underwear at gunpoint and asked her to spread open her labia so he could inspect her vagina and defendant then used the barrel of his gun to separate her labia and the victim testified that she felt the gun up against her private area right where her tampon would be entered, such evidence was sufficient to support a finding that a penetration occurred under G.S. 14-27.1(4) to support defendant's conviction for first degree sexual offense, despite defendant changing his mind about pursuing any further contact with the victim upon discovering the tampon. State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005), review denied, appeal dismissed, 360 N.C. 290, 628 S.E.2d 384 (2006).

Testimony of Child as Evidence of Penetration. — Seven-year-old child's testimony constituted sufficient evidence of penetration to support a conviction of first-degree sexual offense. State v. Watkins, 318 N.C. 498, 349 S.E.2d 564 (1986).

Child's Testimony Held Sufficient to Show Penetration. — In trial for first-degree sexual offense, where victim testified that defendant put his penis in the "back" and went on to explain that she meant "where I go number two," the child's testimony, taken as a totality, was sufficient evidence that the defendant penetrated child's anal opening. State v. Estes, 99 N.C. App. 312, 393 S.E.2d 158 (1990).

Although young victim did not use the word "vagina" or "genital area" when describing the sexual assault perpetrated upon her, where she did employ words commonly used by females of tender years to describe those areas of their bodies, of which they are just becoming aware, such evidence was ample to support the verdict of guilty of first degree sexual offense. State v. Rogers, 322 N.C. 102, 366 S.E.2d 474 (1988).

Fellatio may be accomplished by mere touching of the male sex organ to the lips or mouth of another. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434 (1986).

Fellatio is defined as "contact between the mouth of one party and the sex organs of another." State v. Johnson, 105 N.C. App. 390, 413 S.E.2d 562 (1992).

Under the corpus delicti rule, statements defendant made to a victim's brother immediately after defendant confessed to a detective that the victim attempted to perform fellatio, opportunity evidence, and defendant's testimony that he felt something touch his penis did not constitute the substantial independent evidence that was required to establish the sexual act element of first-degree sexual offense under G.S. 14-27.1(4) and G.S. 14-27.4 because the victim testified that a sexual act did not occur, the statements made to the victim's brother were not independent of the extrajudicial confession, and the extrajudicial confession and defendant's testimony did not allow a jury to find beyond a reasonable doubt that the victim's mouth made contact with defendant's penis. State v. Smith, 362 N.C. 583, 669 S.E.2d 299, 2008 N.C. LEXIS 972 (2008).

Child's Testimony Held Insufficient to Attempted Fellatio. — Testimony of ten-year-old victim of sexual abuse that she gritted her teeth when defendant began to force her to commit fellatio on January 7 and that she gritted her teeth while defendant masturbated over her on January 9, were insufficient to convict defendant of attempt to commit fellatio on second occasion. There must be some evidence that a touching, however slight, occurred, and victim's testimony was not, as a matter of law, sufficient to show that defendant's penis touched her lips or mouth on January 9. State v. Murphy, 100 N.C. App. 33, 394 S.E.2d 300 (1990).

Touching the victim's breast and genitals demonstrated intent to commit a sexual act against the victim without her consent sufficient to support the charge of attempted second degree sex offense. State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Anal intercourse requires penetration of the anal opening of the victim by the penis of the male. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Variance Between Indictment and Proof. — Where the indictment alleged that defendant engaged "in a sexual act, to wit: performing oral sex" on the child involved, but the State's evidence showed only that the defendant placed his finger in victim's vagina, which by definition is a separate sex offense under the terms of subdivision (4) of this section, the court erred in denying defendant's motion for a directed verdict at the end of all the evidence, since the defendant was convicted of a crime he had not been charged with. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

A "Sexual Act" Includes Anal Intercourse. — Defendant's conviction for sexual assault was affirmed because there was substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing a knife as a dangerous or deadly weapon. While the elderly victim gave conflicting testimony as to whether defendant penetrated her anally, a report from a rape kit concluded that semen was present on the swab from the victim's rectum; furthermore, an emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma and a victim might not recall anal penetration due to the fear experienced during such an assault. State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006), review denied, 360 N.C. 578, 635 S.E.2d 902 (2006).

"Sexual Contact." — State was not required to show that the conduct of defendant, a massage therapist, in touching the two female clients of the salon where defendant worked resulted in penetration, as the crime of sexual battery involved sexual contact, as defined by G.S. 14-27.1(5), and through the use of force and against the will of the two clients in violation of G.S. 14-27.5A(a)(1). The State presented sufficient evidence to show that defendant touched, inter alia, the breasts and buttocks of the two female clients and that the female clients were petrified as defendant did so because they did not know what defendant planned to do next. State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (2008).

Applied in State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985); State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991); State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004); State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006); State v. Norman, — N.C. App. —, 675 S.E.2d 395, 2009 N.C. App. LEXIS 504 (2009); State v. Lark, — N.C. App. —, 678 S.E.2d 693, 2009 N.C. App. LEXIS 1101 (July 7, 2009).

Cited in State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Edwards, 305 N.C. 378, 289 S.E.2d 360 (1982); State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984); State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986); State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986); State v. Moorman, 82 N.C. App. 594, 347 S.E.2d 857 (1986); State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804 (1987); State v. Manley, 95 N.C. App. 213, 381 S.E.2d 900 (1989); State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989); State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15 (1991); State v. Hooper, 103 N.C. App. 662, 406 S.E.2d 643 (1991); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); State v. Woody, 124 N.C. App. 296, 477 S.E.2d 462 (1996); State v. Anthony, 351 N.C. 611, 528 S.E.2d 321, 2000 N.C. LEXIS 348 (2000); State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001); State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002); Evans v. Evans, 169 N.C. App. 358, 610 S.E.2d 264, 2005 N.C. App. LEXIS 609 (2005); State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005); State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006); State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007); State v. Tadeja, 191 N.C. App. 439, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

§ 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

(c) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 63; c. 106, ss. 1, 2; c. 179, s. 14; 1983, c. 175, ss. 4, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 2; 2004-128, s. 7.)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to essentials of bill of indictment for rape, see G.S. 15-144.1. As to exclusion of bystanders during trial for rape or other sex offense, see G.S. 15-166. As to venue for trial of sex offenses where victim was transported, see G.S. 15A-136. As to office of coordinator of services for victims of sexual assault, see G.S. 143B-394.1 through 143B-394.3.

Legal Periodicals. — For note on United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), and its impact upon State capital punishment legislation, see 47 N.C.L. Rev. 421 (1969).

For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For comment on capital punishment and

evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For an article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For note discussing the constitutionality of North Carolina's Rape-Shield Law, see 17 Wake Forest L. Rev. 781 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note discussing "serious personal injury" in rapes and sexual offenses in light of State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982), see 19 Wake Forest L. Rev. 881 (1983).

For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?," see 21 Wake Forest L. Rev. 93 (1985).

For note, "State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases," see 64 N.C.L. Rev. 1352 (1986).

For note, "State v. Stafford: Rape Trauma Syndrome and the Admissibility of Statements Made by Rape Victims," see 64 N.C.L. Rev. 1364 (1986).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

For note, "State v. Strickland: Evening the Odds in Rape Trials! North Carolina Allows Expert Testimony on Post Traumatic Stress Disorder to Disprove Victim Consent," see 69 N.C.L. Rev. 1624 (1991).

For note entitled, "Michigan v. Lucas: Failure to Define the State Interest in Rape Shield Legislation," see 70 N.C.L. Rev. 1592 (1992).

For comment, "Old Wine in New Bottles: The 'Marital' Rape Allowance," see 72 N.C.L. Rev. 261 (1993).

For note, "Serious Personal Injury Requirement for Rape Is Met by Mental Injury Alone — State v. Baker," see 21 N.C. Cent. L.J. 368 (1995).

For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

I. General Consideration.
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I. GENERAL CONSIDERATION.

Editor's Note. *— Many of the annotations under this section are from cases decided under former statutory provisions.*

Constitutionality of Former § 14-21. — See State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

Double Jeopardy Prohibitions Held Not Violated. — Where defendant was convicted of first-degree rape under subdivision (a)(1) of this section and taking indecent liberties under G.S. 14-202.1, these convictions did not violate the double jeopardy prohibitions under either our state or the federal Constitution. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

It is not double jeopardy for a defendant to be punished for convictions of rape, incest, and taking indecent liberties with a minor when all the convictions were based on one incident. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Elements Required. — In order to prove first-degree rape, it is sufficient that the State demonstrate that the defendant engaged in vaginal intercourse with another person by force and against the will of the other person and either (1) employed or displayed a dangerous weapon or (2) inflicted serious personal injury upon the victim or another person. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

History of Offense. — See State v. Dick, 6

N.C. 388 (1818); State v. Jesse, 20 N.C. 95 (1838); State v. Johnston, 76 N.C. 209 (1877).

Rape by force and against the victim's will is an act of violence by any definition, and it is a crime of violence as a matter of law. State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989), sentence vacated and remanded for further consideration at 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990) in light of State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913.

The language of this section, "serious personal injury," and the legislative context in which it arose, differs substantially from the language of G.S. 14-32, "serious injury." State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Indians. — This section does not apply where the alleged acts were those of one Indian against another Indian within Indian country. United States v. Welch, 822 F.2d 460 (4th Cir. 1987).

Generally, rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense. State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976), cert. denied, 291 N.C. 715, 232 S.E.2d 207 (1977).

Separate Acts of Intercourse as Separate Offenses. — Where after defendant completed intercourse with first victim, he was not successful in his attempts with second victim, and he then completed the act with the first victim for a second time, each of his acts of forcible intercourse with the first victim was a separate rape rather than a continuing offense. State v. Dudley, 319 N.C. 656, 356 S.E.2d 361 (1987).

Although defendant's husband did not fully penetrate the 11-year-old victim until his third attempt, each separate act of intercourse was complete and sufficient to sustain an indictment for first degree rape, and no double jeopardy occurred when the defendant/wife was convicted as an aider and abettor for two counts of attempted rape and one count of rape. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

Intoxication is not a defense to the crime of rape. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Imposition of a mandatory life sentence for first-degree rape is not constitutionally disproportionate and is not cruel and unusual punishment as prohibited by U.S. Const., Amend. VIII and N.C. Const., Art. I, § 27. State v. Peek, 313 N.C. 266, 328 S.E.2d 249 (1985).

Provision in this section for a mandatory life sentence for a conviction of rape in the first degree is not unconstitutional under U.S. Const., Amends. VIII and XIV. State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986).

Imposition of sentences of life imprisonment for first degree rape and first degree sexual offense does not violate the prohibition against cruel and unusual punishments. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

Sentencing Factors. — Where a defendant has been charged with rape in the first degree under subdivision (a)(2)a of this section but has pled guilty to rape in the second degree under subdivision (a)(2) of G.S. 14-27.3, if the sentencing judge concludes by a preponderance of the evidence that the defendant had used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Due to the General Assembly giving children under 13 greater protection from first-degree rape than victims over 13, the rape of a victim under 13 by a defendant at least 12 and at least four years older than the victim makes the defendant more blameworthy, because rape victims under 13 are in fact more vulnerable to the crime of rape than they would otherwise be if older than 12. This does not, however, allow the age of the victim to be considered in sentencing for first-degree rape, because (1) age is an element of first-degree rape under subdivision (1) of subsection (a) of this section and as such cannot be considered an aggravating factor upon sentencing for that crime under G.S. 15A-1340.4(a)(1)(p), and (2) first-degree rape is a Class B felony which carries a mandatory life sentence without consideration of aggravating and mitigating factors, under G.S. 14-1.1(a)(2). State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Unanimity of Verdict. — Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court did not violate defendant's right to a unanimous verdict based upon generic testimony, or evidence of more incidents than there were criminal charges. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Right to Unanimous Jury Verdict not Violated. — Defendant was not deprived of defendant's right to a unanimous jury verdict as to charges of first-degree statutory sexual offense under G.S. 14-27.2, statutory sexual offense against a person who was 13, 14, or 15 years old under G.S. 14-27.4(a)(1), taking indecent liberties with a child under G.S. 14-202.1, second-degree forcible sexual offense under G.S 14-27.5, and assault on a female by a male at least 18 years of age under G.S. 14-33(c)(2) as: (1) the indictments were valid absent the inclusion of the specific acts that constituted the alleged sexual offenses; (2) the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts that were to serve as the underlying basis for each offense; (3) the jury was instructed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim; (4) there was nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets; and (5) the jury was polled following the announcement of the verdicts. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986).

Double Jeopardy Prohibitions Held Not Violated. — Where defendant was convicted of first-degree rape under subdivision (a)(1) of this section and taking indecent liberties under G.S. 14-202.1, these convictions did not violate the double jeopardy prohibitions under either our state or the federal constitution. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

It is not double jeopardy for a defendant to be punished for convictions of rape, incest, and taking indecent liberties with a minor when all the convictions were based on one incident. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Assault on a female is not a lesser included offense of rape, because assault on a female contains elements not present in the greater offense of rape. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts. — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

Instruction on Parole Ineligibility in Capital Case. — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Prosecutorial Comments in Closing Argument. — Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court did not err by failing to intervene ex mero motu to limit certain remarks made by the state in its closing argument; in the remarks, the prosecutor referred to defendant as “vile,” “amoral,” “wicked,” and “evil.” State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Applied in State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983); State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984); State v. Goforth, 67 N.C. App. 537, 313 S.E.2d 595 (1984); State v. Owens, 73 N.C. App. 631, 327 S.E.2d 42 (1985); State v. Moser, 74 N.C. App. 216, 328 S.E.2d 315 (1985); State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985); State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989); State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989); State v. O'Hanlan, 153 N.C. App. 546, 570 S.E.2d 751, 2002 N.C. App. LEXIS 1249 (2002); State v. Garcia, 358 N.C. 382, 597 S.E.2d 724, 2004 N.C. LEXIS 669 (2004).

Cited in State v. Green, 336 N.C. 142, 443 S.E.2d 14; State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980); State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981); State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981);

State v. Brown, 56 N.C. App. 228, 287 S.E.2d 421 (1982); State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Wilhite, 308 N.C. 798, 303 S.E.2d 788 (1983); State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Whitfield, 310 N.C. 608, 313 S.E.2d 790 (1984); State v. Whitaker, 76 N.C. App. 52, 331 S.E.2d 752 (1985); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985); State v. Franks, 74 N.C. App. 661, 329 S.E.2d 717 (1985); State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986); State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986); State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986); State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986); Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986); State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810 (1987); State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987); State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987); State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182 (1987); State v. Howard, 320 N.C. 718, 360 S.E.2d 790 (1987); State v. Barnes, 91 N.C. App. 484, 372 S.E.2d 352 (1988); State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989); State v. Hinton, 95 N.C. App. 683, 383 S.E.2d 704 (1989); State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991); State v. Sneeden, 108 N.C. App. 506, 424 S.E.2d 449 (1993); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755 (1993); State v. McClain, 112 N.C. App. 208, 435 S.E.2d 371 (1993); State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994); State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); State v. Dalton, 122 N.C. App. 666, 471 S.E.2d 657 (1996); State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998); State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999); State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000); State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002); State v. Howard, 158 N.C. App. 226, 580 S.E.2d 725, 2003 N.C. App. LEXIS 1049 (2003); State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005); State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006); In re J.L., 183 N.C. App. 126, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007); State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008); State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008); State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

II. INDICTMENT.

In enacting subsection (a), the General Assembly has provided for a "shortened form" of the rape indictment which explicitly eliminates the requirement that the indictment contain allegations of every element of the offense. State v. Corbett, 307 N.C. 169, 297 S.E.2d 553 (1982).

Construction With G.S. 15-144.1. — In a rape prosecution, the fact that a lesser charge of assault on a female would not be available when a defendant asserts that the intercourse was consensual does not nullify the reference in G.S. 15-144.1 to assault on a female. A jury could find a defendant not guilty of rape under G.S. 14-27.2 or G.S. 14-27.3 based on evidence that defendant's penis had not vaginally penetrated the victim. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Allegation of Intent. — Intent is not an element of the offense of raping a female child under the age of 12 years (now 12 years or less), and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

Indictment Was Valid. — Indictment charging defendant with statutory sexual offense under G.S. 14-27.2, statutory sexual offense of a person who was 13, 14, or 15 years of age under G.S. 14-27.7A, taking indecent liberties with a child under G.S. 14-202.1, and forcible sexual offense under G.S. 14-27.5 that did not list the specific underlying sexual acts was valid, as the jury was instructed on the specific sexual acts that were to serve as the underlying act for each charged offense; when a short form indictment properly alleged the essential elements of the offense, it did not have to allege every matter required to be proved on the trial under G.S. 15-144.2(a), and indictments charging indecent liberties with a child or a sexual offense were valid even when they did not contain a specific allegation regarding which specific sexual act was committed. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Allegation of "By Force and Against The Will". — An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946).

Bill of indictment charging the rape of a "child under the age of 13 years," although a valid indictment for a rape occurring after Oct. 1, 1983, did not allege a criminal offense for a rape allegedly occurring before the amendment to the statute, effective Oct. 1, 1983, substituting "a child under the age of 13 years" for "a child of the age of 12 years or less." Therefore, the trial court did not have subject matter jurisdiction and the judgment entered would be arrested. State v. Howard, 317 N.C. 140, 343 S.E.2d 538 (1986), holding, however, that the State could seek an indictment of defendant based upon the statute in effect on Feb. 15, 1983.

Indictment charging defendant with first degree rape was fatally defective and should have been quashed, where it charged defendant, pursuant to this section, with the rape of "a child under the age of 13 years" during the "academic school year of 1981." This section was amended effective October 1, 1983, by substituting "a child under the age of 13 years" for "a child of the age of 12 years or less." Thus, at the time of the alleged offense, the prior statute controlled. State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987).

Failure of Indictment to Allege Date of Crime. — Because time did not constitute an element of first-degree rape, time was not of the essence of the crime; accordingly, in a case where the failure of the indictments to allege any date on which the offenses occurred would not be grounds for dismissal of the charges, the designation of a two-year period was not grounds for dismissal. State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300, appeal dismissed, cert. denied, 334 N.C. 437, 433 S.E.2d 182 (1993).

Violation of Subdivision (a)(2)c Not Alleged. — Juvenile petition alleging that juvenile who was under the age of 12 at the time of the offense "did unlawfully willfully and feloniously carnally know and abuse ... a child 6 years old and thus of the age of 12 years or less in violation of ... G.S. 14-27.2" was insufficient to allege a violation of subdivision (a)(2)c of this section. State v. Drummond, 81 N.C. App. 518, 344 S.E.2d 328 (1986).

Separate Indictment Required As to Earlier Incidents. — When a defendant charged with rape admits that he had sexual intercourse with the prosecutrix, neither the State nor the defendant is entitled to have the jury consider a lesser included offense on the basis of incidents which might have preceded the sexual intercourse because the bill of indictment charging only rape does not encompass such earlier incidents but is directed only to the sexual intercourse itself; thus, if the State contends defendant committed some other crime, such as assault, prior to the rape itself, it should file a separate indictment or add a count to the rape indictment charging this other crime. State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

Effect of Verdict Where Indictment Insufficient. — Where an indictment is insufficient to charge first-degree rape, but is sufficient to charge second-degree rape, and the evidence is clearly sufficient to support a guilty verdict for that offense, the verdict must be regarded as a verdict of guilty of second-degree rape, and the defendant may not be sentenced for first-degree rape. The case must be remanded for entry of a verdict of guilty of second-degree rape and for a proper judgment on that verdict. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Failure to Submit Crime as Charged in Indictment. — Where defendant was charged with forcible first-degree rape, the failure of the trial court to submit the case to the jury pursuant to such crime as charged in the indictment amounted to a dismissal of that charge and all lesser included offenses. Therefore, by this failure the trial judge dismissed the first and second-degree rape charges alleged in the indictment. State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

Where the jury was instructed and reached its verdict on the basis of the elements set out in subdivision (a)(1) of this section, whereas defendant had been charged with rape on the basis of the elements set out in subdivision (a)(2) and in G.S. 14-27.3(a)(1), the indictment under which defendant was brought to trial could not be considered to have been a valid basis on which to rest the judgment. State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

III. OTHER CRIMES.

Separate Crimes Arising Out of Same Events. — Where a burglar, after breaking and entering, proceeds to rape someone inside the dwelling, he can be convicted of both burglary and rape. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes in this case. State

v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980), overruled on other grounds, State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Defendants' convictions of both first-degree kidnapping and rape against one victim and of first-degree kidnapping and both first-degree rape and first-degree sex offense against the other could not all stand, even though the combination of convictions, because of the manner in which they were consolidated for judgment, resulted in no additional punishment attributable to any of the kidnapping cases, where it could not be said that the jury's verdict of first-degree kidnapping was based upon a sexual assault other than the ones forming the basis for the other convictions. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

The holding in State v. Price, 313 N.C. 297, 327 S.E.2d 863 (1985), that no principle of double jeopardy was violated by entry of judgments that the defendant committed both rape in the first degree and kidnapping in the first degree was overruled. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Defendant may not be separately punished for the offenses of first-degree rape and first-degree kidnapping where the rape is the sexual assault used to elevate kidnapping to the first degree. State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986).

Although some restraint is inherent in the crime of forced rape, the restraint, confinement, and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetuated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape; such asportation is separate and independent of the rape, is removal for the purpose of facilitating the felony of rape, and is, therefore, kidnapping pursuant to G.S. 14-39. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Convictions of first-degree kidnapping and first-degree rape could not both stand, where there was evidence of an unindicted sexual offense and of a first degree sexual offense for which defendant was indicted but not convicted, as well as evidence of the rape for which defendant was both indicted and convicted, but the trial court did not specify in its instructions to the jury in the kidnapping case which of these sexual assaults the jury might use to satisfy the "sexual assault" element of the first degree kidnapping. State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987).

A criminal defendant cannot be convicted of both first degree kidnapping and sexual assault when the latter was used to prove an element of the kidnapping, and thus where the jury may not have understood that it could only convict for first degree kidnapping by using the unindicted sexual assault, rather than the attempted rape of which defendant was convicted to supply the sexual assault element of the crime of first degree kidnapping, defendant's convictions of both first degree kidnapping and attempted first degree rape could not stand. State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987).

Vaginal intercourse is not an element of taking indecent liberties with a minor, and committing the act for the purpose of arousing or gratifying sexual desire is not an element of rape. Thus defendant was not placed in double jeopardy by being convicted of both crimes. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

A defendant cannot be convicted of both first-degree rape and first-degree kidnapping when the rape is used to prove an element of the kidnapping charge. State v. Grimes, 96 N.C. App. 489, 386 S.E.2d 214 (1989), cert. denied, 327 N.C. 485, 397 S.E.2d 227 (1990).

Trial court properly allowed the jury to review the evidence of defendant's commission of rape and sexual offense under both a theory of statutory rape/sexual offense and forcible rape/ sexual offense, however upon the jury's verdicts of guilty under both theories, the judgment had to be arrested on one count of first-degree rape and on one count of first-degree sexual offense; separate convictions for these offenses, even though consolidated for a single judgment, had potentially severe adverse collateral consequences. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Conspiracy. — Where evidence shown that victim told a co-defendant that she did not want to have sex with him, defendant purportedly laughed when the victim asked to be taken back to where they had found her, and defendant engaged in sex acts with victim, the evidence taken was adequate to support the inference that defendant made an agreement with the co-defendant to commit rape in the first degree and the trial court did not err in submitting the charge of conspiracy to commit first-degree rape to the jury. State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

First- and Second-Degree Rape Distinguished. — The sole distinction between the crimes of first and second-degree rape is the element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

One difference between rape in the first degree under subdivision (a)(2)a of this section and rape in the second degree under G.S. 14-27.3 is that in the former but not in the latter a deadly weapon must have been used to effectuate the rape. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

A verdict of guilty of rape in the first degree necessarily includes the jury's determination that the defendant is guilty of each element of rape in the second degree. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Assault on Child Under 12 Not Lesser Included Offense. — Vaginal intercourse with a child under 12 is not itself an assault, since the crime of assault has essential elements which are not also essential elements of statutory rape. For example, assault generally requires proof of state of mind of either the defendant or the victim — the defendant's intent to do immediate bodily harm or the victim's reasonable apprehension of such harm. The statutory rape law, subdivision (a)(1) of this section, does not contain a state of mind element, however. Assault on a child under 12, former G.S. 14-33(b)(3), was not, therefore, a lesser included offense of first-degree rape of a child under 12 (now 13), under subdivision (a)(1) of this section. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

The offense of assaulting a child under the age of 12, former G.S. 14-33(b)(3), was not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less (now under the age of 13 years), under subdivision (a)(1) of this section. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

One was guilty of a misdemeanor assault under former G.S. 14-33(b)(3) if he assaulted a child under the age of 12 years. This crime had an essential element which was not also an essential element of the crime of first-degree rape of a child of the age of 12 years or less (now under the age of 13 years). Subdivision (a)(1) of this section provides that a person is guilty of first-degree rape only if he "engages in vaginal intercourse" with the young victim; no concomitant assault is required. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Nor Is Assault on Female by Male over 18. — The offense of assault on a female by a male over the age of 18, former G.S. 14-33(b)(2), was not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less (now under the age of 13 years), under subdivision (a)(1) of this section. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Nor Is Taking Indecent Liberties with Child Under 16. — The offense of taking indecent liberties with a child under G.S. 14-202.1 is not a lesser included offense of statutory rape under subdivision (a)(1) of this section because the age elements are different and, while sexual purpose may be inherent in an act of forcible vaginal intercourse, it is not required to be proved in order to convict a defendant of rape. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977).

Arrest of Judgment Proper. — Trial court did not err by electing to arrest judgment on a felonious child abuse with a deadly weapon conviction as only one felony was necessary to support a felony murder conviction, and the jury found that five felonies could support a felony murder charge including forcible rape, statutory rape, forcible sex offense, statutory sex offense, and felony child abuse with a deadly weapon. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, and the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense; thus, the court had to arrest judgment. State v. Kelso, 187 N.C. App. 718, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

IV. VICTIM UNDER AGE.

Proof of Force or Infliction of Injury Not Essential. — The use of deadly force or infliction of serious bodily injury is not an essential element of the crime of rape of a female under the age of 12 (now 13 years). State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Neither force nor intent is an element of rape of a female child under the age of 12 years (now 13 years). State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

Nor Proof of Assault. — The lack of an assault requirement under the statutory rape law, subdivision (a)(1) of this section, is understandable given the purpose of the statute. Unlike the provision of the first-degree rape statute that applies if the victim is an adult, subdivision (a)(2) of this section, the forbidden conduct under the statutory rape provision, subdivision (a)(1) of this section, is the act of intercourse itself; any force used in the act, any injury inflicted in the course of the act, or the apparent lack of consent of the child are not essential elements. This is so because the statutory rape law, subdivision (a)(1) of this section, was designed to protect children under 12 (now

13) from sexual acts. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

There is no requirement that the rape of a child be assaultive in character. State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898, cert. denied, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987).

Use of Force Presumed. — Force is conclusively presumed in the case of carnal knowledge of a female under the age of 10 (now 13 years). State v. Dancy, 83 N.C. 608 (1880); State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963); State v. Summitt, 45 N.C. App. 481, 263 S.E.2d 612 (1980), aff'd, 301 N.C. 591, 273 S.E.2d 425, cert. denied, 451 U.S. 970, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981); State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Consent No Defense. — Consent of prosecutrix is no defense in a prosecution for carnal knowledge of a female child under the age of 12 years (now 13 years). State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967); State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Attempted First-Degree Rape of Child. — In order to prove attempted first-degree rape of three and a half year old child, the State had to show that the victim was 12 years old or less, that the defendant was at least 12 years old and at least four years older than the victim, that the defendant had the intent to engage in vaginal intercourse with the victim, and that the defendant committed an act that went beyond mere preparation but fell short of actual commission of intercourse. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), cert. denied, 316 N.C. 382, 342 S.E.2d 901 (1986).

Evidence of 20-year-old defendant's action with nine-year-old child was sufficient to support the jury's verdict that defendant was guilty of attempted first degree rape, even though he stopped when she started to cry. State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987).

Juvenile who was under the age of 12 at the time of the offense could not be found guilty of first-degree rape under subdivision (a)(1) of this section for engaging in vaginal intercourse with six-year-old victim where the record contained no evidence of the age of his accomplice. State v. Drummond, 81 N.C. App. 518, 344 S.E.2d 328 (1986).

Competence of Child as Witness. — Whether a five-year-old child is competent to testify in a rape prosecution is a matter resting in the sound discretion of the trial judge, and where the evidence upon the voir dire as well as the child's testimony upon the trial negates abuse of discretion the ruling of the trial court that the child was a competent witness will not be disturbed on appeal. State v. Merritt, 236 N.C. 363, 72 S.E.2d 754 (1952).

In a prosecution for rape of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidence discloses that such acts were repeated with regularity up to the date specified in the indictment. State v. Browder, 252 N.C. 35, 112 S.E.2d 728 (1960).

Leading Questions Held Proper. — In prosecution for first-degree rape of six-year-old, the trial court did not abuse its discretion in permitting the prosecutor to ask leading questions on direct examination of the victim. State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986).

Young Victim's Testimony Held Sufficient. — Although the victim did not use the word "vagina," or "genital area," when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware, and her testimony was sufficient to require submission of defendant's guilt of second-degree sexual offense to the jury. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Where a child testified that the defendant stuck his ding dong up her po po, and she demonstrated, using male and female dolls, that the po po is a vagina and the ding dong is a penis, this was substantial evidence from which the jury could find the defendant engaged in vaginal intercourse with his daughter. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Evidence of Discussion of Sexual Matters in Child's Presence. — In a prosecution for the rape of a six-year-old child, evidence that the victim's father had discussed sexual matters in her presence was not competent as bearing upon consent, since consent is no defense, or to impugn the credibility of the victim's testimony, or for any other purpose. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Taking Testimony of Child in Absence of Jury. — In a prosecution for rape of an eight-year-old child, it was error to have the court reporter take the testimony of the child in the absence of the jury and then read to the jury the examination which had been conducted in its absence. State v. Payton, 255 N.C. 420, 121 S.E.2d 608 (1961).

Evidence held sufficient to convict a defendant of the offense of engaging in vaginal intercourse with a victim under the age of 13 years, when he was at least 12 years old and at least four years older than the victim. State v. Degree, 322 N.C. 302, 367 S.E.2d 679 (1988).

V. CONSENT.

Explicit Threat Unnecessary. — The absence of an explicit threat inducing consent is not determinative; it is enough if the totality of the circumstances surrounding the actions of defendant give rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual contact. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

The words "against the will" connote the victim's lack of consent. State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982).

Proof of Lack of Consent. — Evidence of physical resistance is not necessary to prove lack of consent in a rape case. State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Consent Induced by Fear and Violence Is Void. — Consent of prosecutrix which is induced by fear and violence is void and is no legal consent. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965); State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Circumstantial evidence and a co-defendant's testimony that the victim feared defendant because defendant was carrying a knife was sufficient to prove lack of consent. State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61, 2002 N.C. LEXIS 676 (2002).

Sexual Encounters for Payment. — Although the victim was a prostitute and initially sought a sexual encounter for payment, the victim's fear of defendant was specific to the events leading to defendant's sexual assaults on and murder of her, so that a jury could reasonably find that there was substantial evidence that the victim withdrew any prior consent to the sexual acts. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Consent is also not a defense to § 14-27.7A although the legislature created it as a separate statute, rather than amending this section. State v. Anthony, 351 N.C. 611, 528 S.E.2d 321, 2000 N.C. LEXIS 348 (2000).

Consent Not Shown Where Woman Visits Disreputable Places Unescorted. — Contributory negligence by the victim is no bar to prosecution by the State for the crime of rape. Hence, the fact that a woman goes, without proper escort, to a place where men of low morals might reasonably be expected to congregate does not establish her consent to have sexual relations with them, although it is competent evidence to be considered by the jury on that question. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

VI. USE OF FORCE OR THREATS.

Common Law Meaning. — The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and G.S. 14-27.3, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Actual Physical Force Not Required. — By "force" does not necessarily mean by actual physical force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Fear, fright, or duress, may take the place of force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Or Threat of Serious Bodily Injury. — The mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Force Implied in the Case of an Incapacitated Victim. — It makes no difference in the case of a sleeping or similarly incapacitated victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; force and lack of consent are implied in law. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

The "general fear" theory in State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984), is applicable only to fact situations similar to those in that case. State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987).

Reasonableness of Fear and Fear of Violence. — The failure of the trial judge in a prosecution for first degree rape to instruct the jury that the fear which induces consent must be reasonable and that the fear must be of violence was not error. Statements contained in prior cases do not establish an objective standard of reasonableness by which the jury must judge consent, and, even if the reasonableness standard were the rule, instructions that the victim's fear must be reasonable and of violence were unnecessary under the facts of the case. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Evidence of Force Held Sufficient. — Where it was established that the victim, a 78-year-old lady, had been severely beaten, resulting in multiple contusions and a large bite on her arm, multiple abrasions on her face, a one and one-half inch long laceration on the left side of her scalp, abrasions on both legs, and fractured ribs on her left side, there was evidence sufficient to support a conviction under this section. State v. Green, 305 N.C. 463, 290 S.E.2d 625 (1982).

VII. DANGEROUS OR DEADLY WEAPONS.

What Is a Dangerous or Deadly Weapon. — In order to be characterized as a dangerous or deadly weapon, an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is any article, instrument or substance which is likely to produce death or great bodily injury. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Legislative Intent Regarding Use of Deadly Weapon. — The legislature intended to make implicit under this section a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed. State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Powell, 306 N.C. 718, 295 S.E.2d 413 (1982).

This section does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Instead it requires a showing only that such a weapon was employed or displayed. State v. Langford, 319 N.C. 340, 354 S.E.2d 523 (1987).

A weapon has been "employed" when defendant has it in his possession at the time of the rape. State v. Langford, 319 N.C. 340, 354 S.E.2d 523 (1987).

"Employs" a Weapon. — A weapon has been "employed" within the meaning of this section when the defendant has it in his possession at the time of the rape. State v. White, 101 N.C. App. 593, 401 S.E.2d 106, cert. denied, 329 N.C. 275, 407 S.E.2d 852 (1991).

Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

Formerly, it was necessary to show specifically that the weapon was used to overcome the victim's resistance or to procure her submission, but this section, however, simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape. State v. Powell, 306 N.C. 718, 295 S.E.2d 413 (1982).

Weapons of Conspirators. — Pursuant to G.S. 14-27.2(a)(2)(a) and (c), there was substantial evidence to support defendant's conviction of first degree rape, because the co-defendant displayed a handgun during his and defendant's sexual assault of the victim and the jury could have imputed co-defendant's use of the handgun to defendant under the theory of acting in concert. State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Charge That Fake Gun Can Be Deadly or Dangerous Weapon. — Where the indictment charges violation of this section with the use of deadly weapons, "to wit: a rifle, a shotgun, and a pistol," a jury instruction that the deadly weapon element of this section would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon does not change the theory alleged in the indictment. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Unloaded Gun. — A gun which is used in the commission of rape to threaten the victim into submission, if not known to be unloaded, is an "article which the other person reasonably believes to be a dangerous or deadly weapon" and is sufficient to meet the definition of first degree rape. State v. Woodard, 102 N.C. App. 687, 404 S.E.2d 6 (1990), cert. denied, 329 N.C. 504, 407 S.E.2d 550 (1991).

Cord. — Where defendant choked the victim with a cord until she lost consciousness and the manner in which defendant used the rope could have resulted in the victim's death by strangulation, the only reasonable inference was that the cord as used by defendant was a dangerous weapon as a matter of law. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Knife. — Where the jury, had it been left to determine the nature of the weapon as a factual issue, would have probably found that the knife used in rape of the victim was a dangerous or deadly weapon or at least that the victim reasonably believed it to be such, the court's instructional error, if any, in instructing the jury that "a knife is a deadly weapon," had no probable impact on the jury's finding of guilt so as to merit a new trial despite the defendant's failure to object to the instruction. State v. Clemmons, 319 N.C. 192, 353 S.E.2d 209 (1987).

Large Knife. — The trial judge committed no error in taking from the jury the question of whether a knife (described as being a large knife with a long shiny blade), which was capable of cutting a person's throat, going into the windpipe and going four inches into the stomach, was a deadly weapon. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Where there was conflicting evidence on defendant's use of a knife, proof of which was necessary for a verdict of first-degree rape, victim testifying that defendant employed a knife during the act of rape, while defendant testified that there was no knife in his truck when the incident occurred, and no knife was ever located by investigating officers, the trial court properly included the lesser-included offenses of second-degree rape and second-degree sexual offense in its charge to the jury. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

Use of Weapon in Hands of Codefendant as Aggravating Factor. — Where defendant's commission of rape through the use of deadly weapons in the hands of his codefendant is a circumstance transactionally related to the commission of second-degree rape and reflective of his individual culpability for the crime, it may be considered by the trial judge and found as an aggravating factor. State v. Collier, 72 N.C. App. 508, 325 S.E.2d 256 (1985).

Box Cutter as Deadly Weapon. — Evidence held to amply support the trial judge's instruction to the effect that utility knife or box cutter used in the perpetration of rape was a dangerous or deadly weapon per se, where in the circumstances of its use, it was likely to produce death or great bodily harm. State v. Torian, 316 N.C. 111, 340 S.E.2d 465, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 77 (1986).

Sufficiency of Evidence. — In a case in which the defendant and an accomplice raped a woman while the accomplice threatened the victim with a gun, remand was necessary as to charges of first degree rape and first degree sexual offense by anal intercourse because (1) defendant sufficiently preserved the issue for appellate review, and (2) the evidence was insufficient to permit a reasonable jury to convict defendant of the first degree offenses for which no acting in concert instruction was given since the record contained no evidence showing defendant's personal use or display of a dangerous weapon. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

VIII. SERIOUS PERSONAL INJURY.

Definitions. — The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Construction of Terms. — Some guidance to the meaning of the phrase "serious bodily injury" (now "serious personal injury") can be found by reference to cases construing G.S. 14-32 (assault with a deadly weapon with intent to kill inflicting serious injury) and by viewing similar cases from other jurisdictions. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

"Serious bodily injury" (now "serious personal injury") is not the equivalent of "by force and against her will." State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Connection with Sexual Acts. — The element of infliction of serious personal injury upon the victim or another person in the crimes of first-degree sexual offense and first-degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape. State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985).

Continuous Transaction. — In a rape case where both rapes and the assault that inflicted serious injury occurred within a one-half hour period, the injury was one in a series of incidents in the same criminal episode, forming one continuous transaction between the rapes and its infliction. State v. Johnson, 320 N.C. 746, 360 S.E.2d 676 (1987).

Injuries to Third Party. — State could properly rely on injuries suffered by an attempted rape victim's daughter in elevating the attempted rape to attempted first degree rape, as the jury could have reasonably inferred that defendant attacked the daughter to aid his escape and that the attempted rape of the mother and the attack on the daughter were part of one continuous transaction. State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002).

Mental Injury May Constitute Serious Personal Injury. — Proof of the element of infliction of "serious personal injury" as required by subdivision (2)b of this section and G.S. 14-27.4(2)b may be met by the showing of mental injury as well as bodily injury. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

While serious injury can be used to support a first-degree rape conviction, this element is not required for a conviction of second-degree rape. Mental injuries associated with the crime are sufficient to make a crime first degree rape, but they must be associated with the rape, and the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "res gestae" results present in every forcible rape. State v. Finney, 358 N.C. 79, 591 S.E.2d 863, 2004 N.C. LEXIS 10 (2004).

But Must Be Greater Than That Present in Every Rape. — The legislature intended that ordinarily the mental injury inflicted must be more than the res gestae results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

In order to prove a serious personal injury based on mental or emotional harm there is no requirement that the mental injury arise from an action not ordinarily present in a forcible rape; what is required is that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape. State v. Baker, 336 N.C. 58, 441 S.E.2d 551 (1994).

In order for a mental injury to constitute "serious personal injury," the mental injury must be more than the res gestae results present in every forcible rape and sexual offense; if a mental injury extends for some appreciable time, it is a mental injury beyond that normally experienced in every forcible rape. State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995).

Where defendant argued that the jury was improperly not instructed that, in order to support a conviction for first-degree rape, the alleged mental injury had to be more than or different from the injury usually associated with forcible rape, the argument failed; the jury was properly instructed that serious mental injury could be shown if the injury lasted for an appreciable period of time beyond the crime, as a mental injury that extended for some period of time was a mental injury beyond that normally experienced in every forcible rape. State v. Finney, 157 N.C. App. 267, 581 S.E.2d 764, 2003 N.C. App. LEXIS 543 (2003), cert. granted, 357 N.C. 453, 586 S.E.2d 273 (2003).

Question Must Be Decided on Facts of Case. — Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case. It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

In determining whether "serious personal injury" has been inflicted as the phrase is used in the definitions of first-degree rape and first-degree sexual offense, the court must consider the particular facts of each case. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Sufficiency of Evidence. — The evidence in a first-degree rape prosecution was sufficient to support a finding that the victim suffered a serious bodily injury where the victim suffered a hard blow to her upper jaw that left her stunned and dazed and knocked five teeth out of alignment, breaking the root of one tooth, where the teeth had to be deadened, forced back into line and secured with a metal brace, and where expert medical testimony predicted that the teeth would die and that root canals or actual extraction would be necessary. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

The evidence supported the serious injury element under this section where it showed that defendant repeatedly struck victim in the face immediately before he forced her to have sexual intercourse with him. State v. Locklear, 320 N.C. 754, 360 S.E.2d 682 (1987).

In trial on charges of first-degree rape and first-degree sexual offense, evidence supported the jury's verdict of guilty on the basis that the victim suffered serious personal injury in the form of both bodily and mental injury, where the victim testified that in addition to the physical pain she experienced during and immediately after the rape and sodomy, she had continued to experience appetite loss, severe headaches, nightmares, sleep difficulty, difficulty in urination, and difficulty in bowel movements. State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

The mental injuries at issue extended for some appreciable time beyond the incidents surrounding the crime itself where the victim experienced weight loss for ten months after the rape; 12 months after the rape, she was still experiencing depression, was unable to sleep, and did not feel comfortable interacting with the public; the victim had quit work, moved from her home, and sought counseling; and after the rape, the victim was unable to carry out her role as a mother and had to give up her child to the child's grandmother for care for nine months. State v. Baker, 336 N.C. 58, 441 S.E.2d 551 (1994).

Testimony of victim that she moved out of her home because she was "scared to go back" home, was not sufficient evidence to support the conclusion that the victim sustained a "serious" personal injury. State v. Lilly, 117 N.C. App. 192, 450 S.E.2d 546 (1994), aff'd, 342 N.C. 409, 464 S.E.2d 42 (1995).

State sufficiently proved the "serious personal injury" element of attempted first degree rape by evidence that the attempted rape victim suffered a broken nose, a concussion, bruises, and abrasions, and that her daughter suffered a cracked cheekbone and a broken nose and jaw. State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002).

IX. PARTIES TO CRIME.

Juvenile who was under the age of 12 at the time of the offense could not be found guilty of first-degree rape under subsection (a)(1) of this section for engaging in vaginal intercourse with six-year-old victim where the record contained no evidence of the age of his accomplice. State v. Drummond, 81 N.C. App. 518, 344 S.E.2d 328 (1986).

Aider and Abettor Defined. — An aider or abettor of first-degree rape is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Knowledge of Aider and Abettor's Threats. — For defendant to be convicted of first-degree rape based in part on the actions of codefendant, it is necessary to show only that the two share a common unlawful purpose, i.e., that the two aid and abet one another in the commission of the crime; it is not necessary for each to have full knowledge of all acts committed by the other. Thus, where the trial court fully and adequately instructed on the elements of aiding and abetting, the court did not err in failing to instruct that the defendant must be found to have known of codefendant's threats which induced consent. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Aiders and Abettors Are Guilty of Rape. — Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as a principal in the offense. State v. Jordan, 110 N.C. 491, 14 S.E. 752 (1892).

A man and a woman are both guilty of raping a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897).

One who is present, aiding and abetting, in a rape actually perpetrated by another, is equally guilty with the actual perpetrator of the crime. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

The presence of defendant's nephews inside and outside the truck while defendant engaged in sexual acts with the victim could reasonably have been regarded as encouragement to defendant and constituted sufficient evidence that they and defendant shared the "community of unlawful purpose" necessary for aiding and abetting. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Defendant/female, as an aider and abettor, was equally as guilty of rape against 11-year old victim as the actual male perpetrator. State v. Owen, 133 N.C. App. 543, 516 S.E.2d 159, 1999 N.C. App. LEXIS 620 (1999), cert. denied, 351 N.C. 117, 540 S.E.2d 743 (1999).

Thus, a woman may be convicted of rape. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

A woman, who is physically incapable of committing rape upon another woman, may be convicted of rape where she aids and abets a male assailant in the rape of another woman. State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

And a husband may be guilty of the rape of his wife. (But see G.S. 14-27.8). State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967), overruled on other grounds, State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

Sufficiency of Evidence of Aiding and Abetting. — Where the testimony of each defendant tended to show that he was close by when the other was having intercourse with the victim, either sitting in the front seat of the car or leaning against the outside of the car, and where defendants' testimony and the relationship of each defendant to the other as cousins were consistent with a jury determination that each defendant knew and intended that the other would regard his presence as an encouragement and protection, the defendants' evidence did not tend to negate the element of aiding and abetting. State v. Amerson, 316 N.C. 161, 340 S.E.2d 98, cert. denied, 316 N.C. 161, 350 S.E.2d 859 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

X. INTENT.

Intent to commit the crime of rape is inferred from the commission of the act. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Perverse Intent. — Where the evidence was sufficiently clear that defendant violently sexually assaulted and murdered four year old as a part of the same violent transaction, it was not too speculative for the jury to infer that defendant committed these acts against the child with an intent to satisfy his perverse desires. State v. Kandies, 342 N.C. 419, 467 S.E.2d 67 (1996), cert. denied, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996).

To support a conviction for breaking or entering and attempted first-degree rape, the State's evidence must show that defendant broke or entered the victim's home with the intent to commit the felony of rape. In addition, the State's evidence must show that defendant had the intent to commit the crime of rape as defined by this section and that defendant committed an act which went beyond mere preparation, but fell short of the actual completion of the offense. State v. Parks, 78 N.C. App. 778, 336 S.E.2d 424 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

State Must Show Substantial Evidence of Intent. — Although to prove the charge of attempted first-degree rape the State is not required to show an actual physical attempt to have sexual intercourse with the victim, there must be substantial evidence that defendant had the intent to gratify his passion upon the victim notwithstanding any resistance on her part. State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990), holding evidence insufficient to convict defendant of attempted first-degree rape.

Testimony as to Statements Made by Defendant to Victim. — Testimony by rape victim that defendant acknowledged prior sexual offenses and that he stated he enjoyed degrading white women was admissible evidence relevant to show both defendant's motive for assaulting prosecutrix and possession of criminal intent before the fact. State v. Searles, 304 N.C. 149, 282 S.E.2d 430 (1981).

For discussion of sufficiency of evidence to justify an inference of intent to rape, see State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983).

XI. PENETRATION.

The legislature did not intend to alter the penetration required for the offense of rape when it enacted this section. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

Vaginal Intercourse Defined. — An essential element of rape under subdivision (a)(1) is vaginal intercourse, which is defined as the slightest penetration of the female sex organ by the male sex organ. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

Slightest Penetration Is Sufficient to Withstand a Motion to Dismiss. — For a charge of first-degree rape to withstand a motion to dismiss for insufficient evidence, there must be evidence, among other things, that defendant engaged in "vaginal intercourse" with the victim, however, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Testimony by child prosecutrix that defendant inserted his penis at least partially into her vagina was sufficient to show that defendant engaged in vaginal intercourse with prosecutrix, and discrepancies between the victim's testimony and the physical evidence, were for the jury to resolve and did not warrant dismissal of the discharge. State v. Weaver, 117 N.C. App. 434, 451 S.E.2d 15 (1994).

Penetration Without Emission Sufficient. — It shall not be necessary upon the trial of any indictment for the offense of rape to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

The slightest penetration of the sexual organ of the female by the sexual organ of the male amounts to carnal knowledge in a legal sense. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968).

As vaginal intercourse requires only the slightest penetration, the absence of sperm and other physical symptoms such as swelling or abrasions does not support a finding of attempted rape. State v. Ashley, 54 N.C. App. 386, 283 S.E.2d 805 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 381 (1982).

Evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown to prove the offense of rape. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Lack of Erection. — While penetration is best achieved when there is an erection, by no means can penetration to the degree necessary to satisfy the penetration element of rape be excluded because there is no erection. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Scope of Medical Expert's Testimony. — A medical expert may not testify that the defendant raped the prosecuting witness; however, a physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby. State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981).

Testimony that an examination revealed evidence of traumatic and forcible penetration consistent with an alleged rape is a proper expression for an expert witness to establish whether the victim had been penetrated by force. State v. Galloway, 304 N.C. 485, 284 S.E.2d 509 (1981).

Pregnancy as Tending to Show Penetration. — Testimony of the prosecutrix concerning her pregnancy tended to show penetration, one of the elements of rape. Defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense charged. Hence, evidence tending to prove penetration, an essential element of the offense, was properly admitted. State v. Cross, 284 N.C. 174, 200 S.E.2d 27 (1973).

Evidence of Penetration Held Sufficient. — Testimony by the prosecutrix in a rape case that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration. State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980).

Child's testimony that defendant had "put his private parts in my private parts," which was further clarified on direct examination, was sufficient to support the charge of first-degree rape. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

The State introduced sufficient evidence of penetration to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed the offense of incest and rape, where the child victim testified at trial that her father had penetrated her, even though there were discrepancies in her extrajudicial statements to others and in her trial testimony with regard to the manner, extent and frequency of the penetration. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Child's testimony, coupled with medical evidence, held sufficient evidence of a penetration to support a first-degree rape conviction. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Child's testimony and medical evidence held sufficient evidence of penetration to support a first-degree rape conviction. State v. Moore, 103 N.C. App. 87, 404 S.E.2d 695 (1991).

After threatening a victim with a knife and blinding her by taping her eyes shut, defendant penetrated the victim vaginally from the front, then withdrawing, turning her on her side and re-penetrating her vaginally; here, there was sufficient evidence to show that defendant committed two separate acts of first degree rape such that defendant's motion to dismiss the second count of first degree rape and defendant's motion to dismiss the second degree kidnapping charge were properly denied. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Evidence of Penetration Held Insufficient. — There was insufficient evidence that defendant engaged in vaginal intercourse with a child victim before the victim turned 13 to send a statutory rape charge under G.S. 14-27.2(a)(1) to the jury as the victim testified that the first time defendant had sex with the victim it was anal intercourse, and that although defendant began touching the victim earlier, the victim was 13 years old when defendant started having sexual intercourse with the victim. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Instruction on Attempted Rape Not Required. — Victim's testimony that defendant tried to make the victim have sex with defendant and the lack of medical evidence of penetration did not create a conflict that would necessitate an instruction on first-degree attempted rape under G.S. 14-27.2(a)(1) since: (1) an expert witness testimony as to a lack of trauma did not indicate lack of penetration; (2) there was evidence that defendant had inserted defendant's penis into the victim's vagina, which was corroborated; (3) a witness testified that defendant told the witness that defendant had had sex with the victim; and (4) the victim's testimony was consistent with penetration. State v. Thomas, 187 N.C. App. 140, 651 S.E.2d 924, 2007 N.C. App. LEXIS 2309 (2007).

Instruction Upheld. — The trial court did not err by instructing the jury that "vaginal intercourse" is defined to be penetration, however slight, of female sex organ by the male sex organ, rather than as defendant requested: "The slightest penetration of the female vagina by the male sex organ." State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

Although the victim's own testimony was perhaps scientifically inaccurate and somewhat ambiguous regarding the act of penetration, it was corroborated by the testimony of numerous other witnesses; therefore, the trial court did not err in denying the defendant's motion to dismiss the charge of first-degree rape. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

Evidence of Penetration Held Sufficient. — In a prosecution for first-degree statutory rape, under G.S. 14-27.2(a)(1), and second-degree forcible rape, under G.S. 14-27.3(a)(1), sufficient evidence was submitted of defendant's penetration of the victim, when the victim testified that defendant placed his penis between her legs, continued pushing, "it hurt," and she found blood on her underwear, and a physician testified that, although there was no indication of complete penetration, there was bruising of the inner lip of the labia minora near the hymen, so the denial of defendant's motion to dismiss for lack of sufficient evidence of penetration was proper, as complete penetration was not required. State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298, 2003 N.C. App. LEXIS 1432 (2003), cert. denied, 358 N.C. 733, 601 S.E.2d 863 (2004).

XII. CHARACTER OF VICTIM.

General Character Bears on Question of Consent. — The general character of the prosecutrix in a rape case may be shown as bearing upon the question of consent. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

And May Be Shown by Evidence of Reputation. — The most generally permissible method of proving character in a prosecution for rape is by evidence of the witness' reputation. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

The character of the alleged victim in a rape prosecution may be shown by evidence of her reputation as bearing upon the question of consent. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Testimony of Stranger Investigating Reputation. — A stranger who has investigated a person's reputation in the appropriate community may testify to the result of his investigation. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Unchastity Bears on Credibility and Consent. — In the case of a prosecuting witness over the age of 12 years the general character of the prosecuting witness for unchastity may be shown for the purpose of attacking the credibility of her testimony, and has bearing upon the likelihood of her consent. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

When a defendant has been charged with rape or with assault with intent to commit rape, evidence of the prosecutrix's reputation for unchastity is admissible both to attack her credibility as a witness and to show the likelihood of consent. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

In a prosecution for rape, the general character of the prosecutrix for unchastity may be shown both to attack the credibility of her testimony and as bearing upon the likelihood of consent. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), cert. denied, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

Specific Acts of Unchastity with Persons Other Than Defendant. — Testimony of specific acts of unchastity with person other than defendant is properly excluded. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), cert. denied, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

Specific acts of unchastity with persons other than defendant are inadmissible in rape cases. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

A witness called by the defendant cannot be asked about specific acts of misconduct by prosecutrix. This witness must confine himself to testimony concerning general reputation for chastity. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

The prosecutrix may be cross-examined concerning specific acts of unchastity for the sole purpose of impeaching credibility, but the defendant is bound by her answer. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

An accused in a prosecution for rape has a right to impeach the State's witness by competent evidence of bad reputation of the witness. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Evidence of Victim's Character Improperly Excluded. — Where the evidence of the victim's character was offered in a rape case according to the standard permissible method of proving character, since the witness's testimony was directed to the "general reputation and character" of the victim and not to his personal opinion, it was error for the court not to allow the jury to consider the witness's testimony on the issue of consent. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Charge Limiting Consideration of Character. — There was no prejudice to the defendant in the technically erroneous charge in a rape case limiting consideration of the victim's character to the issue of credibility and not allowing the jury to consider character on the issue of consent where the credibility of the victim's testimony that she did not consent was the key to the State's case, and there was no real distinction between the issue of the victim's credibility and the issue of her consent. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

XIII. EVIDENCE.

Evidence aliunde defendant's admissions held sufficient to satisfy the requirements of the corpus delicti rule, and when considered with defendant's confession, held sufficient to survive defendant's various motions to dismiss rape charge against him. State v. Sloan, 316 N.C. 714, 343 S.E.2d 527 (1986).

The unsupported testimony of the prosecutrix in a prosecution for rape is sufficient to require submission of the case to the jury. State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978).

Not Limited to Non-Fatal Injuries. — The statutes governing first-degree rape and first-degree sexual offense do not limit the injuries underlying the charge to those not resulting in death. State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998).

Testimony of Witnesses to Victim's Physical Condition. — Evidence of independent witnesses as to the physical condition of the prosecutrix on the night the intercourse occurred corroborates her testimony. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

Evidence of Defendant's Prior Sexual Misconduct. — Trial court's allowance of testimony by the eight-year-old victim regarding prior acts of sexual misconduct was not error; testimony was admissible to establish a common plan or scheme on the part of defendant to sexually molest his niece. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Defendant's convictions for first-degree rape of a child under the age of 13 were affirmed because evidence of defendant's prior sexual relations with his older half-daughter from about nine years earlier was properly admitted under G.S. 8C-1-404(b) to show a common scheme or plan; further, DNA evidence showing that defendant was the father of the victim's child, and thus must have had sexual intercourse with her, was admissible to show a common scheme or plan under Rule 404(b). State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Evidence of Victim's Past Sexual Behavior. — Defendant's request to cross-examine the prosecuting witness in rape trial, based upon his speculation that she was motivated to accuse him of rape because she was pregnant by her boyfriend, did not fall under an exception in G.S. 8C-1, Rule 412; therefore the trial court was correct in denying this line of questioning during cross-examination of the prosecuting witness. State v. Alverson, 91 N.C. App. 577, 372 S.E.2d 729 (1988).

Testimony as to Victim's Credibility Inadmissible. — Statements by an expert on child sexual abuse that she "had not picked up on anything" to suggest that someone had told the alleged victim what to say, and that she had no concerns that the alleged victim had been "coached," bore directly on the alleged victim's credibility and were inadmissible. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

The trial court erred by allowing the teacher of an alleged victim of sexual abuse to testify on direct examination regarding specific instances of the alleged victim's conduct which tended to establish her truthfulness. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

Victim's Testimony Consistent with Physical Evidence Held Substantial. — Where at trial, the victim, age nine, testified defendant, age 31, laid her on the ground, took off her shorts and panties and "put his thing in mine," and where doctor testified there was bruising on the sides of the victim's labia and a small laceration in the area of the fourchette, and in the doctor's expert opinion, this physical evidence was consistent with a penis having been forced through the victim's labia, there was substantial evidence that defendant engaged in vaginal intercourse with the victim. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Evidence Held Sufficient to Support the Serious Injury Element. — Where the defendant choked the victim into unconsciousness three times, her jeans were tied around her neck and used to drag her nude body through a wooded area where she was left, she had a deep red ring around her throat and bruises and abrasions over nearly her entire body, the victim testified that the defendant had tried to put her eyes out with his thumbs, the evidence, taken in the light most favorable to the State, supported the serious injury element of first-degree rape and first-degree sexual offense. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Victim's Out-of-Court Statements. — In defendant's trial for first-degree rape of a five-year-old, the victim's out-of-court statements to social worker contained sufficient guarantees of trustworthiness for admission under G.S. 8C-1, Rule 803(24). State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989), applying State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Statements Made for Purpose of Diagnosis and Treatment. — In a second-degree rape case, where doctor testified he asked the victim if "anything" was put inside her and the victim responded, "Yes", the victim's statements to the doctor were made for the purpose of diagnosis and treatment and were reasonably pertinent to the doctor's diagnosis and treatment; therefore, the question and answer were permitted as an exception to the general hearsay rule. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

Testimony Establishing Plan or Scheme. — The challenged testimony of the victim, her attending physician, and the investigating police officer tended to establish a plan or scheme by defendant to sexually abuse the victim when the victim's mother went to work; furthermore, as the alleged prior incidents occurred within twelve months prior to the incident for which defendant was charged, proof of the incidents was not so remote in time as to outweigh its probative force; therefore, the trial court did not err in allowing evidence of these prior incidents. State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988), cert. denied, 324 N.C. 341, 378 S.E.2d 806 (1989).

Expert Testimony About Behaviors Observed in Children Who Have Experienced Sexual Abuse. — Trial court did not abuse its discretion by allowing an expert witness who was called by the State during defendant's trial on charges of attempted first-degree rape and taking indecent liberties with a minor to testify about common characteristics and behaviors observed in children who experienced sexual abuse, even though the witness did not interview the victim or talk to her parents. State v. McCall, 162 N.C. App. 64, 589 S.E.2d 896, 2004 N.C. App. LEXIS 12 (2004).

Opinion Testimony as to Age of Defendant. — Lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the State. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Failure to Submit Proof of Age. — Noting the difficulty of determining the age of a juvenile by mere observation, particularly when the age of the juvenile at the time of the alleged offense, not at the time of trial, is the crucial determination, the court held that the charge of first-degree rape should have been dismissed at the close of the evidence because the State failed to offer any direct evidence of respondent's age. In re Jones, 135 N.C. App. 400, 520 S.E.2d 787, 1999 N.C. App. LEXIS 1158 (1999).

Leading Questions to Young Victim. — In trial charging defendant with rape of his 9-year-old sister, the trial court did not abuse its discretion by allowing leading questions to be asked of the prosecuting witness until she gave the desired answer that vaginal penetration had occurred. State v. Wilson, 322 N.C. 91, 366 S.E.2d 701 (1988).

Social Worker Had Become Agent of State. — In case involving crimes against child victim, where social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Date of Offense. — Where the jury was instructed that the State would be held to prove that offense involving a child victim occurred on or about a specified date, and defendant was given the benefit of this instruction and an opportunity to present alibi evidence for that date, which evidence the jury chose to disbelieve, the State would not be required to furnish conclusive proof that the offense occurred on that date. To force the State to admit of a date certain in order to accommodate defendant's alibi evidence, and then by convoluted reasoning to suggest that failure to prove that the offense occurred on that specific date was fatal to the State's case, would clearly frustrate the State's efforts to convict offenders on sex related offenses involving young children. State v. Wood, 311 N.C. 739, 319 S.E.2d 247 (1984).

Use of Term "Rape" in Testimony. — Victim's use of the term "rape" in her testimony was clearly a convenient shorthand term, amply defined by the balance of her testimony, and did not constitute an opinion on a question of law. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Testimony by the prosecutrix that defendant raped her did not invade the province of the jury since (1) the court sustained an objection to the testimony and (2) the testimony was competent as a shorthand statement of fact. State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

Testimony as to Odors and Voices of Assailants. — There was no merit to defendant's contention in a rape case that the trial court erroneously allowed the prosecutrix to identify the defendant by body odor and voice since prosecutrix never identified defendant but simply testified that she knew four men were involved because her assailants had four different body odors and she heard four different voices, and defendant admitted he was present with three other men. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Improper Advances Made Four Years

Before. — In a prosecution for rape of a female child under the age of 12 years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent evidence in corroboration of the offense charged. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 288 (1968).

Testimony as to Assault on Others at Time of Rape. — Testimony as to the events that occurred in a home from the time of defendant's violent entry until the consummation of rape was competent and relevant as part of the res gestae, including testimony that persons other than the rape victim had been assaulted by the defendant. State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971).

Assaults on Other Women on Same Date. — In a prosecution for first-degree rape, evidence that defendant committed assaults on two other women on the same date as the rape was competent to show defendant's state of mind and his common scheme and design to apply physical force in the commission of crimes of violence; furthermore, the two assaults were sufficiently close in time to the alleged rape that the incidents presented circumstances, not too remote in time to have probative value, which tended to aid the jury in understanding the conduct and motives of defendant. State v. Rick, 51 N.C. App. 383, 276 S.E.2d 768, aff'd, 304 N.C. 356, 283 S.E.2d 512 (1981).

Photographs. — Color photographs depicting the condition of the rape victim's body when examined by the doctor were competent for the purpose of illustrating the doctor's testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Letter Written by Defendant to Victim's Mother. — In prosecution for first-degree rape and intercourse by a substitute parent, the trial court did not commit prejudicial error in admitting into evidence, over objection, a letter which the defendant wrote to the victim's mother, in which defendant promised not to "bother" victim again, despite defendant's contention that what he had meant was that he would not discipline the victim anymore. State v. Moses, 316 N.C. 356, 341 S.E.2d 551 (1986).

In prosecution for first-degree rape under this section, court properly permitted testimony regarding a letter from defendant to victim's mother, and the State did not violate G.S. 15A-903(a)(1) when it failed to produce this letter, since it was never in the State's possession and defendant failed to show that the original was destroyed in bad faith, as required by G.S. 8C-1, Rule 1004. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corroborate the State's theory of the case, are competent. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Trial court properly admitted into evidence panties allegedly worn by defendant's eight-year-old niece and the results of lab tests performed on the panties since there was no prejudice by admission of the evidence in question. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Pubic Hair. — Where pubic hair found on the victim was "microscopically consistent" with defendant's pubic hair and could have originated from the defendant, it is admissible although an expert could not positively identify the defendant from the hair comparison. State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982).

In a rape case, a hair belonging to someone other than the victim found in her pubic area tended to show that the person from whom the hair came could have engaged in sexual contact with the victim. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

Semen. — The trial court did not err in allowing evidence that a medical examination disclosed the presence of semen in the victim's vagina, although there was no laboratory proof that the semen came from the defendant, where the victim testified that defendant had a climax when he had intercourse with her, and further testified that she did not have intercourse with anyone else that day, and the semen samples were taken shortly after the event. There is no requirement that there be laboratory proof of the source of semen before it can be introduced into evidence. State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985).

Previous Convictions of Aiders and Abettors. — In trial on charge of first degree rape, which was tried on the theory that defendant was the principal and two other men were aiders and abettors, evidence of the previous convictions of the other men was irrelevant under G.S. 8C-1, Rule 401, and being irrelevant, was not admissible. Further, the admission of such evidence violated the defendant's Sixth Amendment right to confront the witnesses against him with regard to this charge. State v. Brown, 319 N.C. 361, 354 S.E.2d 225 (1987).

Testimony Irrelevant. — Trial judge did not err by not allowing defendant's witnesses to testify that he had not molested their children and by not allowing several children to testify that he had not molested them since such testimony was totally irrelevant. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Evidence as to Weapon Admitted. — Victim's testimony regarding the shiny object in defendant's hand, which the victim believed to be a knife, was relevant to the first-degree rape charge. State v. Lawrence, 191 N.C. App. 422, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Evidence Held Sufficient to Support Dangerous Weapon Element. — Where the victim reasonably believed that the defendant had an object which was a dangerous weapon that he would use, the trial court did not err in denying defendant's motion to dismiss the first-degree rape charge on the grounds that there was no evidence to support a finding that a dangerous or deadly weapon was employed or displayed. State v. Mayse, 97 N.C. App. 559, 389 S.E.2d 585, cert. denied, 326 N.C. 803, 393 S.E.2d 903 (1990).

Evidence Held Sufficient to Support Force Element. — The evidence reasonably supported the inference that the victim had vaginal intercourse with defendant by force and against her will where her body was severely beaten, and testimony indicated that she was alive during the beating. State v. Moseley, 338 N.C. 1, 449 S.E.2d 412 (1994), cert. denied, 514 U.S. 1091, 115 S. Ct. 1815, 131 L. Ed. 2d 738 (1995).

Evidence Held Sufficient to Support Separate Charges and Convictions. — Evidence which showed two distinct acts of intercourse, both accomplished by force and over the repeated resistance of the victim, was sufficient to support separate charges and convictions of first degree rape charges. State v. Grimes, 96 N.C. App. 489, 386 S.E.2d 214 (1989), cert. denied, 327 N.C. 485, 397 S.E.2d 227 (1990).

Defendant's 11 convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the generic evidence in the form of the victim's testimony as to the acts that occurred approximately twice a week over a 10-month period was sufficient to support the convictions; thus, defendant's right to a unanimous verdict was not violated. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Evidence Held Sufficient. — Evidence aliunde defendant's admissions held sufficient to satisfy the requirements of the corpus delicti rule, and when considered with defendant's confession, held sufficient to survive defendant's various motions to dismiss rape charge against him. State v. Sloan, 316 N.C. 714, 343 S.E.2d 527 (1986).

As the victim testified that defendant had vaginal intercourse with her when she was 12, and defendant's testimony established that he was more than four years older than the victim, defendant's motion to dismiss first degree rape charges was properly denied. State v. Carter, — N.C. App. —, 679 S.E.2d 457, 2009 N.C. App. LEXIS 1174 (July 21, 2009).

Evidence held sufficient to withstand a motion to dismiss charge of first degree rape of ten-year-old victim. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

Evidence held sufficient to support conviction for first-degree rape of five-year-old, despite victim's inability to testify upon being adjudged incompetent as a witness. State v. Deanes, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, 490 U.S. 1101, 109 S. Ct. 2455, 104 L. Ed. 2d 1009 (1989).

Where the prosecuting witness testified that defendant removed her clothing, put her on top of him, and that she could feel something moving between her legs and defendant let her go only when her aunt drove into the driveway, the State met its burden of presenting substantial evidence on each element of the offense of attempted first degree rape. State v. Reynolds, 93 N.C. App. 552, 378 S.E.2d 557 (1989).

Evidence was sufficient to withstand defendant's motion to dismiss where at trial child testified that defendant pulled down her pajamas and laid her on the floor and although child did not respond when asked to point to where her private parts were located, the transcript revealed that she knew where they were since she answered affirmatively when asked if private parts "were [where he] goes to the bathroom," and doctor testified that the opening of the child's vagina was approximately two centimeters in diameter and there was evidence of tearing, and subsequent healing, of the hymen ring. State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989).

Victim's testimony that defendant had sexual intercourse with her on the couch and later in the bedroom was sufficient to allow the jury to draw the reasonable inference that defendant had vaginal intercourse with the victim, and victim's testimony that defendant threatened her with an open knife was sufficient to establish that defendant employed or displayed a dangerous or deadly weapon; therefore, trial court properly denied defendant's motion to dismiss rape charges. State v. Grimes, 96 N.C. App. 489, 386 S.E.2d 214 (1989), cert. denied, 327 N.C. 485, 397 S.E.2d 227 (1990).

Evidence is sufficient to show first-degree rape where the victim testified to many acts of vaginal intercourse by the defendants to which she did not consent, she recounted the threats by the defendants to hurt her with a butcher knife, which was found at the scene unless she cooperated, and the victim explained how the defendants held her arms and legs as each attempted vaginal intercourse and achieved some penetration. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

There was sufficient evidence from which a rational trier of fact could find in the present case that the defendant engaged in vaginal intercourse with victim by force and against her will while either employing a dangerous weapon or inflicting serious personal injury upon her. State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994).

Evidence that a murder victim was abducted from her apartment, that the defendant's sperm was found in her vagina, and that intercourse occurred in the woods where her body was found supported the finding that the defendant had intercourse with the victim against her will, thus supporting his conviction for first-degree rape and felony-murder. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

Evidence which included the testimony of victim, victim's mother, a police detective, a social worker and a counselor, was sufficient to support the charges of first-degree rape under this section. State v. Jarrell, 133 N.C. App. 264, 515 S.E.2d 247 (1999).

Sufficient evidence supported the defendant's conviction of first degree murder and first degree rape where the State's expert testified that the victim, who weighed 92 pounds and was less than five feet tall, had a series of small, superficial stab wounds on her throat, consistent with "compliance or intimidation wounds," and had "typical defense knife-type defense wounds" on the inside of her hands, her neck had been sliced with a knife, half-way severing her left jugular vein, and there was sperm inside her body. State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145, 2001 N.C. App. LEXIS 269 (2001), review denied, 353 N.C. 729, 551 S.E.2d 439 (2001).

Although the victim did not testify that defendant penetrated her vaginally, a nurse testified that the victim told her at the hospital the night of the crime that the men had penetrated both her vagina and her rectum and the victim testified that defendant had committed all the same sex acts that the co-defendant had, which include vaginal penetration; thus, the evidence was sufficient to convict defend. State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

In a prosecution for first-degree statutory rape, under G.S. 14-27.2(a)(1), and second-degree forcible rape, under G.S. 14-27.3(a)(1), sufficient evidence was submitted showing that defendant was the perpetrator when the victim testified that defendant raped her and repeated this story to several people, so the denial of defendant's motion to dismiss for lack of sufficient evidence that he was the perpetrator was proper, even though defendant presented evidence that he was not the perpetrator. State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298, 2003 N.C. App. LEXIS 1432 (2003), cert. denied, 358 N.C. 733, 601 S.E.2d 863 (2004).

Although a nurse and doctor who examined an alleged rape victim testified that they did not find conclusive physical evidence that a sex act occurred, this medical testimony did not negate the victim's testimony that defendant committed numerous sexual acts against her, which was corroborated by the forensic evidence; also, the State presented evidence of seminal fluid collected from the victim's bedroom that matched defendant's DNA. Therefore, the State presented sufficient evidence from which a jury could find that defendant committed first-degree statutory rape under G.S. 14-27.2(a)(1), first-degree sexual offense under G.S. 14-27.4(a)(1), and indecent liberties with a child under G.S. 14-202.1. State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004).

Defendant's adjudication for first-degree attempted rape was affirmed and the trial court did not err in denying defendant's motion to dismiss at the end of all the evidence, where: (1) defendant, who was 14 years old, told the victim, his 8-year-old step-sister, to come into his room; (2) when the victim entered the room, defendant pulled down her pants; (3) defendant then pulled down his own pants and touched the victim's vagina with his penis; (4) when he heard his step-mother coming, defendant ran to his closet while pulling up his pants; (4) the step-mother found the victim under the covers in defendant's bed not wearing pants or underwear; and (5) while the step-mother was in the room defendant hid in the closet. In re D.W., 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005).

Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at knifepoint from the front of her home to a bedroom and then sexually assaulted her constituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Complainant's testimony that defendant's penis penetrated her vagina "more than once" provided support for the rape charge provided sufficient evidence to support defendant's conviction; thus, the denial of defendant's motion to dismiss was proper. State v. Watson, 179

N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

Evidence supported defendant's conviction for rape, statutory rape, sex offense, statutory sex offense, and sex offense in a parental role as: (1) defendant attacked the 14-year-old victim over a period of hours; (2) defendant's expert testified that various wounds were inflicted while the victim was alive; (3) defendant raped the victim vaginally and anally while the victim was alive, leaving semen inside both her vagina and anus; (4) evidence from the victim's lung tissue showed the victim was alive for a substantial period of time after the brain injury was inflicted; and (5) after hitting the victim in the head, defendant walked around thinking about how to cover up the crime, attempted to clean the victim up, and then sexually assaulted her body, all part of the same episode. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Victim's testimony, corroborated by DNA evidence, that (1) defendant entered the victim's vagina with his penis, (2) defendant forced himself upon the victim, (3) the victim fought defendant and made it known that the victim did not want to engage in sexual intercourse with defendant, (4) defendant hit the victim with a bottle, (5) defendant brandished a knife, and (6) defendant choked the victim to unconsciousness with his hands, was sufficient to support defendant's conviction for first-degree rape. State v. Little, 188 N.C. App. 152, 654 S.E.2d 760, 2008 N.C. App. LEXIS 97 (2008).

Victim's testimony that defendant possessed a shiny, silver object which the victim thought was a knife, together with defendant's threatening behavior, was sufficient evidence that defendant displayed an article the victim reasonably believed was a dangerous weapon. Defendant's threats were also sufficiently connected in time to the sexual acts. State v. Lawrence, 191 N.C. App. 422, 663 S.E.2d 898, 2008 N.C. App. LEXIS 1509 (2008).

Sufficient evidence supported defendant's conviction of first degree rape, G.S. 14-27.2(a), as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Evidence Insufficient to Support Sentence. — While defendant assumed a leadership position in committing the offenses of kidnapping and rape, there was insufficient evidence that defendant acted with more than one other person or that defendant was in a position of trust and confidence with the victim; thus, the trial court's imposition of a sentence in excess of the presumptive range was erroneous and an abuse of discretion. State v. Rogers, 157 N.C. App. 127, 577 S.E.2d 666 (2003).

XIV. INSTRUCTIONS.

Failure to Instruct as to Force. — An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held reversible error. State v. Simmons, 228 N.C. 258, 45 S.E.2d 121 (1947).

Failure to Charge on Lesser Offense Proper. — The court's failure to charge the jury on a lesser crime than rape as principals and to submit guilt of a lesser offense as a permissible verdict was not error since there was no evidence from which the jury could find that any defendant committed an included crime of lesser degree. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72; 414 U.S. 869, 94 S. Ct. 182, 38 L. Ed. 2d 116 (1973).

The trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Where all the evidence in a prosecution for rape revealed a completed act of sexual intercourse and the only dispute between the State and the defendant was whether the act was accomplished by consent or by force, there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977); State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

Where all the State's evidence indicated that vaginal penetration of the victim by defendant took place after he showed her a knife and that the victim was in fear for her life, while defendant's evidence was that he entered victim's home at her invitation and that the act of sexual intercourse occurred with victim's consent, there was no evidence of second degree rape, and no instruction thereon was required. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Where there was no evidence to support a verdict of rape in the second degree, all of the evidence showing either rape in the first degree or no rape at all, the trial judge was not required to submit the lesser offense. State v. Kinch, 314 N.C. 99, 331 S.E.2d 665 (1985).

In a trial for first-degree rape when all the evidence tended to show that the accused committed the crime with which he was charged and there was no evidence of guilt of the lesser-included offense of attempted first-degree rape, the court correctly refused to charge on the unsupported lesser offense. State v. McNicholas, 322 N.C. 548, 369 S.E.2d 569 (1988).

In a first-degree rape case, where the State introduced sufficient evidence of vaginal penetration through the victim's testimony to permit a rational jury to find beyond a reasonable doubt that defendant engaged in forced intercourse with the victim, there was no error in the court's refusal to instruct on lesser included offenses. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Although defendant contended that there was "substantial doubt" that he employed or used a dangerous or deadly weapon in the commission of rape, any "doubt" on this issue was for the jury to resolve; therefore, there being no evidentiary basis on which to submit second-degree rape charges to the jury, the trial court properly denied defendant's request therefor. State v. Grimes, 96 N.C. App. 489, 386 S.E.2d 214 (1989), cert. denied, 327 N.C. 485, 397 S.E.2d 227 (1990).

Pursuant to G.S. 15-144.1, trial court properly declined to instruct a jury regarding assault on a female. Conduct that defendant relied on as supporting the assault charge was unrelated to the conduct supporting the first degree rape conviction, under G.S. 14-27.2; however, that conduct supported the G.S. 14-39 kidnapping conviction. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

When Instructions on Lesser Included Offense Are Warranted. — Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning crucial elements of the offense. State v. Charles, 92 N.C. App. 430, 374 S.E.2d 658 (1988), cert. denied, 324 N.C. 338, 378 S.E.2d 800 (1989).

Where the evidence in the record only tended to establish that defendant raped his minor niece, the court did not err in denying defendant's requested instruction on attempted first degree rape. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

When Charge on Lesser Included Offense Not Warranted. — When the State seeks a conviction only on the greater offense and tries the case on an "all or nothing basis," the trial court needs to present an instruction on the lesser offense only when the defendant presents evidence thereof or when the State's evidence is conflicting; hence, in case in which the State proceeded on an "all or nothing basis" in prosecution of defendant for first-degree sexual offense and first-degree rape of two year old, the trial court did not err in refusing to instruct the jury on attempted first-degree rape and attempted first-degree sexual assault. State v. Ward, 118 N.C. App. 460, 455 S.E.2d 666 (1995).

When Charge on Attempted Rape Is Warranted. — Instructions pertaining to attempted first-degree rape as a lesser included offense of first-degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts, or when, from the evidence presented, the jury may draw conflicting inferences. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

When Charge of Attempted Rape Not Required. — Where there is evidence of some penetration sufficient to support a conviction of rape and defendant denies having had any sexual relations with the victim, defendant is not entitled to a charge of attempted rape. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Where defendant's confession was the only evidence introduced at trial establishing his participation in the gang rape of an 11-year old victim, the trial court correctly refused to instruct the jury on attempted rape. State v. Brown, 112 N.C. App. 390, 436 S.E.2d 163 (1993), petition denied as to additional issues, 335 N.C. 561, 441 S.E.2d 124 (1994), aff'd, 339 N.C. 606, 453 S.E.2d 165 (1995).

Defendants were not entitled to a jury instruction on second-degree rape where the State's evidence tended to prove a first-degree rape, and defendants' evidence did not conflict with the State's evidence as to whether each defendant aided and abetted the other, but instead, was itself sufficient to support the jury in finding the element of aiding and abetting, by acts of encouragement and protection, and conflicted with the State's evidence only on the issue of consent. State v. Amerson, 316 N.C. 161, 340 S.E.2d 98 (1986), cert. denied, 316 N.C. 161, 350 S.E.2d 859 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Defendant was not entitled to an instruction on the lesser included offense of second-degree rape, where he had an open knife in his hand or lying in the open easily within his reach during all times pertinent to his act of sexual intercourse with the victim, the evidence would not support a reasonable finding that the victim was not aware of the knife, and defendant's statement to a police officer only amounted to a description of how he employed or displayed the knife, not a denial that he had employed or displayed a knife. State v. Langford, 319 N.C. 332, 354 S.E.2d 518 (1987).

Defendant's mere failure to recollect whether he had knife open during rape created no conflict with victim's clear and unequivocal testimony that he held the open knife to her throat. Nor was a conflict created in the evidence by victim's response on cross-examination to the question of whether she actually saw a knife or whether the knife was "just mentioned," as taking her answer in light of her other testimony concerning the knife, it was clear that she answered, in effect, that the knife was not "just mentioned," and that she actually saw the knife as defendant brought it to her throat. In fact, victim was even able to estimate the length of the open blade before it was placed to her throat. Therefore, defendant was not entitled to an instruction on the lesser offense of second-degree rape. State v. Langford, 319 N.C. 340, 354 S.E.2d 523 (1987).

Instruction on Lesser-Included Offense Properly Denied. — Where both defendant and the victim agreed that weapons were displayed during the altercation, and the only fact in dispute was whether the sex was consensual; the trial court correctly denied the instruction to charge on a lesser-included offense. State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906, cert. denied, 336 N.C. 613, 447 S.E.2d 409 (1994).

Lesser Offenses Improperly Submitted to Jury. — In prosecutions for rape, when all the evidence tended to show a completed act of intercourse and the only issue was whether the act was with the prosecuting witness's consent or by force and against her will, it was not proper to submit to the jury lesser offenses included within a charge of rape. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

Instruction on "Use of Deadly Weapon". — The state is only required to show that defendant possessed a deadly or dangerous weapon at the time of the rape and that the victim was aware of the presence of the weapon because it had been displayed or employed; therefore, although the trial court's instruction did not emphasize the victim's awareness of the weapon, the instruction made clear that the state was required to prove that the weapon was displayed in some fashion, and there was no error. State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383, cert. denied, 325 N.C. 435, 384 S.E.2d 545 (1989).

Appellate court affirmed defendant's first-degree rape conviction, where defendant did not object to the jury instruction, because, even if the trial court erred by instructing the jury that a knife was a dangerous weapon as a matter of law, the trial court's instruction did not amount to plain error as, in light of the entire record, particularly the victim's testimony that she knew it was a knife that defendant took from his pocket, that she asked him not to hurt her upon seeing the knife, and that she was scared, the jury likely would have found that the victim reasonably believed the knife to be a dangerous or deadly weapon. State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006), review denied, 360 N.C. 578, 635 S.E.2d 902 (2006).

Withdrawal of Request for Instructions Held Voluntary. — Defendant on trial for first-degree rape and first-degree sexual offense was not forced by any erroneous ruling of the trial court to withdraw his request for instructions; accordingly, the defendant's withdrawal of his request for instructions on involuntary commitment was voluntary and not improperly coerced by a mistaken ruling of the trial court. State v. Coppage, 94 N.C. App. 630, 381 S.E.2d 169, cert. denied, 325 N.C. 547, 385 S.E.2d 503 (1989).

Instruction on Defendant's Admission as to Presence. — In a prosecution for first-degree rape where the trial court instructed that the defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of a fact relating to the crime charged, there was no merit to defendant's contention that such instruction could have led the jury to believe that his mere presence was sufficient for conviction and that he had therefore committed the crime, since the trial court's instructions made clear what the jury must find in order to convict defendant. State v. Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Prejudicial Expression of Opinion by Judge. — The trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her" intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

Instructions Permitting Conviction of Both Defendants If One Found Guilty. — Where jury instructions in case in which two defendants were jointly tried for rape and murder were susceptible to the construction that the jury should convict both if it found one guilty, defendants would be granted a new trial as to the charges against them. State v. McCollum, 321 N.C. 557, 364 S.E.2d 112 (1988).

Failure to Instruct on Corroborative Evidence. — Where the evidence clearly showed that defendant engaged in sexual acts with child on more than one occasion, the State focused the child's testimony on the incident in question and made it clear that defendant was charged for committing that act, and the jury was charged solely as to this incident, there was no prejudicial error in failing to instruct on corroborative evidence. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

Instruction Held Proper. — Where instruction given in first-degree rape case was essentially the pattern jury instruction in N.C.P.I. — Crim. 101.36, there was no error, under the "plain error" doctrine or otherwise. State v. Ayers, 92 N.C. App. 364, 374 S.E.2d 428 (1988).

Instructions as to state's burden in proving first-degree rape, and on the consequences of jury's finding that defendant was insane at the time he perpetrated the crime, were held proper. State v. Coppage, 94 N.C. App. 630, 381 S.E.2d 169, cert. denied, 325 N.C. 547, 385 S.E.2d 503 (1989).

Trial court did not err in declining to instruct the jury on attempted first degree rape where there was no evidence that defendant merely attempted to rape the victim and all of the State's evidence tended to show that defendant penetrated the victim. State v. Green, 95 N.C. App. 558, 383 S.E.2d 419 (1989).

Trial court properly instructed the jury that it could find defendant guilty of the crimes of first-degree rape and first degree sexual offense if it found that defendant either displayed a dangerous or deadly weapon or was aided and abetted by one or more other persons during their commission, pursuant to G.S. 14-27.2(a)(2)(a) and (c) and G.S. 14-27.4(a)(2)(a) and (c). State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Defendant's convictions for first-degree rape of a child under the age of 13, in violation of G.S. 14-27.2(a)(1), were affirmed because the trial court properly instructed the jury on all 11 counts as its charge on the initial instruction on the elements of first-degree rape applied to all 11 counts. State v. Bullock, 178 N.C. App. 460, 631 S.E.2d 868, 2006 N.C. App. LEXIS 1572 (2006).

Instruction on Serious Injury Held Not Error. — In prosecution for first-degree rape and first-degree sexual offense, the trial court did not err in instructing the jury on the element of serious injury, where the trial court corrected its instructions on the mental element of serious injury when the lack of any evidence tending to show mental injury was drawn to the court's attention, and the trial court then specifically instructed the jury that there was no evidence of mental injury in the present case and that the jury's sole consideration was whether there was serious bodily injury. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Instruction Held Improper. — In a case in which the defendant and an accomplice raped a woman, defendant was entitled to a new trial on the charge of first degree rape by acting in concert with someone else because the jury instruction referred to guilt both as a principle and by acting in concert, which allowed the jury to convict defendant twice for the same crime, in violation of double jeopardy rights. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

XV. ATTEMPT.

Editor's Note. — *Many of the cases cited below were decided under former G.S. 14-27.6 or other prior provisions.*

Assault with Intent to Commit Rape Under Former § 14-22. — See State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972); State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972); State v. Rice, 18 N.C. App. 575, 197 S.E.2d 245, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973); State v. Dais, 22 N.C. App. 379, 206 S.E.2d 759, appeal dismissed, 285 N.C. 664, 207 S.E.2d 758 (1974); State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975); State v. Bradshaw, 27 N.C. App. 485, 219 S.E.2d 561 (1975), cert. denied, 289 N.C. 299, 222 S.E.2d 699 (1976); State v. Giles, 34 N.C. App. 112, 237 S.E.2d 305 (1977); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

Elements of Proof. — In order to prove the offense set forth in former G.S. 14-27.6, the State must prove that an accused had the intent to commit the crime and committed an act that goes beyond mere preparation, but falls short of actual commission of the offense. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982); State v. Moser, 74 N.C. App. 216, 328 S.E.2d 315 (1985); State v. Harris, 319 N.C. 383, 354 S.E.2d 222 (1987).

An attempt to commit rape has the elements of (1) an intent to commit rape, and (2) an overt act done for that purpose, which goes beyond mere preparation, but falls short of the completed offense. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

Before a defendant may be convicted of attempted rape, the State must prove, beyond a reasonable doubt, that the defendant: (1) had the specific intent to rape the victim, and (2) committed an act which went beyond mere preparation but fell short of the actual commission of the rape. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987); State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

Intent is an essential element of attempted rape. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

State Must Show Substantial Evidence of Defendant's Intent. — Although to prove the charge of attempted first-degree rape the State is not required to show an actual physical attempt to have sexual intercourse with the victim, there must be substantial evidence that defendant had the intent to gratify his passion upon the victim notwithstanding any resistance on her part. State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990), holding evidence insufficient to convict defendant of attempted first-degree rape.

Proof of Intent to Rape. — To show an intent to rape, the State must prove that defendant intended to have sexual intercourse with the victim notwithstanding any resistance on her part. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Sexually motivated assaults may give rise to an inference that defendant intended to rape his victim, notwithstanding that other inferences are also possible. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987); State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

State Need Not Show Actual Physical Attempt to Have Intercourse. — To convict a defendant of attempted rape, the state is not required to show that he made an actual physical attempt to have intercourse. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

The State need not show that the defendant made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident. State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

It is sufficient if defendant has the intent to rape at any point during the assault, and it need not be shown that he made an actual, physical attempt to have intercourse. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

The element of intent is established if the evidence shows that defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part. It is not necessary that defendant retain the intent throughout the incident. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988); State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

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The State need not show that the defendant made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident. State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

Conviction Under Former § 14-27.6 and § 14-32 Not Double Jeopardy. — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

Intoxication may be a valid defense to the crime of attempted rape. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Attempted Rape of Child. — In order to prove attempted first degree rape of three and a half year old, the State had to show that victim was 12 years old or less, that defendant was at least 12 years old and at least four years older than victim, that defendant had the intent to engage in vaginal intercourse with victim, and that defendant committed an act that went beyond mere preparation but fell short of actual commission of intercourse. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), cert. denied, 316 N.C. 382, 342 S.E.2d 901 (1986).

To support a conviction for breaking or entering and attempted first-degree rape, the State's evidence must show that defendant broke or entered the victim's home with the intent to commit the felony of rape. In addition, the State's evidence must show that defendant had the intent to commit the crime of rape as defined by G.S. 14-27.2 and that defendant committed an act which went beyond mere preparation, but fell short of the actual completion of the offense. State v. Parks, 77 N.C. App. 778, 336 S.E.2d 424 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Admissibility of Other Acts Establishing Pattern of Conduct. — In a prosecution for attempted rape by defendant of his stepdaughter, testimony which tends to show that defendant systematically engaged in nonconsensual sexual relations with his stepdaughters as they matured physically, a pattern of conduct embracing the offense charged, is properly admitted. State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982).

Admissibility of Prior Conviction. — Evidence of defendant's prior conviction in 1977 for assault with intent to rape, as well as his recent release from prison, offered to prove that his intent in assaulting and kidnapping his victim was to rape her, was properly admitted for that purpose in trial for kidnapping and attempted rape. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Instructions pertaining to attempted first-degree rape as a lesser included offense of first degree rape are warranted when the evidence pertaining to the crucial element of penetration conflicts or when, from the evidence presented, the jury may draw conflicting inferences. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

An attempt instruction is not warranted merely because there is no medical evidence of penetration or other physical symptoms, as long as there is sufficient evidence of completed acts of fellatio and anal intercourse. State v. Callahan, 86 N.C. App. 88, 356 S.E.2d 403 (1987), aff'd, 93 N.C. App. 579, 378 S.E.2d 812 (1989).

The fact that defendant verbally manifested his intent to rob the victim when he first grabbed hold of her did not exclude a reasonable inference by the jury that once defendant learned that the victim had no money, he formed the intent to gain some other gratification from the situation. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

Evidence Held Sufficient. — The evidence supported a reasonable inference that defendant removed his victim for the purpose of facilitating an attempt to rape her, where he grabbed her by the throat, ordered her to drive to a secluded, deserted parking lot beside a bus and turn off her taxi's lights, he commanded her to pull her pants down to her knees and inquired about her underclothing, and he stated his intent to commit at least one manner of sexual attack on her, not necessarily to the exclusion of any other. The jury could have reasonably inferred that, but for the victim's ingenuity and courage, she would have been subjected to attempted forcible sexual intercourse. State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986).

Evidence held sufficient to allow a jury to infer that defendant intended to rape his victim. State v. Hall, 85 N.C. App. 447, 355 S.E.2d 250, cert. denied, 320 N.C. 515, 358 S.E.2d 525 (1987).

Evidence of 20-year-old defendant's action with nine-year-old child was sufficient to support the jury's verdict that defendant was guilty of attempted first-degree rape, even though he stopped when she started to cry. State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987).

Testimony of victim that defendant dragged her down a hallway toward a guest bedroom, put his hand down over her shoulder and down the front of her shirt, and grabbed her breasts was sufficient circumstantial evidence from which the jury could infer defendant's intent to engage in vaginal intercourse with the victim by force and against her will. State v. Schultz, 88 N.C. App. 197, 362 S.E.2d 853 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 386 (1988).

Where defendant grabbed the victim from behind; dragged her several feet; forced her to the ground, covering her mouth with hand; and proceeded to fondle her without her consent, desisting only after she kicked his groin area, this was ample evidence to support an inference that defendant, at some point during the attack, intended to forcibly rape the victim despite her resistance. State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

Where the defendant was playing with his pants zipper prior to the attack and during the attack he fumbled with the victim's shorts and then began rubbing her crotch, this constituted sufficient evidence of overt sexual behavior from which the jury could properly infer, notwithstanding the possibility of other inferences, that defendant intended to engage in vaginal intercourse with his victim. State v. Dunston, 90 N.C. App. 622, 369 S.E.2d 636 (1988).

State proved intent in an attempted first-degree forcible rape trial because defendant's forcing the victim to undress at knife point and then stabbing her when she refused to approach constituted an overt act manifesting a sexual purpose or motivation. State v. Owen, 159 N.C. App. 204, 582 S.E.2d 689, 2003 N.C. App. LEXIS 1443 (2003).

Evidence Held Insufficient. — Evidence of defendant's intent was, at most, ambiguous where, as vicious as the attack was, the only suggestion of a sexual component was defendant's persistent attempts to have the victim roll onto her stomach; while defendant's behavior allowed speculation as to why he wanted the victim prone rather than supine or on her side, this behavior was not substantial evidence allowing a reasonable conclusion that defendant had an intent to gratify his passion on the victim notwithstanding her resistance. State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858, 2000 N.C. App. LEXIS 986 (2000).

Charge Improper. — It was error for the Court of Appeals to hold the lesser included offense of attempted second degree rape should have been submitted where the state submitted positive evidence of every element of the crime and the defendant testified that the event was consensual. If the jury had believed the defendant's evidence, he would have been found not guilty; the defendant did not present evidence of a lesser included offense. State v. Nelson, 341 N.C. 695, 462 S.E.2d 225 (1995).

Sufficiency of Evidence to Support Felony Murder Charge. — Evidence as to the position of the victim's legs and evidence of the removal of clothes from the lower part of the victim's body was sufficient, with other evidence, to be submitted to the jury on a charge of felony murder when the underlying felony was attempted rape. State v. Harris, 319 N.C. 383, 354 S.E.2d 222 (1987).

§ 14-27.2A. Rape of a child; adult offender.

(a) A person is guilty of rape of a child if the person is at least 18 years of age and engages in vaginal intercourse with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child born as a result of the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes.

(e) The offense under G.S. 14-27.2(a)(1) is a lesser included offense of the offense in this section. (2008-117, s. 1.)

Editor's Note. — Session Laws 2008-117, s. 22, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-27.3. Second-degree rape.

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony.

(c) Upon conviction, a person convicted under this section has no rights to custody of or rights of inheritance from any child conceived during the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 or Subchapter 1 of Chapter 7B of the General Statutes. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 5; 1981, cc. 63, 179; 1993, c. 539, s. 1130; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(b); 2004-128, s. 8.)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to essentials of bill of indictment for rape, see G.S. 15-144.1. As to venue of trial of sex offenses where victim was transported, see G.S. 15A-136. As to office of coordinator of services for victims of sexual assault, see G.S. 143B-394.1 through 143B-394.3.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For comment, "The Use of Rape Trauma Syndrome as Evidence in a Rape Trial: Valid or Invalid?", see 21 Wake Forest L. Rev. 93 (1985).

For note discussing whether sex with a sleeping woman meets the requirements of force and lack of consent, see 65 N.C.L. Rev. 1246 (1987).

For note entitled, "Michigan v. Lucas: Failure to Define the State Interest in Rape Shield Legislation," see 70 N.C.L. Rev. 1592 (1992).

For survey on constructive force as an element of second-degree rape, see 70 N.C.L. Rev. 2027 (1992).

For note, "Serious Personal Injury Requirement for Rape Is Met by Mental Injury Alone — State v. Baker," see 21 N.C. Cent. L.J. 368 (1995).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
III. Evidence.
IV. Instructions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Some of the annotations under this section are from cases decided under former similar statutory provisions.*

First and Second-Degree Rape Distinguished. — The sole distinction between the crimes of first and second-degree rape is the element of the use of a deadly weapon or aiding and abetting. If serious bodily injury is inflicted, the crime is also first-degree rape. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

While serious injury can be used to support a first-degree rape conviction, this element is not required for a conviction of second-degree rape. Mental injuries associated with the crime are sufficient to make a crime first degree rape, but they must be associated with the rape, but the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "res gestae" results present in every forcible rape. State v. Finney, 358 N.C. 79, 591 S.E.2d 863, 2004 N.C. LEXIS 10 (2004).

Custodial Sexual Offense Distinguished. — Second-degree rape and second-degree sexual offense require an act by force and against the will of another person; custodial sexual offense does not. Custodial sexual offense requires that the perpetrator, or the perpetrator's principal or employer, have custody of the victim; second-degree rape and second-degree sexual offense do not. Custodial sexual offense thus requires proof of a fact which second-degree rape and second-degree sexual offense do not, and both second-degree rape and second-degree sexual offense require proof of a fact which custodial sexual offense does not. Double jeopardy considerations thus are not implicated. State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987).

Contributing to Delinquency of a Minor Is Separate Crime. — Even though the crimes of second-degree rape and contributing to the delinquency of a minor are related in character and grow out of the same transaction, they are legally distinct and separate crimes. The prosecution for one is not a bar to a prosecution for the other. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

And Is Not a Lesser Included Offense of Second-Degree Rape. — The act of sexual intercourse is not inherent to the crime of contributing to the delinquency of a minor under G.S. 14-316.1. Therefore, this offense is not a lesser included offense of second-degree rape pursuant to this section. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Discretion as to the punishment for rape in the second degree is vested in the trial court, not the Supreme Court. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Sentencing Factors. — Where a defendant has been charged with rape in the first degree under subdivision (a)(1) of G.S. 14-27.2 but has pled guilty to rape in the second degree under subdivision (a)(2) of this section, if the sentencing judge concludes by a preponderance of the evidence that the defendant had used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983).

Because the age of the victim is not a necessary element of second-degree rape, and a determination by a preponderance of the evidence in the sentencing phase that the defendant raped a 11-year-old child is reasonably related to the purpose of sentencing, the age of a victim under 13 may be considered as a nonstatutory aggravating factor in sentencing for second-degree rape. State v. Vanstory, 84 N.C. App. 535, 353 S.E.2d 236, cert. denied, 320 N.C. 176, 358 S.E.2d 67 (1987).

Construction with Other Provisions. — The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting involve the "use or threat of violence to the person" within the meaning of G.S. 15A-2000(e)(3). State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), cert. denied, 522 U.S. 1126, 118 S. Ct. 1074, 140 L. Ed. 2d 132 (1998).

Sufficiency of Indictment. — The indictment upon which defendant was tried charged common-law rape, and its language was clearly sufficient to embrace second-degree rape as defined by this section. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

Where G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1), the statutes defining second-degree rape and second-degree sexual offense, required the offenses to be against "another person," the indictments charging these offenses did not need to state the victim's full name, nor did they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. Therefore, the test in Coker, that a person of common understanding would know the intent of the indictments, was met. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

An indictment which charged that the defendant "did, unlawfully, willfully and feloniously ravish and carnally know, by force and against her will," the prosecuting witness, a female, charged all of the elements of second-degree rape. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Where the statutes defining second-degree rape and second-degree sexual offense (G.S. 14-27.3 and G.S. 14-27.5) require the offenses to be against "another person," the indictments charging these offenses do not need to state the victim's full given name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. An indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

Indictment Upheld. — While it would have been the better practice for the indictment to simply charge the defendant with the intent to commit second-degree rape, charging intent to commit attempted second-degree rape is not fatally defective. State v. Whitaker, 76 N.C. App. 52, 331 S.E.2d 752 (1985), modified on other grounds, 316 N.C. 515, 342 S.E.2d 514 (1986).

Indictments tracked the statutory language of G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). Therefore, "RTB" was sufficient to inform defendant that he was charged with second-degree rape and second-degree sexual offense against "another person." State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

In order to determine if the lack of a victim's full name renders indictments fatally defective, courts apply the tests set forth in Coker and Lowe to inquire (1) whether a person of common understanding would know that the intent of the indictments was to charge a defendant with second-degree rape and second-degree sexual offense, violations of G.S. 14-27.3 and G.S. 14-27.5, and (2) whether a defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by the use of the victim's initials. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

Use of Words "And/Or" in Indictment

Acceptable. — Use of the words "and/or" did not render a short form indictment for rape facially invalid because a person of common understanding would known that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify defendant of the charges against him in order to prepare an adequate defense and to protect him from being punished a second time for the same act. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Minor plaintiffs' action against their father for willfully assaulting, abusing, molesting and raping them was improperly dismissed under the provisions of G.S. 1A-1, Rule 12(b)(6) on the ground that the action was barred by the parental immunity doctrine. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

Inapplicability of Doctrine of Parental Immunity. — Where a father's acts against his minor daughters constituted incest in violation of this section, G.S. 14-178, and second degree sexual offense in violation of G.S. 14-27.5, and caused plaintiffs to suffer permanent physical, emotional and mental injuries, the doctrine of parental immunity will not bar a civil suit against him. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

A proper indictment for the rape of a person who is asleep is one alleging rape of a "physically helpless" person. State v. Moorman, 82 N.C. App. 594, 347 S.E.2d 857, reversed on other grounds, 320 N.C. 387, 358 S.E.2d 502 (1987).

For discussion of sufficiency of evidence to justify an inference of intent to rape, see State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983).

No Variance Where Indictment Alleged Use of Force and Proof Showed That Victim Was Asleep. — Where evidence showed that penetration and the initiation of sexual intercourse was achieved while the prosecutrix was asleep and unable to communicate an unwillingness to submit to the act, there was no fatal variance between the indictment's allegations that defendant carnally knew the prosecutrix by force and against her will and the proof the State presented at trial, and judgment of second-degree rape charge would not be arrested. State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. State v. Jones, 317 N.C. 487, 346 S.E.2d 657 (1986).

Failure to Submit Crime as Charged in Indictment. — Where defendant was charged with forcible first-degree rape, the failure of the trial court to submit the case to the jury pursuant to such crime as charged in the indictment amounted to a dismissal of that charge and all lesser included offenses. Therefore, by this failure the trial judge dismissed the first and second-degree rape charges alleged in the indictment. State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

Where the jury was instructed and reached its verdict on the basis of the elements set out in G.S. 14-27.2(a)(1), whereas defendant had been charged with rape on the basis of the elements set out in G.S. 14-27.2(a)(2) and in subdivision (a)(1) of this section, the indictment under which defendant was brought to trial could not be considered to have been a valid basis on which to rest the judgment. State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

Separate Acts of Intercourse. — Where the evidence as to each of three separate acts of forcible intercourse was complete and sufficient to sustain a conviction of second degree rape without resort to the evidence necessary to prove either of the other rape charges, each of the three acts of forcible vaginal intercourse with the victim was a separate rape, and defendant was properly convicted and sentenced for all three offenses. State v. Midyette, 87 N.C. App. 199, 360 S.E.2d 507 (1987), aff'd, 322 N.C. 108, 366 S.E.2d 440 (1988).

Where there was only one sexual assault, the second-degree rape of the victim, which could have formed the "sexual assault" element of the first-degree kidnapping conviction, and since the rape was used to raise the kidnapping to first-degree, the defendant was convicted more than once for the same offense in violation of the prohibition against double jeopardy. Therefore, the case was remanded to the trial court for a new sentencing hearing, to either arrest judgment on the first-degree kidnapping conviction and resentence the defendant for second-degree kidnapping, or arrest judgment on the second-degree rape conviction. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Double Jeopardy Not Shown. — Defendant's convictions of two violations of G.S. 14-27.7, for engaging in a sexual act and in intercourse with a person over whom his employer had custody, following his earlier acquittal of second-degree rape under this section and committing a sex act on a person who was physically helpless under G.S. 14-27.5, and vacation of his conviction of engaging in a sex act by force and against victim's will in violation of G.S. 14-27.5, did not violate the double jeopardy clauses of the U.S. Const., Amend. V and N.C. Const., Art. I, § 19, as the offenses that defendant was convicted of were not lesser included offenses of other crimes that he was earlier tried for. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138 (1986), aff'd, 319 N.C. 258, 354 S.E.2d 486 (1987).

At trial for second-degree rape, the defendant was furnished with an opportunity to plead and offer evidence to sustain his plea of former jeopardy by proving that the sexual act at issue, not the alcohol related instances, were the basis of his earlier plea of guilty to charges of contributing to the delinquency of a minor; however, defendant failed to do so. Thus, defendant's assertion that the factual basis for the acceptance of his guilty plea was solely based upon the sexual act was too speculative and wholly insufficient to establish his burden of proof. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Standing to Challenge Section. — Defendant who was neither "mentally defective," "mentally incapacitated," nor "physically helpless" had no standing to challenge the constitutionality of this section on grounds that it unconstitutionally infringed upon a physically handicapped or mentally disabled person's right to privacy by intruding upon such a person's right to engage in consensual vaginal intercourse. State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804, cert. denied and appeal dismissed, 320 N.C. 175, 358 S.E.2d 66, 358 S.E.2d 67 (1987).

Indictment Defective. — Indictment of defendant for statutory rape was insufficient to support a judgment on the offense of attempted second degree rape, where the indictment failed to charge essential elements of the offense of attempted second degree rape. Because the indictment was fatally defective, defendant's conviction for attempted second degree rape was a nullity. State v. Frink, 177 N.C. App. 144, 627 S.E.2d 472, 2006 N.C. App. LEXIS 689 (2006).

Applied in State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); State v. Barnes, 56 N.C. App. 515, 289 S.E.2d 580 (1982); State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527 (1987); State v. Scott, 323 N.C. 350, 372 S.E.2d 572 (1988); State v. Baker, 109 N.C. App. 557, 428 S.E.2d 216 (1993); Johnson v. Commonwealth, 53 Va. App. 608, 674 S.E.2d 541, 2009 Va. App. LEXIS 157 (2009).

Cited in State v. Green, 336 N.C. 142, 443 S.E.2d 14; State v. Ashley, 54 N.C. App. 386, 283 S.E.2d 805 (1981); State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Pace, 51 N.C. App. 79, 275 S.E.2d 254 (1981); State v. Clontz, 305 N.C. 116, 286 S.E.2d 793 (1982); State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983); State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983); State v. Franks, 74 N.C. App. 661, 329 S.E.2d 717 (1985); In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985); State v. Elliott, 77 N.C. App. 647, 335 S.E.2d 774 (1985); State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987); State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988); State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988); State v. Cofield, 324 N.C. 452, 379 S.E.2d 834 (1989); State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990); State v. Ward, 104 N.C. App. 550, 410 S.E.2d 210 (1991); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (1993); State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (1993); State v. Canup, 117 N.C. App. 424, 451 S.E.2d 9 (1994); State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999); State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

II. ELEMENTS OF OFFENSE.

The essential elements for a conviction of second-degree rape are that vaginal intercourse took place by force and against the will of the other person. State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified on other grounds, 318 N.C. 330, 348 S.E.2d 805 (1986).

Use of Force. — The element of "by force and against her will" has long been present in North Carolina rape statutes, and is still sufficient to support a conviction of second-degree rape under this section. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Force is an essential element of the offense of rape. State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980).

Phrase "by force and against her will" (now "by force and against the will of the other person") used in this section and G.S. 14-27.2, 14-27.4 and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

"By force and against the will of the other person" is defined as notwithstanding her resistance. In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985).

Force required to constitute rape must be actual or constructive force used to achieve sexual intercourse. State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182, cert. denied, 320 N.C. 796, 361 S.E.2d 84 (1987).

Actual Physical Force Not Required. — The force necessary to constitute rape need not be actual physical force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified on other grounds, 318 N.C. 330, 348 S.E.2d 805 (1986).

Constructive force is sufficient and the female's submission under fear or duress takes the place of actual physical force. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Stanley, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

The force necessary to sustain a conviction of rape under subdivision (1) of subsection (a) of this section need not be actual physical force, but may be constructive force such as fear, fright, or coercion. State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987).

Constructive force in the form of fear, fright or coercion suffices to establish the element of force in second-degree rape and may be demonstrated by proof of defendant's acts which, in the totality of the circumstances, create the reasonable inference that the purpose of such acts was to compel victim's submission to sexual intercourse. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

Defendant was not entitled to dismissal pursuant to G.S. 15A-954 of the second-degree rape charge, in violation of G.S. 14-27.3, against defendant; there was sufficient evidence of constructive force to convict defendant, where the victim testified that defendant threatened the victim that if the victim did not do what defendant asked, defendant would pull a gun on the victim. State v. Scercy, 159 N.C. App. 344, 583 S.E.2d 339, 2003 N.C. App. LEXIS 1499 (2003), appeal dismissed, cert. denied, 357 N.C. 581, 589 S.E.2d 363 (2003).

And fear, fright, or coercion may take the place of force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified on other grounds, 318 N.C. 330, 348 S.E.2d 805 (1986).

Establishing constructive force. — The element of force can be shown to be constructive force in the form of fear, fright, or coercion. State v. Martin, 126 N.C. App. 426, 485 S.E.2d 352 (1997).

Victim's General Fear of Defendant. — The case of State v. Lester, 70 N.C. App. 757, 321 S.E.2d 166 (1984), aff'd per curiam, 313 N.C. 595, 330 S.E.2d 205 (1985) holding that although the victim's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape, is expressly overruled. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

In view of the victim's unusual prior consensual relationship with the defendant, absent evidence that the defendant used force or threats to overcome the will of the victim to resist the sexual intercourse alleged to have been raped, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape. State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

The "general fear" theory in State v. Alston, 310 N.C. 399, 312 S.E.2d 470, is applicable only to fact situations similar to those in that case. State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987); State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Sexual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse; the youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Victim's Physical Helplessness Is Sufficient Force. — The physical act of vaginal intercourse with the victim while she is physically helpless is sufficient force for the purpose of second-degree rape. State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919, cert. denied and appeal dismissed, 313 N.C. 604, 332 S.E.2d 180 (1985).

Mentally Defective Victim. — If there is substantial evidence that a person has engaged in prohibited sexual conduct in violation of this section or G.S. 14-27.5, and the victim was mentally defective, and the perpetrator knew or reasonably should have known that the victim was mentally defective, there is substantial evidence that the person has engaged in such conduct "by force and against the will" of the victim. State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998), cert. denied, 352 N.C. 362, 544 S.E.2d 562 (2000).

Inference of Constructive Force in Par-

ent-Child Relationship. — Where explicit threats or displays of force are absent, constructive force may nevertheless be inferred from the unique situation of dominance and control which inheres in the parent-child relationship. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

Which Need Not Have Biological or Legal Basis. — A parent-child relationship exists for purposes of a constructive force analysis under this section where defendant's relationship with victim encompasses nearly all the practical incidents of parenthood, notwithstanding the absence of a biological or legal parent-child relationship. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

State introduced evidence sufficient to establish constructive force where it showed that there had been ample time for dominance and control by defendant to develop over child victim where defendant was not a parent but was the live-in boyfriend of victim's mother, began living with the family when victim was only eight years old, and assumed parental responsibilities, often baby-sitting victim and her sister while his girlfriend worked, and where victim and defendant had both participated in simulated parent-child relationship for four or five years when the acts of sexual intercourse between them began. State v. Morrison, 94 N.C. App. 517, 380 S.E.2d 608, cert. denied, 325 N.C. 549, 385 S.E.2d 507 (1989).

The defendant, the victim's step-father, began abusing the victim when she was only 15 years old. Each episode of abuse occurred while the victim lived with the defendant as an unemancipated minor in the defendant's trailer and subject to his parental authority. In each incident, the defendant was either silent or at most said "Shh" while climbing on top of his step-daughter and engaging in sexual intercourse with her. She never gave her consent and the defendant never asked for it. The State presented sufficient evidence from which a jury could reasonably infer that the defendant used his position of power to force his step-daughter to participate in sexual intercourse. State v. Hardy, 104 N.C. App. 226, 409 S.E.2d 96 (1991).

Constructive Force Shown. — Evidence of threats and displays of force by defendant, who lived with victim's mother and had a parental role in the family, for the purpose of compelling victim's submission to sexual intercourse on the dates in question, held sufficient to constitute constructive force within the meaning of this section. State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989).

Force and Lack of Consent Implied in Law Where Victim Is Sleeping or Incapacitated. — In the case of a sleeping or similarly incapacitated victim, it makes no difference whether the indictment alleges that vaginal intercourse was by force and against the victim's will or whether it alleges merely vaginal intercourse with an incapacitated victim. In such a case, sexual intercourse with the victim is ipso facto rape, because the force and lack of consent are implied in law. State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Evidence of both actual and constructive force was present in rape case, the actual force occurring when defendant pushed the victim towards the bed and when he pushed her hands aside, and constructive force occurring when defendant locked the door, yelled at the victim and placed her in fear that she would be hurt. State v. Morrison, 85 N.C. App. 511, 355 S.E.2d 182, cert. denied, 320 N.C. 796, 361 S.E.2d 84 (1987).

Penetration Must Be Established. — It is necessary to establish penetration by the male sex organ of the female sex organ. State v. Barnes, 307 N.C. 104, 296 S.E.2d 291 (1982).

In a rape prosecution, the fact that a lesser charge of assault on a female would not be available when a defendant asserts that the intercourse was consensual does not nullify the reference in G.S. 15-144.1 to assault on a female. A jury could find a defendant not guilty of rape under G.S. 14-27.2 or G.S. 14-27.3 based on evidence that defendant's penis had not vaginally penetrated the victim. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Slightest Penetration Sufficient. — The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute. State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440, cert. denied and appeal dismissed, 333 N.C. 464, 428 S.E.2d 185 (1993).

It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440, cert. denied and appeal dismissed, 333 N.C. 464, 428 S.E.2d 185 (1993).

Withdrawal of Consent. — Consent can be withdrawn. This concept ordinarily applies, however, to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused. State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979).

Assault on a female is not a lesser included offense of attempted second-degree rape, because the assault offense contains essential elements which are not contained in the attempted rape offense. State v. Wortham, 318 N.C. 669, 351 S.E.2d 294 (1987), disapproving State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983), insofar as the result in Freeman on the assault of a female conflicts with this decision.

An attempt to commit rape has the elements of (1) an intent to commit rape, and (2) an overt act done for that purpose, which goes beyond mere preparation, but falls short of the completed offense. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

There was substantial evidence of restraint to support defendant's second-degree attempted rape conviction as defendant straddled the victim and tried to pull up the victim's shirt, and defendant's pants were unzipped, which created an inference of guilt and was evidence of intent; the same evidence demonstrated defendant's overt act in furtherance of the crime. State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

Lesser Included Offense. — Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

III. EVIDENCE.

Use of Term "Rape" in Testimony. — Testimony by the prosecutrix that defendant raped her did not invade the province of the jury since (1) the court sustained an objection to the testimony and (2) the testimony was competent as a shorthand statement of fact. State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

Prior Use of Tampon by Complainant. — In prosecution for second-degree rape, and incest involving 13-year-old complainant, where physical examination revealed no bruising or tearing of the genital or rectal area and no sperm within the vagina, but did reveal an opening in the hymen, evidence concerning complainant's prior use of tampon was relevant and should have been admitted. State v. Baron, 58 N.C. App. 150, 292 S.E.2d 741 (1982).

Victim's Mental Status. — A trial judge has no authority to order a victim to submit to a psychological examination when the victim's mental status is an element of the crime with which the defendant is charged. State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994).

The victim's character for drunkenness was not pertinent to defendant's defense in trial for second-degree rape. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Proffered testimony as to the victim's alcohol consumption with other people in party settings had no tendency to prove that the victim consented to sexual activity with the defendant on the day in question. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Defendant's Good Character. — Where defendant's testimony contradicts that of the prosecuting witness, the jury is required, in reaching a verdict, to pass on the defendant's credibility. Therefore, it is error for the court to fail to instruct the jury that evidence introduced by the defendant as to his good character could also be considered as bearing on his credibility. State v. Williams, 59 N.C. App. 549, 297 S.E.2d 604 (1982), cert. denied, 307 N.C. 702, 301 S.E.2d 396 (1983).

Flight from First Trial on Offense. — In prosecution for second-degree rape, probative value of evidence of defendant's flight from first trial on such offense was not outweighed by its prejudicial effect, despite the fact that he was without counsel in the trial from which he fled. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Evidence of Restraint for Attempted Rape Independent of Restraint for Kidnapping Charge. — Trial court did not err in denying defendant's motion to dismiss his second-degree kidnapping charge, under G.S. 14-39(a), and there was sufficient evidence that defendant restrained the victim for the purpose of facilitating a felony where there was sufficient evidence from which the jury could find that defendant intended to rape the victim; further, the evidence of restraint forming the basis of the kidnapping charge was independent of the restraint inherent in the attempted rape charge as defendant pushed the victim down the hallway of her residence, into her bedroom, and pinned her on her bed, which constituted evidence that defendant took the victim to a more secluded area to prevent others from witnessing or hindering the rape. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Evidence of Force Sufficient to Go to Jury. — Where the State's evidence tended to show that defendant broke into and entered the victim's home twice, and the second time got into the victim's bed, kissed her and held her down while repeating: "I've been wanting you, and now I'm going to have you" and later, put his hand into the victim's panties and said, "Here it is, I'm going to eat it," and finally, stated he "might as well [go] ahead and rape you anyway," there was sufficient evidence of defendant's intent to engage in vaginal intercourse by force and against the will of the victim to have allowed the case to go to the jury. State v. Walton, 90 N.C. App. 532, 369 S.E.2d 101 (1988).

There was sufficient evidence that defendant attempted to have intercourse with a child victim, and that defendant used force of threats in defendant's attempt to have intercourse with the victim for purposes of an attempted rape charge under G.S. 14-27.3(a)(1) to go to a jury as: (1) defendant attempted to have intercourse with the victim through defendant's repeated asking the victim for sex and the multiple other sexual acts; (2) these repeated acts constituted overt sexual behavior beyond mere preparation in defendant's attempt to have intercourse with the victim; and (3) defendant's relationship with the victim constituted one in which defendant had a position of power over the victim, and defendant used the position in such a way as to constitute constructive force. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

DNA Evidence. — In rape case where assignment of error did not bring forward a specific objection to the admission of DNA evidence, but rather challenged its general admissibility, the assignment was overruled. State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440, cert. denied and appeal dismissed, 333 N.C. 464, 428 S.E.2d 185 (1993).

Evidence of Defendant's Intent Insufficient. — Evidence that defendant could not be ruled out as a partial contributor to the semen stain on the victim's jeans, standing alone as it did in the case, was not enough to show defendant had the intent to have vaginal intercourse with the victim by force and against her will. State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995).

Evidence held sufficient to show sexual act was accomplished "by force" as is required by subdivision (a)(1) of this section where among other things, defendant pinned victim against sink, continued to restrain victim and would not let her go when victim pushed defendant, angled victim down hall and into bathroom, repeatedly placed victim upon bathroom sink so that he could accomplish act of sexual intercourse, forcibly unbuttoned victim's blouse and forcibly removed her pants and panties and kept victim within his physical power during entire sexual episode. State v. Scott, 323 N.C. 350, 372 S.E.2d 572 (1988).

Evidence Held Sufficient. — Evidence held sufficient to find that defendant confined, restrained and removed victim from one place to another to facilitate the attempted gratification of his passion on her notwithstanding her resistance. State v. Whitaker, 76 N.C. App. 52, 331 S.E.2d 752 (1985), modified on other grounds, 316 N.C. 515, 342 S.E.2d 514 (1986).

Considering 13-year-old victim's fear of her stepfather, along with her testimony that he accomplished his penetration of her through the use of force, there was sufficient evidence for the jury to find that defendant used sufficient actual force to overcome victim's will and any resistance she was capable of. State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414, modified on other grounds, 318 N.C. 330, 348 S.E.2d 805 (1986).

Evidence held sufficient to show that the defendant used physical force as well as the victim's fear and fright to commit the crime of second-degree rape, where upon learning that she was sick, ignoring her demand that he leave her alone, and breaking through a locked door to enter her home, the defendant used force to make the victim submit to vaginal intercourse. State v. Strickland, 318 N.C. 653, 351 S.E.2d 281 (1987).

Evidence held sufficient to authorize the trial court's denial of a motion at the close of the evidence to dismiss the charge of attempted second-degree rape. State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810, cert. denied, 319 N.C. 408, 354 S.E.2d 724 (1987).

Under the evidence, with all reasonable inferences drawn in the State's favor, a jury could reasonably have found that defendant showed a preconceived intent to rape the prosecutrix, so as to support a charge of first degree burglary, (1) by entering motel room shortly after prosecutrix's male companion had left, (2) by remaining in the room after he knew for certain that a woman was in it, and (3) by closing and locking the room door before jumping on the prosecutrix, who lay in bed, and that he committed an overt act toward the commission of rape necessary for a conviction of attempted second-degree rape. The fact that the prosecutrix was more than a match for defendant, causing him to abandon any such intent and flee the room, would not absolve him from responsibility for his actions. State v. Planter, 87 N.C. App. 585, 361 S.E.2d 768 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 666 (1988).

Where victim testified, inter alia, that defendant pushed her onto her back when she tried to turn away and held her arms or hands during the act of intercourse and she stated that defendant repeatedly told her not to tell anyone and threatened to kill her and her family members if she did, this evidence was sufficient to show that defendant acted "by force and against the will of the other person," as required by subdivision (a)(1). State v. Hall, 98 N.C. App. 1, 390 S.E.2d 169, rev'd on other grounds, 330 N.C. 808, 412 S.E.2d 883 (1990).

Although the victim was not able to identify the defendant as the perpetrator, the evidence was sufficient on the charges; the circumstantial evidence showed that hairs found at the scene of the crime were microscopically consistent with those of defendant and could have originated from the defendant and that the shoe prints found in the sand by the culvert and in the dust on the hardwood floor in the victim's bedroom matched the treads of the defendant's shoes. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Evidence was sufficient to support defendant's conviction for rape under G.S. 14-27.3(a), as the victim's testimony that she was afraid of defendant and struggled with defendant physically to prevent intercourse, gave proof of both actual and constructive force sufficient to support the conviction. State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898, 2002 N.C. App. LEXIS 1266 (2002), cert. denied, 357 N.C. 65, — S.E.2d — (2003), cert. dismissed, — N.C. —, 602 S.E.2d 679 (2004).

Trial court did not err in denying defendant's motion to dismiss his attempted second-degree rape charge and the evidence was sufficient to support defendant's conviction, including defendant's intent to rape the victim, where defendant: (1) forced entry into the victim's residence at 4:00 a.m., (2) pinned the victim to her bed, (3) threatened the victim, (4) grabbed the victim's breast and between her legs, and (5) despite resistance, did not end the assault until the police arrived. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Defendant's initial subterfuge; subsequent suggestive touching of the female victim along with the expression of his desire for her, the later assault, which included pulling the female's pants down while lying on top of her, and threats of harm when she tried to get away from him, were sufficient to permit a reasonable fact-finder to infer that defendant had the requisite intent to rape the female victim and committed sufficient overt acts toward that end; defendant's conviction for attempted second degree rape was affirmed. State v. Farmer, 158 N.C. App. 699, 582 S.E.2d 352, 2003 N.C. App. LEXIS 1230 (2003).

In a prosecution for first-degree statutory rape, under G.S. 14-27.2(a)(1), and second-degree forcible rape, under G.S. 14-27.3(a)(1), sufficient evidence was submitted showing that defendant was the perpetrator when the victim testified that defendant raped her and repeated this story to several people, so the denial of defendant's motion to dismiss for lack of sufficient evidence that he was the perpetrator was proper, even though defendant presented evidence that he was not the perpetrator. State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298, 2003 N.C. App. LEXIS 1432 (2003), cert. denied, 358 N.C. 733, 601 S.E.2d 863 (2004).

In a prosecution for first-degree statutory rape, under G.S. 14-27.2(a)(1), and second-degree forcible rape, under G.S. 14-27.3(a)(1), sufficient evidence was submitted of defendant's penetration of the victim, when the victim testified that defendant placed his penis between her legs, continued pushing, "it hurt," and she found blood on her underwear, and a physician testified that, although there was no indication of complete penetration, there was bruising of the inner lip of the labia minora near the hymen, so the denial of defendant's motion to dismiss for lack of sufficient evidence of penetration was proper, as complete penetration was not required. State v. Bell, 159 N.C. App. 151, 584 S.E.2d 298, 2003 N.C. App. LEXIS 1432 (2003), cert. denied, 358 N.C. 733, 601 S.E.2d 863 (2004).

Forensic DNA testing showing a high probability that defendant was the father of the victim's children and the victim's statement that defendant, her father, started molesting her when she was four years old provided sufficient evidence to support defendant's conviction for second-degree rape. State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

Rape conviction was supported by testimony that defendant engaged in sexual intercourse with the victim when she was helpless due to her having consumed a large quantity of alcohol, the victim's her lack of experience with intoxicating beverages, and the victim's repeated loss of consciousness due to her alcohol consumption. State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Trial court did not err in denying defendant's motion to dismiss for insufficient evidence and in convicting him of second-degree rape in violation of G.S. 14-27.3(a)(2) because given the evidence of the victim's age, frailty, and physical limitations, there was evidence from which the jury could reasonably conclude that the victim was not able to actively oppose or resist her attacker; the victim was 83 years of age, suffered from severe arthritis, and normally walked with the assistance of a walker, and because of the victim's physical condition, it was impossible for her to travel down the front steps of her house without assistance. State v. Atkins, — N.C. App. —, 666 S.E.2d 809, 2008 N.C. App. LEXIS 1743 (2008).

Evidence Held Insufficient. — Evidence that respondent tried to remove minor female's shorts, but stopped when she simply spread her legs to prevent her shorts from sliding off, and that when minor female told him to stop and that her mother would be home soon, respondent got up and left, was not sufficient as a matter of law to support the essential finding that respondent intended to have sexual intercourse with minor female notwithstanding her resistance. In re Howett, 76 N.C. App. 142, 331 S.E.2d 701 (1985).

Where there was conflicting evidence on defendant's use of a knife, proof of which was necessary for a verdict of first-degree rape, victim testifying that defendant employed a knife during the act of rape, while defendant testified that there was no knife in his truck when the incident occurred, and no knife was ever located by investigating officers, the trial court properly included the lesser-included offense of second-degree rape and second-degree sexual offense in its charge to the jury. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

Destruction of Evidence. — Destruction of rape kit and all articles of clothing the victim had been wearing the night of the rape after a computer printout indicated that the case had been voluntarily dismissed did not involve reversible error, where the evidence was not exculpatory. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

IV. INSTRUCTIONS.

Failure of the trial court to define "sexual intercourse" in jury instructions is not usually error. State v. Barnes, 307 N.C. 104, 296 S.E.2d 291 (1982).

When Instruction Beyond "Sexual Intercourse" Not Required. — Special instructions beyond the phrase "sexual intercourse" as to penetration are not required when there is plenary evidence before the jury that the female sex organ had been penetrated by the male sex organ. State v. Barnes, 307 N.C. 104, 296 S.E.2d 291 (1982).

When Instruction on Penetration Element Required. — Where (1) the evidence of penetration by a male sex organ is weak, (2) there is a suggestion from the examining physician that penetration could have been by some other object, and (3) a prior erroneous instruction on second-degree sex offense, equating sexual intercourse with penetration of an object might have misled the jury, the failure to instruct on the penetration element of the offense is prejudicial error. Under these circumstances it was necessary for the trial judge to have included, in his instruction on second-degree rape, language sufficient to establish that penetration must be of the female sex organ by the male sex organ. State v. Barnes, 307 N.C. 104, 296 S.E.2d 291 (1982).

Withdrawal of Consent After Penetration. — In a prosecution for second-degree rape where, under the court's instruction, the jury could have found the defendant guilty of rape if they believed the victim had consented to have intercourse with the defendant and in the middle of that act, she changed her mind, the court committed error requiring a new trial. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions. State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979).

Impermissible Instruction Regarding Elements of Force and Lack of Consent. — In a second degree rape charge under G.S. 14-27.3 where the victim alleged that she said no and that defendant engaged in sexual intercourse with her while she was asleep, and defendant alleged that the victim was awake and consented to intercourse, the State and defendant presented contradictory evidence on the elements of force and against the victim's will, but the trial court impermissibly instructed the jury that two elements — force and lack of consent — were established as a matter of law if victim was found to be sleeping or similarly incapacitated; the trial court's jury instruction created a reasonable likelihood that the jury did not deliberate upon the contradictory evidence, but rather understood the trial court's instruction to mean force and lack of consent had been established. Thus, there was a reasonable likelihood the jury concluded the victim was asleep by a standard less than beyond a reasonable doubt; therefore, pursuant to G.S. 15A-1443(b), the erroneous jury instruction was not harmless beyond a reasonable doubt, and defendant was entitled to a new trial. State v. Smith, 170 N.C. App. 461, 613 S.E.2d 304, 2005 N.C. App. LEXIS 1075 (2005), aff'd, modified, 360 N.C. 341, 626 S.E.2d 258 (2006).

Instruction on Attempted Second-Degree Rape. — Evidence was sufficient to support the alternative jury instruction for attempted second-degree rape; although the prosecuting witness did testify that she was raped by defendant in his bedroom, at other points in her testimony she described only an attempt to rape her, and jury acted within its prerogative to believe some, but not all of her testimony. State v. Hinton, 95 N.C. App. 683, 383 S.E.2d 704 (1989), cert. denied, 326 N.C. 266, 389 S.E.2d 117 (1990).

Where evidence unequivocally showed an act of penetration by defendant, and the only conflict presented by the evidence was whether intercourse was consensual or by force, the trial court did not err in denying request for an instruction on attempted second-degree rape. State v. Graham, 118 N.C. App. 231, 454 S.E.2d 878 (1995).

Jury instruction for second degree rape was not fatally ambiguous simply because the physical helplessness clause and the mental incapacity clause were joined in the disjunctive. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Defendant was entitled to a new trial because the trial court erred when the court did not include the words "due to any act committed upon the victim," as stated in G.S. 14-27.1(2), in the jury instruction at defendant's trial for second degree rape. State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339, 2008 N.C. App. LEXIS 1483 (2008).

Instruction on Lesser Offense Not Required. — In prosecutions for rape, when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was with the prosecuting witness's consent or by force and against her will, it is not proper to submit to the jury lesser offenses included within a charge of rape. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Where the State's evidence showed that defendant engaged in sexual intercourse with the prosecuting witness by force and against her will, while defendant's evidence showed that he and the prosecuting witness were engaged in consensual sexual foreplay when the prosecuting witness bit him, causing him to lose interest, there was no evidence of a failed attempt at nonconsensual intercourse, and the court thus did not err in failing to charge on the lesser included offense of attempted second-degree rape. State v. Taylor, 79 N.C. App. 635, 339 S.E.2d 859, cert. denied, 317 N.C. 340, 346 S.E.2d 146 (1986).

When Lesser Offense May Be Withdrawn from Jury Consideration. — Where under the evidence the jury could not reasonably find that defendant's intercourse with female was consensual and therefore that he did not commit the offense of second degree rape as charged in the indictment, but that he did commit the lesser included offense of assault on a female, it was not error to withdraw the lesser included offense from the jury's consideration. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 63; c. 106, ss. 3, 4; c. 179, s. 14; 1983, c. 175, ss. 5, 10; c. 720, s. 4; 1994, Ex. Sess., c. 22, s. 3.)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to essentials of bill of indictment for sexual offense, see G.S. 15-144.2. As to venue of trial of sex offenses where victim was transported, see G.S. 15A-136. As to office of coordinator of services for victims of sexual assault, see G.S. 143B-394.1 through 143B-394.3.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note that addresses the effect of a recent United States Supreme Court decision on sodomy laws and the manner in which society may shape its characterization of Acquired Immune Deficiency Syndrome (AIDS) and homosexuality, see 66 N.C.L. Rev. 226 (1987).

For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

I. General Consideration.

II. Elements of Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Constitutionality. — This statute sufficiently appraises defendants of prohibited conduct and is not void for vagueness. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

Effect of § 14-27.7. — Argument that an indictment under this section was subject to dismissal on grounds that the section had been partially repealed by G.S. 14-27.7 was without merit, since the two statutes were enacted as parts of the same legislative act, Session Laws 1979, c. 682, and an intent to simultaneously enact and repeal a law could not be attributed to the General Assembly. State v. Nations, 319 N.C. 318, 354 S.E.2d 510 (1987).

Inapplicability of Committed Youthful Offender Statute. — Article 3B of Chapter 148 does not apply to a conviction or plea of guilty of a sexual offense in the first degree, for which the punishment is mandatory life imprisonment. State v. Browning, 321 N.C. 535, 364 S.E.2d 376 (1988); State v. Rhinehart, 322 N.C. 53, 366 S.E.2d 429 (1988).

Indians. — This section does not apply where the alleged acts were those of one Indian against another Indian within Indian country. United States v. Welch, 822 F.2d 460 (4th Cir. 1987).

Mandatory Life Imprisonment Not Cruel and Unusual. — The imposition of a mandatory sentence of life imprisonment for first-degree sexual offense is not so disproportionate as to constitute a violation of U.S. Const., Amend. VIII. State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985).

The mandatory life sentence for first-degree sexual offense is constitutional. State v. Cooke, 318 N.C. 674, 351 S.E.2d 290 (1987).

Imposition of sentences of life imprisonment for first degree rape and first degree sexual offense does not violate the prohibition against cruel and unusual punishments. State v. Spaugh, 321 N.C. 550, 364 S.E.2d 368 (1988).

The mandatory life sentence for first-degree sexual offense does not constitute cruel and unusual punishment. State v. Joyce, 97 N.C. App. 464, 389 S.E.2d 136, cert. denied, 326 N.C. 803, 393 S.E.2d 902 (1990); State v. Young, 103 N.C. App. 415, 406 S.E.2d 3, cert. denied, 330 N.C. 201, 412 S.E.2d 65 (1991).

A life sentence for first-degree sexual offense does not constitute cruel and unusual punishment. State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), cert. denied and appeal denied, 345 N.C. 644, 483 S.E.2d 714 (1997), aff'd, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999).

First and Second Degree Offenses Distinguished. — A second-degree offense differs from a first-degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Taking Indecent Liberties Not Lesser Included Offense. — In a prosecution of defendant under subsection (a) of this section for engaging in a sexual act with children under 12 (now under 13 years of age), the trial court did not err in failing to instruct on taking indecent liberties with children in violation of G.S. 14-202.1, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by subsection (a). State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

The definitional elements of first-degree sex offense and indecent liberties are different; therefore, defendant's conviction of first-degree sex offense and indecent liberties did not contravene his constitutional protection against double jeopardy. State v. Manley, 95 N.C. App. 213, 381 S.E.2d 900, cert. denied, 325 N.C. 712, 388 S.E.2d 467 (1989).

The indictments against the defendant for first-degree sexual offense and for indecent liberties with a child were upheld in spite of his allegations that they were defective as a matter of law in not setting out each element of the offenses. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

Crime against nature is not a lesser included offense of first or second degree sexual offense. State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983). See also, State v. Barrett, 307 N.C. 126, 302 S.E.2d 632 (1982); State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Assault on Female Not Lesser Included Offense. — To convict for first-degree sexual offense, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least 18 years of age. Therefore, the crime of assault on a female has at least three elements not included in the crime of first-degree sexual offense and cannot be a lesser included offense of first-degree sexual offense. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

Defendant may be convicted of kidnapping and of sexual assault where restraint or asportation of victim is separate, complete act, independent of and apart from sexual assault. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Separate Crimes Arising out of Same Events. — Defendants' convictions of both first degree kidnapping and rape against one victim and of first-degree kidnapping and both first degree rape and first-degree sex offense against the other could not all stand, even though the combination of convictions, because of the manner in which they were consolidated for judgment, resulted in no additional punishment attributable to any of the kidnapping cases, where it could not be said that the jury's verdict of first-degree kidnapping was based upon a sexual assault other than the ones forming the basis for the other convictions. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Punishment for Both First-Degree Kidnapping and Sexual Assault Held Error. — The guarantee against double jeopardy under U.S. Const., Amend. V protects against multiple punishments for the same offense. Defendant may not be punished for both first-degree kidnapping and sexual assault, where sexual assault is used to elevate kidnapping to first degree. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Where defendant was convicted and sentenced for sexual assault and first-degree kidnapping predicated on one sexual assault, trial court was required to arrest judgment either on conviction of sexual assault or on conviction of first-degree kidnapping. Defendant could be resentenced for second-degree kidnapping, if judgment on first-degree kidnapping was arrested. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Separate Sentences for Offenses Based on Same Acts. — Imposition of sentences for first-degree sexual offenses as well as offenses of taking of indecent liberties with a child, based on the same acts, did not constitute double jeopardy, as the elements of the two crimes are different. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Defendant's right to a unanimous jury verdict was jeopardized by the trial court's failure to ensure that each juror had in mind the same instances of abuse when voting to convict defendant. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

Applied in State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. McGaha, 306 N.C. 699, 295 S.E.2d 449 (1982); State v. Clark, 307 N.C. 120, 296 S.E.2d 296 (1982); State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983); State v. Shane, 309 N.C. 438, 306 S.E.2d 765 (1983); State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984); State v. Arnold, 314 N.C. 301, 333 S.E.2d 34 (1985); State v. Nations, 319 N.C. 329, 354 S.E.2d 516 (1987); State v. Ackerman, 144 N.C. App. 452, 551 S.E.2d 139, 2001 N.C. App. LEXIS 540 (2001).

Cited in Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489; State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981); State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Schneider, 306 N.C. 351, 293 S.E.2d 157 (1982); State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982); State v. Barrett, 307 N.C. 126, 302 S.E.2d 632 (1982); State v. Thomas, 310 N.C. 369, 312 S.E.2d 458 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986); State v. Brice, 320 N.C. 119, 357 S.E.2d 353 (1987); State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920 (1988); State v. Smith, 323 N.C. 359, 372 S.E.2d 557 (1988); State v. Knight, 93 N.C. App. 460, 378 S.E.2d 424 (1989); State v. Freeman, 93 N.C. App. 380, 378 S.E.2d 545 (1989); In re Lucas, 94 N.C. App. 442, 380 S.E.2d 563 (1989); State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993); State v. McClain, 112 N.C. App. 208, 435 S.E.2d 371 (1993); State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (1994); State v. Figured, 116 N.C. App. 1, 446 S.E.2d 838 (1994); State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995); State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812 (1995); State v. Parker, 119 N.C. App. 328, 459 S.E.2d 9 (1995); State v. Wilkinson, 344 N.C. 198, 474 S.E.2d 375 (1996); State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (1996); State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998); State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999); In re Wright, 137 N.C. App. 104, 527 S.E.2d 70, 2000 N.C. App. LEXIS 265 (2000); State v. Anthony, 351 N.C. 611, 528 S.E.2d 321, 2000 N.C. LEXIS 348 (2000); State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002); State v. Moore, 167 N.C. App. 495, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004); State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005); State v. Reber, 182 N.C. App. 250, 641 S.E.2d 742, 2007 N.C. App. LEXIS 589 (2007); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS

1041 (2007); State v. Shaffer, — N.C. App. —, 666 S.E.2d 856, 2008 N.C. App. LEXIS 1744 (2008).

II. ELEMENTS OF OFFENSE.

Legislative Intent to Distinguish Offenses. — The intent of the legislature when it employed the term "vaginal intercourse" in former G.S. 14-21.1 was not to change the traditional elements of rape but to distinguish that offense from other sexual offenses now included within this section. State v. Johnson, 317 N.C. 417, 347 S.E.2d 7 (1986).

State's Burden of Proof. — To convict a defendant of a first-degree sexual offense with a child of 12 years or less (now under the age of 13 years), the State need only prove that (1) the defendant engaged in a "sexual act," (2) the victim was at the time of the act 12 years old or less, and (3) the defendant was at the time four or more years older than the victim. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

Failure to Allege Age Deemed Fatal. — Four petitions, brought pursuant to this section, failed to state the respondent's alleged misconduct with particularity, as they did not contain the crucial allegations of the age of the victim and the respondent and, therefore, were dismissed as fatally defective. In re Jones, 135 N.C. App. 400, 520 S.E.2d 787, 1999 N.C. App. LEXIS 1158 (1999).

The term "sexual act," as used in this section, means cunnilingus, fellatio, analingus, or anal intercourse. It also means the penetration, however slight, by any object into the genital or anal opening of another person's body. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Penetration. — Where the evidence showed that defendant ordered the victim to drop her pants and underwear at gunpoint and asked her to spread open her labia so he could inspect her vagina and defendant then used the barrel of his gun to separate her labia and the victim testified that she felt the gun up against her private area right where her tampon would be entered, such evidence was sufficient to support a finding that a penetration occurred under G.S. § 14-27.1(4) to support defendant's conviction for first degree sexual offense, despite defendant changing his mind about pursuing any further contact with the victim upon discovering the tampon. State v. Bellamy, 172 N.C. App. 649, 617 S.E.2d 81, 2005 N.C. App. LEXIS 1793 (2005).

When considered with the evidence that a victim suffered extensive damage to her outer genital and rectal areas, the State's evidence gave rise to a reasonable inference that the victim's colon injury was the result of the penetration of an object into her rectum, as defined in G.S. 14-27.4(a)(2). Therefore, the State introduced substantial evidence on the charge of first-degree sexual offense, and the trial court did not err in denying defendant's motion to dismiss. State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Fellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person. State v. Johnson, 105 N.C. App. 390, 413 S.E.2d 562, cert. denied, 332 N.C. 348, 421 S.E.2d 158 (1992).

Lack of Consent Essential. — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982).

Although the victim was a prostitute and initially sought a sexual encounter for payment, the victim's fear of defendant was specific to the events leading to defendant's sexual assaults on and murder of her, so that a jury could reasonably find that there was substantial evidence that the victim withdrew any prior consent to the sexual acts. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Crime Actively Encouraged by Victim. — The defendant was not guilty of a first-degree sexual offense where the victim actively encouraged and ultimately induced the defendant to commit the crime of fellatio on him for the purpose of documenting certain facts relative to their relationship and not for the purpose of having the defendant arrested for his acts. State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982).

Use of Force. — Phrase "by force and against her will," (now "by force and against the will of the other person") used in this section, G.S. 14-27.2, 14-27.3, and 14-27.5, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981).

Actual Physical Force Not Required. — Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981).

Nor is medical evidence of penetration, such as bruising or tearing, required to support a conviction of first-degree sexual offense. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Force and Lack of Consent Are Implied when Victim Is Incapacitated. — It makes no difference in the case of a sleeping or similarly incapacitated victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; force and lack of consent are implied in law. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

The phrase "by force and against the will" used in the first and second-degree rape statutes and the first and second-degree sexual offense statutes means the same as it did at common law when it was used to describe some of the elements of rape. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Whether Sexual Act Committed While Victim Was Alive or Dead Was Irrelevant. — Where the sexual act was committed during a continuous transaction that began when the victim was alive, the evidence was sufficient to support defendant's conviction for first-degree sexual offense; the precise timing of the sexual act was irrelevant if it occurred during a continuous transaction. All of the evidence clearly suggested that the sexual offense and the death of the victim were so connected as to form a continuous chain of events. State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991), cert. denied, 522 U.S. 824, 118 S. Ct. 84, 139 L. Ed. 2d 41 (1997).

Intent to commit the crime of sexual offense is inferred from the commission of the act. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Intoxication Not a Defense. — Since intent is not an essential element of the crime of first-degree sexual offense, intoxication is not a defense of that crime. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Dangerous or Deadly Weapon. — Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

What Is a Dangerous or Deadly Weapon. — In order to be characterized as a dangerous or deadly weapon, an instrumentality need not have actually inflicted serious injury. A dangerous or deadly weapon is any article, instrument or substance which is likely to produce death or great bodily injury. State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986).

Deadly weapon does not have to be one that kills. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983).

Where there is a question as to a weapon's deadly or dangerous nature, it is properly submitted to the jury. State v. Workman, 309 N.C. 594, 308 S.E.2d 264 (1983).

Charge That Fake Gun May Be Deadly or Dangerous Weapon. — Where the indictment charges violation of this section with the use of deadly weapons, "to wit: a rifle, a shotgun, and a pistol," a jury instruction that the deadly weapon element of this section would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon does not change the theory alleged in the indictment. State v. McKinnon, 306 N.C. 288, 293 S.E.2d 118 (1982).

Deadly Weapon Need Not Be Possessed at Precise Moment of Penetration. — In a prosecution for first-degree sexual offense, where a knife was employed in an effort to force the victim to give in to defendant's demands, it was of no consequence that defendant was not in possession of the deadly weapon at the precise moment that penetration occurred. State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986).

Serious Personal Injury. — The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

The element of infliction of serious personal injury upon the victim or another person in the crimes of first-degree sexual offense and first-degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape. State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985).

Not Limited to Non-Fatal Injures. — The statutes governing first-degree rape and first-degree sexual offense do not limit the injuries underlying the charge to those not resulting in death. State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998).

Mental Injury May Constitute Serious Personal Injury. — Proof of the element of infliction of "serious personal injury" as required by G.S. 14-27.2(a)(2)b and subdivision (a)(2)b of this section may be met by the showing of mental injury as well as bodily injury. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

But Must Be Greater Than That Present in Every Sexual Offense. — The legislature intended that ordinarily the mental injury inflicted must be more than the res gestae results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

Question Must Be Decided on Facts of Cases. — Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case. It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982).

In determining whether "serious personal injury" has been inflicted as the phrase is used in the definitions of first-degree rape and first-degree sexual offense, the court must consider the particular facts of each case. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Evidence of Serious Personal Injury Held Sufficient. — Where none of the victim's serious external injuries were the cause of the victim's death, and all of the external injuries were inflicted upon her immediately prior to and during a sexual assault by the defendant, the trial court properly denied defendant's motion to dismiss the charge of first-degree sexual offense for lack of substantial evidence of "serious personal injury." State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

Legislative Intent as to Punishment of Aiders and Abettors. — It is evident that the legislature, by its enactment of subdivision (a)(2)c of this section, chose to include in the more serious first-degree categories those sexual offenses which involved aiders and abettors and to subject to a harsher penalty those who participated in gang assaults, regardless of the actual role of the participant. In so doing, the legislature acknowledged the increased severity of rapes and other sexual offenses committed by persons acting in concert. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

An aider and abettor is one who advises, counsels, procures, or encourages another to commit a crime. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

To render one who does not actually participate in the commission of a crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

Aider and Abettor Is as Guilty as Principal Offender. — Under the statutory scheme, a person who commits a sexual act with another person by force and against the will of the other person, and who also is aided and abetted by one or more persons is guilty of a first-degree sexual offense. An aider and abettor is as guilty as the principal offender, and thus an aider and abettor of any sexual offense ipso facto becomes guilty of a first-degree offense. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Under this section, an aider and abettor of a sexual offense is guilty of a first-degree sexual offense or nothing at all. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

The presence of defendant's nephews inside and outside the truck while defendant engaged in sexual acts with the victim could reasonably have been regarded as encouragement to defendant and constituted sufficient evidence that they and defendant shared the "community of unlawful purpose" necessary for aiding and abetting. State v. Penland, 343 N.C. 634, 472 S.E.2d 734 (1996), cert. denied, 519 U.S. 1098, 117 S. Ct. 781, 136 L. Ed. 2d 725 (1997).

Conviction for Aiding and Abetting Is Not Double Jeopardy. — One who was convicted of first-degree sexual offense by reason of his aiding and abetting a first-degree sexual offense committed by two other persons has been convicted of only one offense. He was not subjected to multiple convictions or to enhanced punishment by an improper use of the same element twice. Since defendant's acts of assistance were properly used under the statute to elevate the charges against his codefendants to first-degree offenses in the first instance, defendant's acts of aiding and abetting were used against him only once, that is, to find him guilty of the crime of first-degree sexual offense by reason of aiding and abetting. State v. Polk, 309 N.C. 559, 308 S.E.2d 296 (1983).

Second-Degree Sexual Offense Held Not Lesser Included Offense. — In order for an offense to be submitted as a lesser included offense, not only must there be evidence of all elements of the offense, but all the elements of the offense to be submitted must be contained in the greater offense, and thus as a second-degree sexual offense has as an element that the sexual act must be committed "by force and against the will of the other person," or against a person "who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know" of the victim's deficiency, and neither of these alternative elements was an element of the first-degree sexual offense with which the defendant was charged, it was not error for the court to refuse to submit second-degree sexual offense as a lesser included charge. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Submission of Lesser Offenses Not Proper. — Where no evidence was offered which suggested that defendant did not display knife prior to both offenses, the evidence would not have justified submission either of second-degree sexual offense or attempted second-degree rape. State v. Kuplen, 316 N.C. 387, 343 S.E.2d 793 (1986).

Charging a defendant with a separate count of first-degree sexual offense for each alternative sexual act performed in a single transaction would result in a multiplicitous indictment. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Sexual offense indictments were fatally defective because they cited one statute, but defendant was tried, convicted, and sentenced under another statute, and the averments were insufficient to satisfy all of the elements contained in either statute; while the indictments (1) alleged that each victim was a child under age 13, (2) named each child, and (3) averred that defendant "did engage in a sex act" with each, under the very narrow circumstances presented, the use of "short-form" language authorized under G.S. 15-144.2(b) was not sufficient to cure the fatal defects. State v. Miller, 159 N.C. App. 608, 583 S.E.2d 620, 2003 N.C. App. LEXIS 1538 (2003), aff'd, 358 N.C. 133, 591 S.E.2d 520 (2004).

Sufficiency of Evidence. — In a case in which the defendant and an accomplice raped a woman while the accomplice threatened the victim with a gun, remand was necessary as to charges of first degree rape and first degree sexual offense by anal intercourse because (1) defendant sufficiently preserved the issue for appellate review, and (2) the evidence was insufficient to permit a reasonable jury to convict defendant of the first degree offenses for which no acting in concert instruction was given since the record contained no evidence showing defendant's personal use or display of a dangerous weapon. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

III. PRACTICE AND PROCEDURE.

Sufficiency of Indictment. — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

While it is essential that the State prove a "sexual act" as defined by G.S. 14-27.1(4) in order to convict a defendant under this section, an indictment which is drafted pursuant to the provisions of G.S. 15-144.2(b) without specifying which "sexual act" was committed is sufficient to charge the crime of the first-degree sexual offense and to inform a defendant of such accusation. If a defendant wishes additional information in the nature of the specific "sexual act" with which he stands charged, he may move for a bill of particulars. State v. Edwards, 305 N.C. 378, 289 S.E.2d 360 (1982).

Indictments were sufficiently specific under this subsection, where indictments charging sexual offenses with a minor quoted the language of the statute, even though they did not describe the nature of the sex acts. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

While defendant abandoned error as to one of the six challenged indictments filed against him, each alleging charges of first-degree sexual offense, the trial court erred in failing to dismiss the remaining five upon defendant's motion as fatally defective, given that they erroneously charged two similar but distinct crimes and effectively charged neither. State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007), rev'd, 362 N.C. 169, 655 S.E.2d 831 (2008), State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007).

Consolidation of Offenses Occurring on Different Dates. — Consolidation of two counts of first-degree sexual offense and two counts of taking indecent liberties with a child, which allegedly occurred one week apart did not constitute error. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Indictments with Dates Different from Those of Arrest Warrants Held Not Prejudicial. — Trial court committed no error, plain or otherwise, with respect to defendant not having been served with bills of indictment or with respect to the State offering evidence that the offenses occurred on dates different from those alleged in arrest warrants; where defendant was represented by counsel of record on the date of the return of the true bills of indictment, where he and his counsel waived formal arraignment, at which they would have been informed of the allegations contained in the bills of indictment, where defendant presented evidence that he was never alone with the victim during any of the times during which the State's evidence showed the offenses occurred, and where he did not rely solely upon alibi but also presented evidence through his own testimony and the testimony of others directly contradicting the victim's account of the incidents. State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000).

Alternate Theories Properly Considered. — Trial court properly allowed the jury to review the evidence of defendant's commission of rape and sexual offense under both a theory of statutory rape/sexual offense and forcible rape/sexual offense, however upon the jury's verdicts of guilty under both theories, the judgment had to be arrested on one count of first-degree rape and on one count of first-degree sexual offense; separate convictions for these offenses, even though consolidated for a single judgment, had potentially severe adverse collateral consequences. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Indictment with Incorrect Statutory Cite Held Valid. — Defendant's indictments for four counts of statutory sexual offenses were valid even though the indictments cited G.S. 14-27.7A, as the indictments put defendant on notice that defendant was being charged pursuant to G.S. 14-27.4(a)(1) with four counts of first-degree sexual offense against a child who was under the age of 13, where defendant was at least 12 years old and at least four years older than the victim; further, the jury was instructed pursuant to G.S. 14-27.4(a)(1). State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Allegation in indictment that victim was "a child under 12 years of age" sufficiently alleged that she was "a child under the age of 13 years" within the meaning of this section. State v. Gainey, 319 N.C. 391, 354 S.E.2d 236 (1987).

Fatal Variance. — Where all of the State's evidence tended to show that defendant penetrated the vaginal and rectal orifices of two girls by using a tampon, and no evidence in the record tended to show that defendant committed the act of cunnilingus or of anal intercourse with either victim as alleged in the indictment, the trial court erred in failing to dismiss the charges on grounds of a fatal variance between the allegations and the proof at trial. State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

There was a fatal variance between the juvenile petition and the evidence where the petition, which charged a first-degree sexual offense based on the parties' ages, was fatally defective because it did not allege the ages of the victim and the juvenile. In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12, 2004 N.C. App. LEXIS 172 (2004).

Even in child sexual abuse cases, a variance as to time becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense; while time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved, when the defendant relies on the date set forth in the indictment, but the State's evidence substantially varies to the prejudice of defendant's alibi defense, the interests of justice and fair play require that the defendant's motion for dismissal be granted. In a case charging the defendant with taking indecent liberties with a child, where the State's proof failed to show that alleged abuse occurred on the dates in the indictment, where the defendant had relied on those dates in building his alibi defense, and where all the evidence presented at trial went to sexual encounters over a period of years that ended a significant period of time prior to the dates listed in the indictment, defendant's motion to dismiss should have been granted, and defendant's conviction was reversed on appeal. State v. Custis, 162 N.C. App. 715, 591 S.E.2d 895, 2004 N.C. App. LEXIS 245 (2004).

Defendant's convictions on six counts of first-degree sexual offense had to be vacated, as a fatal variance existed between the offense charged, which the State said in the indictment was by force and against the victim's will, and the fact that the State did not present any evidence that the alleged offenses were forcible and the trial court's instruction to the jury that the offense was based on the victim being under 13-years-old. State v. Lawrence, 170 N.C. App. 200, 612 S.E.2d 678, 2005 N.C. App. LEXIS 1016 (2005), rev'd in part, 360 N.C. 368, 627 S.E.2d 609 (2006).

Victim Not Required to Testify. — While it is true that in most sexual offense cases the victim does testify, nevertheless there is no requirement that the victim testify before the accused may be convicted. State v. Cooke, 318 N.C. 674, 351 S.E.2d 290 (1987).

Testimony as to Victim's Credibility Inadmissible. — Statements by an expert on child sexual abuse that she "had not picked up on anything" to suggest that someone had told the alleged victim what to say, and that she had no concerns that the alleged victim had been "coached," bore directly on the alleged victim's credibility and were inadmissible. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

The trial court erred by allowing the teacher of an alleged victim of sexual abuse to testify on direct examination regarding specific instances of the alleged victim's conduct which tended to establish her truthfulness. State v. Baymon, 108 N.C. App. 476, 424 S.E.2d 141, aff'd, 336 N.C. 748, 446 S.E.2d 1 (1994).

Testimony of Children. — A conviction may be upheld in a case involving sexual offenses where proof includes testimony of a child victim even though the victim did not use the precise terms set out in this section. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied and appeal dismissed, 329 N.C. 273, 407 S.E.2d 846 (1991).

Child victim's testimony of defendant's conduct and testimony by previous child victims of similar conduct, along with expert testimony of clinical social worker, was sufficient to convict defendant of first-degree sexual offense. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002).

There was substantial evidence to support the essential elements of first-degree sexual offense under G.S. 14-27.4(a) where all three of defendant's children testified to the egregious acts committed by defendant against them. State v. Bartlett, 153 N.C. App. 680, 571 S.E.2d 28, 2002 N.C. App. LEXIS 1247 (2002), appeal dismissed, cert. denied, 356 N.C. 679, 577 S.E.2d 892 (2003).

Use of Anatomical Dolls to Illustrate Testimony Proper. — The courts of this State have allowed the use of anatomical dolls in sexual abuse cases to illustrate the testimony of child witnesses; the practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony and it conveys the information sought to be elicited, while permitting the child to use a familiar item, thereby making him more comfortable. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Even though dolls were used to illustrate the testimony of a social worker rather than the abused children, the evidence was still admissible; the demonstration illustrated the social worker's testimony as to the manner in which the children communicated accounts of sexual abuse and the social worker's demonstration of what she observed each child do with the dolls also corroborated the testimony of each child. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Seven-year-old child's testimony constituted sufficient evidence of penetration to support a conviction of first degree sexual offense. State v. Watkins, 318 N.C. 498, 349 S.E.2d 564 (1986).

Although young victim did not use the word "vagina" or "genital area" when describing the sexual assault perpetrated upon her, where she did employ words commonly used by females of tender years to describe those areas of their bodies, of which they are just becoming aware, such evidence was ample to support verdict of guilty of first degree sexual offense. State v. Rogers, 322 N.C. 102, 366 S.E.2d 474 (1988).

Proof of Penetration. — To prove a case of first-degree sexual offense, the State must prove there was "penetration, however slight, by any object into the genital or anal opening of another person's body"; that the victim was a child under the age of 13 years old; and the defendant is at least 12 years old and is at least four years older than the victim. State v. Huntley, 104 N.C. App. 732, 411 S.E.2d 155 (1991), cert. denied, 331 N.C. 288, 417 S.E.2d 258 (1992).

Child's Testimony Sufficient to Show Penetration of Anal Opening. — In trial for first degree sexual offense, where victim testified that defendant put his penis in the "back" and went on to explain that she meant "where I go number two," the child's testimony, taken as a totality, was sufficient evidence that the defendant penetrated child's anal opening. State v. Estes, 99 N.C. App. 312, 393 S.E.2d 158 (1990).

Medical Evidence to Support Victim's Testimony. — Evidence was sufficient to allow a jury to convict defendant of first-degree sexual offense when the victim, his daughter, testified about his acts of anal intercourse and fellatio upon her, and medical evidence was presented from which the jury could infer that sexual acts upon the victim occurred. State v. Davis, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 1193 (Aug. 6, 2002), cert. denied, 356 N.C. 170, 568 S.E.2d 623 (2002).

Defendant's conviction of six counts of first-degree sexual offense of a child under the age of 13 years was affirmed because admission of videotape interviews of the children victims was permissible under G.S. 8C-1-803(4) because the challenged statements were made to pediatric nurses at the children's center prior to examination by the doctor; there was sufficient evidence to support the charges. State v. Burgess, 181 N.C. App. 27, 639 S.E.2d 68, 2007 N.C. App. LEXIS 72 (2007).

Medical Evidence Not Required. — Medical evidence was not required to support a conviction of first-degree sexual offense under G.S. 14-27.4(a)(1) where the nature of the criminal acts made it unlikely that there would be physical evidence of the offense. State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212, 2001 N.C. App. LEXIS 860 (2001).

Child's uncertainty as to the time or particular day the offense was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Allowing Testimony as to Age of Defendant Not Error. — In a prosecution for first degree sexual offenses and taking indecent liberties with minors, the trial court did not err in allowing a deputy to testify as to his opinion that defendant appeared to be between 29 and 30 years of age since it was not necessary for the State to prove defendant's exact age in order to convict him of any of the crimes charged, and the deputy had ample opportunity to observe defendant during the booking process and in the courtroom. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Evidence Supported Charge of First-Degree Sexual Offense. — Where the defendant choked the victim into unconsciousness three times, her jeans were tied around her neck and used to drag her nude body through a wooded area where she was left, she had a deep red ring around her throat and bruises and abrasions over nearly her entire body, the victim testified that the defendant had tried to put her eyes out with his thumbs, the evidence, taken in the light most favorable to the State, supported the serious injury element of first-degree rape and first-degree sexual offense. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Because defendant displayed a dangerous or deadly weapon and the co-defendant aided and abetted defendant in having oral or anal intercourse with the victim, the evidence was sufficient to convict him of the crime of first degree sexual offense, under G.S. 14-27.4. State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Evidence that defendant removed his pants, walked into the room where the victim, defendant's seven- or eight-year-old daughter was seated, stood in front of the victim, and asked the victim to put defendant's penis in the victim's mouth qualified as overt act sufficient to submit the charge of attempted first-degree sexual offense to the jury. State v. Henderson, 182 N.C. App. 406, 642 S.E.2d 509, 2007 N.C. App. LEXIS 671 (2007).

Evidence Supported Findings in Aggravation. — In first-degree sexual offense case, rather than characterize the prosecuting attorney's summary of the evidence as a "mere assertion," it was more appropriate to focus on the fact that defense counsel admitted the correctness of that summary in his own statement to the court; the message communicated to the trial court by defendant, through counsel, was very clear by conduct, syntax and vocabulary, and if not a stipulation, it was certainly an admission that defendant in fact stuck his penis in the mouth of the five-year-old niece whom he bathed, fed and took care of, and with whom he lived; therefore, there was sufficient evidence to support the findings in aggravation. State v. Mullican, 95 N.C. App. 27, 381 S.E.2d 847 (1989), aff'd, 329 N.C. 683, 406 S.E.2d 854 (1991).

Motive for Original Use of Force Irrelevant. — Even though defendant struck victim with croquet stick in her bedroom because he was angry with her for having sex with someone else, rather than for the purpose of forcing her to have sex with him, the first-degree sexual offense statute applied; it was clear that defendant's use of the croquet stick had the effect of putting the victim in fear for her life and thereby forcing her to submit to the defendant; fact that defendant initially became angry at the thought that the victim may have engaged in sexual activity with someone else was of no significance. State v. Hinton, 95 N.C. App. 683, 383 S.E.2d 704 (1989), cert. denied, 326 N.C. 266, 389 S.E.2d 117 (1990).

Cross-Examination Properly Restricted. — In trial for first-degree sexual offense and burglary, the trial court did not err in prohibiting defendant's attempted cross-examination of victim concerning psychiatric treatment that she had received and unrelated charges of sexual assault that she had made against another person in a previous judicial proceeding. State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986).

Testimony Held Sufficient to Show Cunnilingus. — Victim's testimony was sufficient to establish that defendant placed his tongue on her mons pubis, which is part of the external female genitalia. Thus, the act of cunnilingus was thus complete. State v. Weathers, 322 N.C. 97, 366 S.E.2d 471 (1988).

Testimony of Victim Sufficient Evidence of Cunnilingus. — Testimony of four-year-old girl that defendant "touched me … with his tongue … between my legs," while indicating the place of touching to the jury, constituted sufficient evidence of cunnilingus to support a conviction for a first-degree sexual offense. State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981).

An alleged child victim's testimony that defendant placed his tongue on her pubic area was sufficient to establish that defendant committed a completed act of cunnilingus. State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212, 2001 N.C. App. LEXIS 860 (2001).

Testimony Held Irrelevant. — Trial judge did not err by not allowing defendant's witnesses to testify that he had not molested their children and by not allowing several children to testify that he had not molested them since such testimony was totally irrelevant. State v. Hoffman, 95 N.C. App. 647, 383 S.E.2d 458 (1989), cert. denied, 326 N.C. 52, 389 S.E.2d 101 (1990).

Evidence of Intent. — Where defendant showed to brother of a sexual-offense victim, condoms to be used "whenever they were going to make love," the prosecution's questions to defendant concerning the condoms were admissible to show proof of intent, preparation, plan, knowledge and absence of mistake. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert.

denied and appeal dismissed, 329 N.C. 273, 407 S.E.2d 846 (1991).

Evidence of prior sex acts may have some relevance to the question of defendant's guilt of the crime charged if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. Such evidence is deemed admissible and not violative of the general rule prohibiting character evidence. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied and appeal dismissed, 329 N.C. 273, 407 S.E.2d 846 (1991).

Evidence Improperly Admitted. — The trial court erred in allowing the State to cross-examine defendant charged with a sexual offense in the first degree concerning the following items in cross-examination: photographs, a dildo, a catalogue of condoms, lubricant, and two books entitled "Sexual Intercourse" and "The Sex Book," all of which were found in his home. State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371, cert. denied and appeal dismissed, 329 N.C. 273, 407 S.E.2d 846 (1991).

Evidence That Defendant Enjoyed Consensual Anal Sex With His Wife Improperly Admitted. — Defendant was granted a new trial on his convictions of first degree sex offense with a child, G.S. 14-27.4, and taking indecent liberties with a child, G.S. 14-202.1, because the trial court erred, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), in admitting testimony by defendant's wife that defendant enjoyed anal sex; the fact that defendant engaged in and liked consensual anal sex with his wife was not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both to be admissible under rule 404(b). State v. Dunston, 161 N.C. App. 468, 588 S.E.2d 540, 2003 N.C. App. LEXIS 2186 (2003).

Statements to Social Worker Acting as Agent of State. — In case involving crimes against child victim, where social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, the social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Admission of defendant's statement concerning prior incidents held proper. In a case of first degree sexual offense and taking indecent liberties with two young boys, defendant's statement to detective concerning prior incidents of taking indecent liberties with two young girls was relevant to show defendant's unnatural lust, intent or state of mind. State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580, cert. denied, 331 N.C. 290, 417 S.E.2d 68 (1992).

Confession was voluntary because defendant was not under arrest during the questioning; he was advised of and knowingly waived his constitutional rights; the officer's statements regarding defendant's employment, the possession of his car, and his rights to visit his son came in response to specific questions asked by defendant; and any promises that may have been made by the officer concerned collateral matters, not involving the crime charged. State v. Cabe, 136 N.C. App. 510, 524 S.E.2d 828, 2000 N.C. App. LEXIS 53 (2000), cert. denied, 351 N.C. 475, 543 S.E.2d 496 (2000).

Evidence Held Sufficient. — Evidence was sufficient to support defendant's conviction of first-degree sex offense based on the theory that he aided and abetted his codefendant brother in the commission of the offense. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

Child's testimony held sufficient to support a conviction for first-degree sexual offense. State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985).

Where both child victims testified and demonstrated with anatomically correct dolls the manner in which defendant inserted his penis into their backsides, this evidence was sufficient to permit the jury to find beyond a reasonable doubt that defendant penetrated the anal openings of both of the boys with his penis. State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986).

Evidence of rectal penetration held sufficient. State v. Sloan, 316 N.C. 714, 343 S.E.2d 527 (1986).

Testimony of child who was nine at the time of the offense, describing 20-year-old defendant's commission of anal intercourse, corroborated by that of her mother and the examining physician's evidence constituting proof of essential elements of first degree sexual offense. State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987).

Evidence held sufficient to convict defendant of an offense under this section against four-year-old victim. State v. Kivett, 321 N.C. 404, 364 S.E.2d 404 (1988).

Evidence held sufficient to support the jury finding that defendant was guilty of first degree sexual offense. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Testimony of child victim held sufficient for the jury to find the dates of the offenses. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

There was evidence in record to support jury's findings as to first-degree sexual offense where, although child responded "I don't think so" when the assistant district attorney asked if defendant had done anything else to her, her sister testified that she and other girl "touched" defendant's penis "with [their] lips" when the three were in the car. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

In trial on charges of first-degree rape and first-degree sexual offense, evidence supported the jury's verdict of guilty on the basis that the victim suffered serious personal injury in the form of both bodily and mental injury, where the victim testified that in addition to the physical pain she experienced during and immediately after the rape and sodomy, she had continued to experience appetite loss, severe headaches, nightmares, sleep difficulty, difficulty in urination, and difficulty in bowel movements. State v. Davis, 101 N.C. App. 12, 398 S.E.2d 645 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Evidence in juvenile proceeding held sufficient to support conviction of first degree sexual offense by 13-year-old babysitter against four-year-old. In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

Although a nurse and doctor who examined an alleged rape victim testified that they did not find conclusive physical evidence that a sex act occurred, this medical testimony did not negate the victim's testimony that defendant committed numerous sexual acts against her, which was corroborated by the forensic evidence; also, the State presented evidence of seminal fluid collected from the victim's bedroom that matched defendant's DNA. Therefore, the State presented sufficient evidence from which a jury could find that defendant committed first-degree statutory rape under G.S. 14-27.2(a)(1), first-degree sexual offense under G.S. 14-27.4(a)(1), and indecent liberties with a child under G.S. 14-202.1. State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004).

Defendant's conviction for sexual assault was affirmed because there was substantial evidence that defendant engaged in a sexual act of anal penetration with the victim, against the victim's will, and by employing a knife as a dangerous or deadly weapon. While the elderly victim gave conflicting testimony as to whether defendant penetrated her anally, a report from a rape kit concluded that semen was present on the swab from the victim's rectum; furthermore, an emergency room doctor testified that it was possible for a person to be penetrated anally without showing signs of trauma and a victim might not recall anal penetration due to the fear experienced during such an assault. State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006), review denied, 360 N.C. 578, 635 S.E.2d 902 (2006).

Evidence supported defendant's conviction for rape, statutory rape, sex offense, statutory sex offense, and sex offense in a parental role as: (1) defendant attacked the 14-year-old victim over a period of hours; (2) defendant's expert testified that various wounds were inflicted while the victim was alive; (3) defendant raped the victim vaginally and anally while the victim was alive, leaving semen inside both her vagina and anus; (4) evidence from the victim's lung tissue showed the victim was alive for a substantial period of time after the brain injury was inflicted; and (5) after hitting the victim in the head, defendant walked around thinking about how to cover up the crime, attempted to clean the victim up, and then sexually assaulted her body, all part of the same episode. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Convictions of two counts of first-degree sexual offense were proper because a detective and a forensic interviewer corroborated the six-year-old victim's testimony by relating that the victim told them during interviews that defendant performed fellatio on him more than once. State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556, 2007 N.C. App. LEXIS 1822 (2007).

Circumstances to which the ten-year-old female testified, and defendant's inculpatory statements, when viewed most favorably to the State, amounted to substantial evidence that defendant's penis touched the ten-year-old female's mouth and supported defendant's conviction for first degree sexual offense. The ten-year-old female testified that the female heard a "swishing" sound made by undershorts being pulled down, and felt skin and wetness on the female's mouth, and, in defendant's inculpatory statements, defendant admitted putting defendant's penis in the "other little girl's mouth. State v. Reaves, — N.C. App. —, 676 S.E.2d 74, 2009 N.C. App. LEXIS 523 (2009).

Trial court did not err in denying defendant's motion to dismiss because, viewing the evidence in the light most favorable to the State of North Carolina, the State presented sufficient evidence of anal penetration of the minor victim by defendant, through the testimony of the victim, the victim's brother, a physician's assistant who examined the victim, and a child therapist who met with the victim, to allow a jury to find that defendant committed first-degree sexual offense. State v. Norman, — N.C. App. —, 675 S.E.2d 395, 2009 N.C. App. LEXIS 504 (2009).

Trial court did not err in denying defendant's motion to dismiss because the evidence was sufficient to constitute substantial evidence of each element of the crime of first degree sexual offense under G.S. 14-27.4(a) where a minor child testified that on three separate occasions defendant reached beneath the child's shorts and touched between "the skin type area" in "the area that you pee out of." Further, the child testified that defendant would rub against a pressure point causing the child pain and made the child feel as if the child was about to pass out, while a pediatrician testified that with extreme pressure and friction on the outside of the child's labia majora or also on the inside coupled with the complaint of pain, it was more suggestive of touching these structures on the inside. State v. Crocker, — N.C. App. —, 676 S.E.2d 658, 2009 N.C. App. LEXIS 712 (2009).

Evidence Held Sufficient. — Trial court did not err in denying defendant's motion to dismiss the first degree sexual offense charge, because the State presented sufficient evidence and the jury instructions, read as a whole, correctly instructed the jury of the findings required for conviction. State v. Lark, — N.C. App. —, 678 S.E.2d 693, 2009 N.C. App. LEXIS 1101 (July 7, 2009).

Evidence Held Insufficient. — Given the ambiguity of the seven-year-old victim's testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence) that anal intercourse occurred, as a matter of law the evidence was insufficient to support a verdict of first-degree sexual offense. State v. Hicks, 319 N.C. 84, 352 S.E.2d 424 (1987).

There was insufficient evidence that defendant engaged in first-degree sexual offense against a child who was under the age of 13, where defendant was at least 12 years old and at least four years older than the victim under G.S. 14-27.4(a)(1) prior to the victim turning 13 to send the case to the jury, as the victim testified that the first time defendant had sex with the victim, the victim was 13, and that over the course of two years, defendant performed various other sexual acts upon the victim; the victim's testimony failed to indicate that the events occurred when defendant began touching the victim and on the day prior to the victim's 13th birthday. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Under the corpus delicti rule, statements defendant made to a victim's brother immediately after defendant confessed to a detective that the victim attempted to perform fellatio, opportunity evidence, and defendant's testimony that he felt something touch his penis did not constitute the substantial independent evidence that was required to establish the sexual act element of first-degree sexual offense under G.S. 14-27.1(4) and G.S. 14-27.4 because the victim testified that a sexual act did not occur, the statements made to the victim's brother were not independent of the extrajudicial confession, and the extrajudicial confession and defendant's testimony did not allow a jury to find beyond a reasonable doubt that the victim's mouth made contact with defendant's penis. State v. Smith, 362 N.C. 583, 669 S.E.2d 299, 2008 N.C. LEXIS 972 (2008).

Expert Statement Improper Evidence. — Expert's statement, which intimated the cause of the alleged victim's post-traumatic stress syndrome was the sexual abuse inflicted by defendant, was erroneously admitted as substantive evidence to prove victim suffered a sexual assault by anal penetration and that defendant committed the offense. State v. Hensley, 120 N.C. App. 313, 462 S.E.2d 550 (1995).

Defendant was entitled to a new trial on the charge of first-degree sexual offense because the trial court erred when it admitted a doctor's expert opinion that sexual abuse had in fact occurred when the doctor's testimony amounted to an improper opinion on the victim's credibility, and it had a probable impact on the jury's result; the victim's testimony was the only direct evidence implicating defendant on the charge of first-degree sexual offense, and while the doctor could give such testimony with regard to vaginal rape, where he found significant findings of physical evidence to support the charge history, he could not testify that it was defendant who repeatedly abused the victim where no such physical evidence existed. State v. Streater, — N.C. App. —, 678 S.E.2d 367, 2009 N.C. App. LEXIS 1065 (July 7, 2009).

Arrest of Judgment Proper. — Trial court did not err by electing to arrest judgment on a felonious child abuse with a deadly weapon conviction as only one felony was necessary to support a felony murder conviction, and the jury found that five felonies could support a felony murder charge including forcible rape, statutory rape, forcible sex offense, statutory sex offense, and felony child abuse with a deadly weapon. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Jury Instruction on Crime Not Set Out in Indictment. — The court erred in entering judgment upon the defendant's conviction of a statutory sexual offense, a violation of G.S. 14-27.7A, following instructions under G.S. 14-27.7A where the indictment alleged a forcible sexual offense, a violation of this section. State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

Instructions under § 14-27.7A Insufficient for Indictment Brought under This Section. — Where the jury is instructed and reaches its verdict on the basis of the elements set out in G.S. 14-27.7A, but defendant was indicted and brought to trial on the basis of the elements set out in this section, the indictment under which defendant was brought to trial could not be considered valid and any judgment made thereon must be vacated. State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

Double Jeopardy. — Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of N.C. G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Unanimity of Verdict. — Trial court did not err by not requiring a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first degree sexual offense where the victim testified that he had committed various sexual acts with the victim. State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134, 2003 N.C. App. LEXIS 2045 (2003).

Defendant was not deprived of defendant's right to a unanimous jury verdict as to charges of first-degree statutory sexual offense under G.S. 14-27.2, statutory sexual offense against a person who was 13, 14, or 15 years old under G.S. 14-27.4(a)(1), taking indecent liberties with a child under G.S. 14-202.1, second-degree forcible sexual offense under G.S 14-27.5, and assault on a female by a male at least 18 years of age under G.S. 14-33(c)(2) as: (1) the indictments were valid absent the inclusion of the specific acts that constituted the alleged sexual offenses; (2) the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts which were to serve as the underlying basis for each offense; (3) the jury was instructed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim; (4) there was nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets; and (5) the jury was polled following the announcement of the verdicts. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Instruction Held to Deprive Defendant of Unanimous Verdict. — The trial court committed reversible error in instructing the jury that it could convict defendant of first degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse, as defendant had a constitutional right to be convicted by the unanimous verdict of a jury in open court, and under this instruction there was no way to tell whether defendant was convicted of second degree sexual offense because the jury unanimously agreed that defendant engaged in fellatio, anal intercourse, both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse, and some found that he engaged in anal intercourse but not fellatio. State v. Callahan, 86 N.C. App. 88, 356 S.E.2d 403 (1987), aff'd, 93 N.C. App. 579, 378 S.E.2d 812 (1989).

Instruction Did Not Deny Defendant's Right to Conviction by Unanimous Jury. — For case holding jury instruction on charge of first degree sexual offense stating that if jury found defendant engaged in either fellatio or vaginal penetration it could convict defendant of that charge was not error and in particular was not a denial of defendant's right to a conviction by a unanimous jury, see State v. McCarty, 326 N.C. 782, 392 S.E.2d 359 (1990).

Trial court properly instructed the jury it could find defendant guilty of the crimes of first-degree rape and first degree sexual offense if it found that defendant either displayed a dangerous or deadly weapon or was aided and abetted by one or more other persons during their commission, pursuant to G.S. 14-27.2(a)(2)(a) and (c) and G.S. 14-27.4(a)(2)(a) and (c). State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38, 2001 N.C. App. LEXIS 419 (2001), cert. denied, 354 N.C. 72, 553 S.E.2d 206 (2001).

Disjunctive Instruction Did Not Risk Nonunanimous Verdict. — A disjunctive jury instruction on a first-degree sexual offense did not risk a nonunanimous verdict by defining a sexual act as either cunnilingus or penetration, where the statutory definition of "sexual act" did not create disparate offenses, but merely enumerated alternative methods of showing the commission of a sexual act. State v. Petty, 132 N.C. App. 453, 512 S.E.2d 428 (1999).

Instruction on Crime Against Nature Properly Refused. — Where there was no evidence from which the jury could have found that victim consented to sexual act, the trial court did not err in refusing to submit a crime against nature charge to the jury. State v. Jordan, 321 N.C. 714, 365 S.E.2d 617 (1988).

Instructions on Serious Injury Upheld. — In prosecution for first-degree rape and first-degree sexual offense, the trial court did not err in instructing the jury on the element of serious injury, where the trial court corrected its instructions on the mental element of serious injury when the lack of any evidence tending to show mental injury was drawn to the court's attention, and the trial court then specifically instructed the jury that there was no evidence of mental injury in the present case and that the jury's sole consideration was whether there was serious bodily injury. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Failure to Instruct Jury Not to Consider Serious Injury Evidence Upheld. — Where the defendant was charged with first-degree sexual offense, but he was convicted of second-degree sexual offense which does not include either use of a deadly weapon or the infliction of serious injury, the trial court did not err in failing to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its verdict on the assault with a deadly weapon inflicting serious injury charge, for in convicting him of second-degree sexual offense the jury necessarily found that no serious injury was inflicted during that offense, and in convicting him of assault with a deadly weapon inflicting serious injury they necessarily found that the victim's only serious injury was inflicted during the assault with the deadly weapon. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

Jury instructions did not result in conditional directed verdicts because reviewing the instructions in their entirety, the instructions could not have led the jury to believe that it could return a verdict of guilty in all four first-degree sexual offense charges if the jury was satisfied of defendant's guilt beyond a reasonable doubt for only one of those offenses. State v. Norman, — N.C. App. —, 675 S.E.2d 395, 2009 N.C. App. LEXIS 504 (2009).

Seven-year-old child's testimony constituted sufficient evidence of penetration to support a conviction of first-degree sexual offense. State v. Watkins, 318 N.C. 498, 349 S.E.2d 564 (1986).

Attempt Instruction Not Warranted. — In a trial for first-degree sexual offense, there was not sufficient evidence of the existence of a mere attempt to warrant an attempt instruction. State v. Rhinehart, 322 N.C. 53, 366 S.E.2d 429 (1988).

In a case in which the defendant and an accomplice raped a woman and defendant was convicted of, inter alia, first degree sexual offense by anal intercourse, an instruction on attempted first degree sexual offense by anal intercourse was not required since the victim's testimony never specifically excluded penetration and there was DNA evidence that defendant's sperm was found on an anal swab. State v. Person, 187 N.C. App. 512, 653 S.E.2d 560, 2007 N.C. App. LEXIS 2574 (2007).

Instruction of Lesser Offenses Warranted. — Where there was conflicting evidence on defendant's use of a knife, proof of which was necessary for a verdict of first-degree rape, victim testifying that defendant employed a knife during the act of rape, while defendant testified that there was no knife in his truck when the incident occurred, and no knife was ever located by investigating officers, the trial court properly included the lesser-included offenses of second-degree rape and second-degree sexual offense in its charge to the jury. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

When Submission of Lesser Included Offense Necessary. — Fact that the evidence in a trial for first degree sexual offense would have supported a verdict of guilty of the lesser included offense of second-degree sexual offense did not mean that the trial judge was required to submit the lesser offense. When the State seeks a conviction of only the greater offense and the case is tried on an all or nothing basis, the State's evidence is not regarded as evidence of the lesser included offense unless it is conflicting, and the lesser included offense must be submitted only when a defendant presents evidence thereof or when the State's evidence is conflicting. State v. Bullard, 97 N.C. App. 496, 389 S.E.2d 123, cert. denied, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Instruction Defining "Sexual Act." — In trial for first-degree sexual offense, trial court's instruction which stated in part that "a sexual act means any penetration, however slight, by an object into the genital opening of a person's body," was not plain error. State v. Carter, 326 N.C. App. 243, 388 S.E.2d 111 (1990).

Instruction on "Use of Deadly Weapon". — The state is only required to show that defendant possessed a deadly or dangerous weapon at the time of the rape and that the victim was aware of the presence of the weapon because it had been displayed or employed; therefore, although the trial court's instruction did not emphasize the victim's awareness of the weapon, the instruction made clear that the state was required to prove that the weapon was displayed in some fashion and, therefore, was proper. State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383, cert. denied, 325 N.C. 435, 384 S.E.2d 545 (1989).

Withdrawal of Request for Instructions Held Voluntary. — Defendant on trial for first-degree rape and first-degree sexual offense was not forced by any erroneous ruling of the trial court to withdraw his request for instructions; accordingly, the defendant's withdrawal of his request for instructions on involuntary commitment was voluntary and not improperly coerced by a mistaken ruling of the trial court. State v. Coppage, 94 N.C. App. 630, 381 S.E.2d

169, cert. denied, 325 N.C. 547, 385 S.E.2d 503 (1989).

Juvenile Disposition. — Juvenile defendant failed to argue how the absence of a sex offender specific evaluation hindered the trial court's ability to properly sentence him on his adjudication for first degree sex offenses with a child. In re J.J.D.L., 189 N.C. App. 777, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

Denial of juvenile defendant's motion for release pending appeal was not improper, given that defendant did not challenge the trial court's findings of fact supporting its reason for denying defendant's motion, which was that he committed first degree sex offenses with a child. In re J.J.D.L., 189 N.C. App. 777, 659 S.E.2d 757, 2008 N.C. App. LEXIS 693 (2008).

§ 14-27.4A. Sexual offense with a child; adult offender.

(a) A person is guilty of sexual offense with a child if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years.

(b) A person convicted of violating this section is guilty of a Class B1 felony and shall be sentenced pursuant to Article 81B of Chapter 15A of the General Statutes, except that in no case shall the person receive an active punishment of less than 300 months, and except as provided in subsection (c) of this section. Following the termination of active punishment, the person shall be enrolled in satellite-based monitoring for life pursuant to Part 5 of Article 27A of Chapter 14 of the General Statutes.

(c) Notwithstanding the provisions of Article 81B of Chapter 15A of the General Statutes, the court may sentence the defendant to active punishment for a term of months greater than that authorized pursuant to G.S. 15A-1340.17, up to and including life imprisonment without parole, if the court finds that the nature of the offense and the harm inflicted are of such brutality, duration, severity, degree, or scope beyond that normally committed in such crimes, or considered in basic aggravation of these crimes, so as to require a sentence to active punishment in excess of that authorized pursuant to G.S. 15A-1340.17. If the court sentences the defendant pursuant to this subsection, it shall make findings of fact supporting its decision, to include matters it considered as egregious aggravation. Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the depraved torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.

(d) The offense under G.S. 14-27.4(a)(1) is a lesser included offense of the offense in this section. (2008-117, s. 2.)

Editor's Note. — Session Laws 2008-117, s. 22, made this section effective effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-27.5. Second-degree sexual offense.

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 7; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1131; 1994, Ex. Sess., c. 24, s. 14(c); 2002-159, s. 2(c).)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to essentials of bill of indictment for sexual offenses, see G.S. 15-144.2. As to venue of trial of sexual offenses where victim was transported, see G.S. 15A-136. As to office of coordinator of services for victims of sexual assault, see G.S. 143B-394.1 through 143B-394.3.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For note discussing whether sex with a sleeping woman meets the requirements of force and lack of consent, see 65 N.C.L. Rev. 1246 (1987).

For note that addresses the effect of a recent United States Supreme Court decision on sodomy laws and the manner in which society may shape its characterization of Acquired Immune Deficiency Syndrome (AIDS) and homosexuality, see 66 N.C.L. Rev. 226 (1987).

For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

First and Second-Degree Offenses Distinguished. — A second-degree offense differs from a first-degree offense only in the absence of the alternative elements of aiding and abetting, use or display of a deadly weapon, or infliction of serious bodily injury. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Under G.S. 14-27.4(a) and subsection (a) of this section, when aiding and abetting is proven, the offense is first degree; it can never be a second-degree offense. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

Where the only theory that would sustain defendant's conviction of a sexual offense was aiding and abetting, defendant could only be tried for a first-degree sexual offense and the court's instruction on second-degree sexual offense was error, since the offense is always first degree when aiding and abetting is proven. State v. Barnette, 304 N.C. 447, 284 S.E.2d 298 (1981).

In order for an offense to be submitted as a lesser included offense, not only must there be evidence of all elements of the offense, but all the elements of the offense to be submitted must be contained in the greater offense, and thus as a second-degree sexual offense has as an element that the sexual act must be committed "by force and against the will of the other person," or against a person "who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know" of the victim's deficiency, and neither of these alternative elements was an element of the first-degree sexual offense with which the defendant was charged, it was not error for the court to refuse to submit second-degree sexual offense as a lesser included charge. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Custodial Sexual Offense Distinguished. — Second-degree rape and second-degree sexual offense require an act by force and against the will of another person. Custodial sexual offense does not. Custodial sexual offense requires that the perpetrator, or the perpetrator's principal or employer, have custody of the victim. Second-degree rape and second-degree sexual offense do not. Custodial sexual offense thus requires proof of a fact which second-degree rape and second-degree sexual offense do not, and both second-degree rape and second-degree sexual offense require proof of a fact which custodial sexual offense does not. Double jeopardy considerations thus are not implicated. State v. Raines, 319 N.C. 258, 354 S.E.2d 486 (1987).

Conduct Included in "Sexual Act". — In defining a "sexual act" in G.S. 14-27.1(4) as "the penetration, however slight, by any object into the genital or anal opening of another person's body," the legislature intended the words "any object" to embrace parts of the human body as well as inanimate or foreign objects; therefore, the State's evidence was sufficient for the jury in a prosecution for second-degree sexual offense where it tended to show that the defendant penetrated the genital opening of the prosecutrix's body with his fingers. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

Since anal intercourse or any other sexual act specified in this section, when it is relied on for conviction, constitutes an essential element of a second-degree sex offense, proof of such a sexual act forcibly committed, standing alone, is never enough to make a sex offense especially heinous, atrocious, or cruel, because under G.S. 15A-1340.4(a)(1) evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984).

Fellatio is included as a sexual act within the meaning of this section. State v. Jacobs, 128

N.C. App. 559, 495 S.E.2d 757 (1998), cert. denied, 348 N.C. 506, 510 S.E.2d 665 (1998).

"By Force". — The phrase "by force and against her will," (now "by force and against the will of the other person") used in this section and G.S. 14-27.2, 14-27.3, and 14-27.4, means the same as it did at common law when it was used to describe some of the elements of rape. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Under the sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the sexual act be committed "by force and against the will" of the victim. Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent. State v. Locklear, 304 N.C. 534, 284 S.E.2d 500 (1981); State v. Raines, 72 N.C. App. 300, 324 S.E.2d 279 (1985).

The threat of serious bodily harm which reasonably induces fear thereof constitutes sufficient force for a second-degree sexual offense under subdivision (a)(1) of this section. State v. Berkley, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

State presented sufficient evidence of the force required for forcible sexual offense under G.S. 14-27.5(a) to go to a jury as: (1) the victim was conditioned by defendant while the victim was living in defendant's home to succumb to defendant's illicit acts through the use of pornography and the regular occurrence of the sexual acts; (2) the victim was subject to defendant's parental authority; (3) the victim testified that defendant told the victim that defendant wanted to be the first one to have sex with the victim, and complained to the victim that defendant's wife was cold and did not have sex with defendant; (4) the victim stated that defendant said defendant was in love with the victim and told the victim about a dream defendant once had in which defendant shot both the victim and defendant; and (5) defendant told the victim that if the victim ever told anyone what defendant did with the victim, that defendant would go to jail, which would ruin defendant's life and defendant would have no reason to live. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Physically Helpless. — While under some circumstances the extreme old age or extreme youthfulness of a victim may increase an offender's culpability because of the victim's relative defenselessness, a 17-year-old rape or kidnapping victim is not so extremely young as to make her age reasonably related to the purposes of sentencing, and defendant would be entitled to a new sentencing hearing on his convictions of second-degree sexual offense and first-degree kidnapping where the trial judge considered the victim's age as an aggravating factor in sentencing him. State v. Lewis, 68 N.C. App. 575, 315 S.E.2d 766, cert. denied and appeal dismissed, 312 N.C. 87, 321 S.E.2d 904 (1984).

Actual physical force is not required to satisfy the statutory requirement that the act be committed by force and against the will of the victim; fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent, takes the place of force and negates the consent. State v. Britt, 80 N.C. App. 147, 341 S.E.2d 51, cert. denied, 317 N.C. 337, 346 S.E.2d 141 (1986).

Mental Status of Defective Victim. — A trial judge has no authority to order a victim to submit to a psychological examination when the victim's mental status is an element of the crime with which the defendant is charged. State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (1994).

If there is substantial evidence that a person has engaged in prohibited sexual conduct in violation of G.S. 14-27.3 or this section, and the victim was mentally defective, and the perpetrator knew or reasonably should have known that the victim was mentally defective, there is substantial evidence that the person has engaged in such conduct "by force and against the will" of the victim. State v. Washington, 131 N.C. App. 156, 506 S.E.2d 283 (1998), cert. denied, 352 N.C. 362, 544 S.E.2d 562 (2000).

Lack of Consent Essential. — Both a first and second-degree sexual offense, insofar as they may be committed against an adult not physically or mentally handicapped, have as an essential element the lack of the victim's consent because they must be committed "by force and against the will" of the victim. State v. Booher, 305 N.C. 554, 290 S.E.2d 561 (1982).

Force and Lack of Consent Are Implied When Victim Is Incapacitated. — It makes no difference in the case of a sleeping or similarly incapacitated victim whether the State proceeds on the theory of a sexual act committed by force and against the victim's will or whether it alleges an incapacitated victim; force and lack of consent are implied in law. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Lesser Included Offense. — It was error for the trial court to submit crime against nature as a lesser included offense of second degree sexual offense. State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983).

Trial court erred by denying defendant's motions to dismiss the charges of first-degree rape and first-degree sexual offense because the State of North Carolina failed to offer any evidence tending to show that defendant employed or displayed a dangerous or deadly weapon or an article which the victim reasonably believed was a dangerous or deadly weapon, as required by G.S. 14-27.2(a)(2)(a) and G.S. 14-27.4(a)(2)(a). However, the case was remanded for resentencing because the jury's convictions necessarily included all the elements of second-degree rape and second-degree sexual offense under G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

When Submission of Lesser Included Offense Necessary. — Fact that the evidence in a trial for first degree sexual offense would have supported a verdict of guilty of the lesser included offense of second-degree sexual offense did not mean that the trial judge was required to submit the lesser offense. When the State seeks a conviction of only the greater offense and the case is tried on an all or nothing basis, the State's evidence is not regarded as evidence of the lesser included offense unless it is conflicting, and the lesser included offense must be submitted only when a defendant presents evidence thereof or when the State's evidence is conflicting. State v. Bullard, 97 N.C. App. 496, 389 S.E.2d 123, cert. denied, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Proper Refusal to Charge on Lesser Included Offense. — All of the evidence tended to show that, if the defendant committed any crime at all, he committed the crime of second-degree sexual offense for which he was tried; in such situations, the trial court must refuse to charge on lesser included offenses. State v. Brown, 332 N.C. 262, 420 S.E.2d 147 (1992).

Second-degree sexual offense and assault with a deadly weapon inflicting serious injury are separate and distinct offenses; each requires the proof of an element that the other does not, and neither is a lesser included offense of the other. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

Nonsuit Not Allowed for Failure to Fix a Definite Time. — In the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Double Jeopardy Not Shown. — Defendant's convictions of two violations of G.S. 14-27.7, for engaging in a sexual act and in intercourse with a person over whom his employer had custody, following his earlier acquittal of second degree rape under G.S. 14-27.3 and committing a sex act on a person who was physically helpless under this section, and vacation of his conviction of engaging in a sex act by force and against victim's will in violation of this section did not violate the double jeopardy clauses of U.S. Const. Amend V and N.C. Const., Art. I, § 19, as the offenses that defendant was convicted of were not lesser included offenses of the crimes that he was earlier tried for. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138, aff'd, 319 N.C. 258, 354 S.E.2d 486 (1987).

Defendant's conviction of both the crime against nature and second degree sexual offense was not error because the crime against nature proscribed by G.S. 14-177 requires penetration of or by the sexual organ, while second degree sexual offense does not. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434 (1986).

Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of N.C. G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Minor plaintiffs' action against their father for willfully assaulting, abusing, molesting and raping them was improperly dismissed under the provisions of G.S. 1A-1, Rule 12(b)(6) on the ground that the action was barred by the parental immunity doctrine. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

Doctrine of Parental Immunity Inapplicable. — Where a father's acts against his minor daughters constituted incest in violation of G.S. 14-178, second degree rape in violation of G.S. 14-27.3, and second degree sexual offense in violation of this section, and caused plaintiffs to suffer permanent physical, emotional and mental injuries the doctrine of parental immunity will not bar a civil suit against him. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

Constructive Force. — In prosecution on charge of second-degree sexual offense committed by the defendant against his 13-year-old son, constructive force reasonably could be inferred from the circumstances surrounding the parent-child relationship, where the defendant began abusing his son when the boy was only eight years old, the child was conditioned to succumb to the defendant's illicit advances at an age when he could not yet fully comprehend the implication of the defendant's conduct, not until he saw a film at school did the boy realize that the defendant's behavior was considered improper and abusive, and the incidents of abuse all occurred while the boy lived as an unemancipated minor in the defendant's household, subject to the defendant's parental authority and threats of disciplinary action. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Trial court properly denied defendant's motion to dismiss for insufficient evidence, as the State proved the element of force under G.S. 14-27.5 since in the case of a parent-child relationship, constructive force could be reasonably inferred from the circumstances surrounding the parent-child relationship, and in the instant case there was sufficient evidence from which a reasonable jury could have concluded that defendant used his position of power to force his stepdaughter to engage in sexual acts, including vaginal penetration. State v. Corbett, 154 N.C. App. 713, 573 S.E.2d 210, 2002 N.C. App. LEXIS 1525 (2002).

Sufficiency of Indictment. — Section 15-144.2(a) authorizes, for sexual offense, an abbreviated form of indictment which omits allegations of the particular elements that distinguish first-degree and second-degree sexual offense. State v. Berkley, 56 N.C. App. 163, 287 S.E.2d 445 (1982).

In an indictment for second-degree sexual offense the statements regarding the victim's and defendant's ages did not render the indictment insufficient to charge a violation of this statute. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Indictment charging defendant with statutory sexual offense under G.S. 14-27.2, statutory sexual offense of a person who was 13, 14, or 15 years of age under G.S. 14-27.7A, taking indecent liberties with a child under G.S. 14-202.1, and forcible sexual offense under G.S. 14-27.5 that did not list the specific underlying sexual acts was valid, as the jury was instructed on the specific sexual acts that were to serve as the underlying act for each charged offense; when a short form indictment properly alleged the essential elements of the offense, it did not have to allege every matter required to be proved on the trial under G.S. 15-144.2(a), and indictments charging indecent liberties with a child or a sexual offense were valid even when they did not contain a specific allegation regarding which specific sexual act was committed. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Where G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1), the statutes defining second-degree rape and second-degree sexual offense, required the offenses to be against "another person," the indictments charging these offenses did not need to state the victim's full name, nor did they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. Therefore, the test in Coker, that a person of common understanding would know the intent of the indictments, was met. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

Where the statutes defining second-degree rape and second-degree sexual offense (G.S. 14-27.3 and G.S. 14-27.5) require the offenses to be against "another person," the indictments charging these offenses do not need to state the victim's full given name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. An indictment for a statutory offense is generally sufficient when it charges the offense in the language of the statute. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

Indictments tracked the statutory language of G.S. 14-27.3(a)(1) and G.S. 14-27.5(a)(1). Therefore, "RTB" was sufficient to inform defendant that he was charged with second-degree rape and second-degree sexual offense against "another person." State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

In order to determine if the lack of a victim's full name renders indictments fatally defective, courts apply the tests set forth in Coker and Lowe to inquire (1) whether a person of common understanding would know that the intent of the indictments was to charge a defendant with second-degree rape and second-degree sexual offense, violations of G.S. 14-27.3 and G.S. 14-27.5, and (2) whether a defendant's constitutional rights to notice and freedom from double jeopardy were adequately protected by the use of the victim's initials. State v. McKoy, — N.C. App. —, 675 S.E.2d 406, 2009 N.C. App. LEXIS 533 (2009).

State submitted substantial evidence to show both that defendant, a salon's massage therapist, had sexual contact with two female clients through the use of force and against their will, and, thus, committed two sexual batteries in violation of G.S. 14-27.5(a)(1), and that defendant while working at the salon was practicing massage therapy without a license in violation of G.S. 90-634(a)(1). As a result, dismissal of those charges on defendant's motion was not warranted. State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (2008).

In deciding whether a particular second-degree sex offense is especially heinous, atrocious or cruel, the facts should be compared with facts which are normally present in any second-degree sex offense, however the offense may be committed. State v. Atkins, 311 N.C. 272, 316 S.E.2d 306 (1984).

Instruction Held to Deprive Defendant of Unanimous Verdict. — The trial court committed reversible error in instructing the jury that it could convict defendant of first-degree sex offense if it found that he forced the victim to perform either fellatio or anal intercourse, as defendant had a constitutional right to be convicted by the unanimous verdict of a jury in open court, and under this instruction there was no way to tell whether defendant was convicted of second degree sexual offense because the jury unanimously agreed that defendant engaged in fellatio, anal intercourse, both fellatio and anal intercourse, or whether some members of the jury found that he engaged in fellatio but not anal intercourse, and some found that he engaged in anal intercourse but not fellatio. State v. Callahan, 86 N.C. App. 88, 356 S.E.2d 403 (1987), aff'd, 93 N.C. App. 579, 378 S.E.2d 812 (1989).

Failure to Instruct Jury Not to Consider Serious Injury Evidence Upheld. — Where the defendant was charged with first-degree sexual offense, but he was convicted of second-degree sexual offense which does not include either use of a deadly weapon or the infliction of serious injury, the trial court did not err in failing to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its verdict on the assault with a deadly weapon inflicting serious injury charge, for in convicting him of second-degree sexual offense the jury necessarily found that no serious injury was inflicted during that offense, and in convicting him of assault with a deadly weapon inflicting serious injury they necessarily found that the victim's only serious injury was inflicted during the assault with the deadly weapon. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

Instruction Upheld Although Not Technically Correct. — While instruction that the first element of attempted second-degree sexual offense is the intent of defendant to commit the offense by inserting his finger into the vaginal "area" was not technically correct, the jury, construing the charge contextually, must have understood that penetration of the vaginal "opening" was the necessary element of the crime. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Instructions on Attempting to Commit Offense Held Not Required. — Where, in prosecution for second-degree sexual offense, the evidence as to penetration was not conflicting at all; for the victim testified that defendant repeatedly penetrated her with a cane, the physical findings testified to by the emergency room doctor who examined her bore her out, and no evidence to the contrary was presented, the court was not required to instruct the jury on attempting to commit the offense. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

Where the state's evidence tended to show that defendant broke into and entered the victim's home twice, and the second time got into the victim's bed, kissed her and held her down while repeating: "I've been wanting you, and now I'm going to have you" and later, put his hand into the victim's panties and said, "Here it is, I'm going to eat it," and finally, stated he "might as well [go] ahead and rape you anyway," there was sufficient evidence of defendant's intent to engage in vaginal intercourse by force and against the will of the victim to have allowed the case to go to the jury. State v. Walton, 90 N.C. App. 532, 369 S.E.2d 101 (1988).

Variance in State's Evidence Held Not a Deprivation of Rights. — Where defendant did not present alibi evidence for the date alleged in the indictment charging him with second-degree sexual offense or for the dates shown by the State's evidence, but simply denied committing the offense, the variation in the State's evidence did not deprive him of his right adequately to present his defense or ensnare him in any way, and was not prejudicial. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

Where there was conflicting evidence on defendant's use of a knife, proof of which was necessary for a verdict of first-degree rape, victim testifying that defendant employed a knife during the act of rape, while defendant testified that there was no knife in his truck when the incident occurred, and no knife was ever located by investigating officers, the trial court properly included the lesser-included offenses of second-degree rape and second-degree sexual offense in its charge to the jury. State v. Watkins, 89 N.C. App. 599, 366 S.E.2d 876, cert. denied, 323 N.C. 179, 373 S.E.2d 123 (1988).

Young Victim's Testimony Held Suffi-

cient. — Although the victim did not use the word "vagina," or "genital area," when describing the sexual assault perpetrated upon her, she did employ words commonly used by females of tender years to describe these areas of their bodies, of which they are just becoming aware, and her testimony was sufficient to require submission of defendant's guilt of second-degree sexual offense to the jury. State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (1988).

The court rejected the defendant's contention that the juvenile court committed plain error in admitting the victim's testimony since she was only four-years-old and was incompetent to testify, specifically, his argument that she did not clearly communicate her understanding of the obligation to tell the truth or illustrate that she had the capacity to understand and relate facts since she provided inaudible responses to questions. The victim's story was consistent and corroborated by the testimony of her mother, her brother, her doctor, and the investigating officer and the evidence sufficiently demonstrated the use of force. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Expert Testimony. — Trial court did not err in allowing testimony by doctor that sexual abuse of child was very likely because the doctor was in a better position than the jury to understand the significance of her medical findings. State v. Dick, 126 N.C. App. 312, 485 S.E.2d 88 (1997), cert. denied, 346 N.C. 551, 488 S.E.2d 813 (1997).

Ineffectiveness of Counsel Argument Rejected Where Evidence Sufficient. — The evidence was sufficient under this section—even if the victim and her brother had been found incompetent to testify and thus, unavailable, because the victim's mother testified that the three-year-old victim came out of the bedroom and told her that the twelve-year-old defendant made her take off her clothes and licked her private parts—and allegations as to ineffective assistance of counsel due to failure to object to the minors' testimony were rejected where the result would not have been different had the attorney objected to its admission. In re Clapp, 137 N.C. App. 14, 526 S.E.2d 689, 2000 N.C. App. LEXIS 252 (2000).

Evidence held sufficient to show that defendant used force to commit two sexual acts with his 12-year-old daughter. State v. Britt, 80 N.C. App. 147, 341 S.E.2d 51, cert. denied, 317 N.C. 337, 346 S.E.2d 141 (1986).

Proof of Aggravating Factors. — Trial court erred in finding an aggravating factor in defendant's prosecution for second degree sexual offense, G.S. 14-27.5; evidence necessary to prove an element of the offense could not be used to prove any factor in aggravation, G.S. 15A-1340.16(d), and to prove the element of force, the State used the same evidence used to prove that defendant took advantage of a position of trust as an aggravating factor. State v. Corbett, 154 N.C. App. 713, 573 S.E.2d 210, 2002 N.C. App. LEXIS 1525 (2002).

Evidence held sufficient to support conviction of second-degree sexual offense. State v. Moorman, 82 N.C. App. 594, 347 S.E.2d 857, rev'd on other grounds, 320 N.C. 387, 358 S.E.2d 502 (1987).

Evidence of penetration held sufficient to support conviction of second-degree sexual offense. State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527, cert. denied, 320 N.C. 174, 358 S.E.2d 64, supersedeas denied, 320 N.C. 174, 358 S.E.2d 65 (1987).

Where defendant entered a hospital in the middle of the night and went into the room of a patient whom he had never seen before, a jury could reasonably find that his actions in pulling back the bedclothing, pulling up the victim's gown, and pulling her panties aside amounted to actual physical "force" as that term is to be applied in sexual offense cases. State v. Brown, 332 N.C. 262, 420 S.E.2d 147 (1992).

Where victim testified that after defendant made her take a shower and douche at his parents' house, "he made her perform oral sex on him, but she gagged herself so he would let her stop.... He forced her head down and made her place her mouth around his penis, and then she proceeded to try and throw up," this testimony constituted relevant evidence that a reasonable mind might accept as adequate to support the conclusion that defendant forced victim to engage in fellatio against her will; the court, therefore, did not err in denying defendant's motion to dismiss the charge of second-degree sexual offense. State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995).

Evidence was sufficient where victim testified that penetration had occurred, there was medical evidence, and other corroborative evidence by a police officer, social workers, and victim's foster mother. State v. Dick, 126 N.C. App. 312, 485 S.E.2d 88 (1997), cert. denied, 346 N.C. 551, 488 S.E.2d 813 (1997).

Testimony of child along with medical evidence of penetration and corroborative evidence by police officer, social workers and child's foster mother constituted sufficient evidence for conviction. State v. Dick, 126 N.C. App. 312, 485 S.E.2d 88 (1997).

Victim's testimonial evidence of being thrown on a bed by defendant juvenile, of being restrained during a sexual assault, and of being threatened if he reported the assault was sufficient to sustain defendant's conviction for second-degree sexual assault in violation of G.S. 14-27.5(a). State v. Tucker, 154 N.C. App. 653, 573 S.E.2d 197, 2002 N.C. App. LEXIS 1540 (2002), cert. denied, 356 N.C. 691, 578 S.E.2d 597 (2003).

Trial court properly denied defendant's motion to dismiss, pursuant to G.S. 15A-954, with respect to sexual offense charges against him which he allegedly committed against his 16-year-old daughter, as the evidence was sufficient to support the jury verdict, finding defendant guilty of second-degree sexual offense in violation of G.S. 14-27.5, where he physically and sexually attacked her; defendant's claim that there were inconsistencies in the testimony and a lack of physical evidence to bolster the victim's testimony lacked merit, as there was no physical evidence bolstering requirement, and inconsistencies were for the jury to resolve. State v. Dorton, 172 N.C. App. 759, 617 S.E.2d 97, 2005 N.C. App. LEXIS 1794 (2005), cert. denied, 360 N.C. 69, 623 S.E.2d 775 (2005).

Evidence that defendant committed several overt acts, including touching the victim's breast and vaginal areas, demonstrated intent to commit a sexual act against the victim without her consent sufficient to support the charge of attempted second degree sex offense. State v. Buff, 170 N.C. App. 374, 612 S.E.2d 366, 2005 N.C. App. LEXIS 998 (2005).

Defendant's conviction for second-degree sexual assault was affirmed because the defendant's videotaped statement made in the back of a patrol car during a conversation with an officer was admissible; the defendant was not being interrogated by the officer at the time and Miranda warnings therefor were not required, the statement was relevant to the crime, and the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. State v. Gantt, 161 N.C. App. 265, 588 S.E.2d 893, 2003 N.C. App. LEXIS 2055 (2003).

Right to Unanimous Jury Verdict not Violated. — Defendant was not deprived of defendant's right to a unanimous jury verdict as to charges of first-degree statutory sexual offense under G.S. 14-27.2, statutory sexual offense against a person who was 13, 14, or 15 years old under G.S. 14-27.4(a)(1), taking indecent liberties with a child under G.S. 14-202.1, second-degree forcible sexual offense under G.S 14-27.5, and assault on a female by a male at least 18 years of age under G.S. 14-33(c)(2) as: (1) the indictments were valid absent the inclusion of the specific acts that constituted the alleged sexual offenses; (2) the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts which were to serve as the underlying basis for each offense; (3) the jury was instructed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim; (4) there was nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets; and (5) the jury was polled following the announcement of the verdicts. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Applied in State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982); State v. Rhinehart, 68 N.C. App. 615, 316 S.E.2d 118 (1984); State v. Parker, 76 N.C. App. 465, 333 S.E.2d 515 (1985); State v. Ackerman, 144 N.C. App. 452, 551 S.E.2d 139, 2001 N.C. App. LEXIS 540 (2001); State v. Whiteley, 172 N.C. App. 772, 616 S.E.2d 576, 2005 N.C. App. LEXIS 1795 (2005).

Cited in State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981); State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); State v. Pace, 51 N.C. App. 79, 275 S.E.2d 254 (1981); State v. Abee, 308 N.C. 379, 302 S.E.2d 230 (1983); State v. Elliott, 77 N.C. App. 647, 335 S.E.2d 774 (1985); State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987); State v. Hartman, 90 N.C. App. 379, 368 S.E.2d 396 (1988); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Murdock, 325 N.C. 522, 385 S.E.2d 325 (1989); State v. Noble, 326 N.C. 581, 391 S.E.2d 168 (1990); State v. Whitaker, 103 N.C. App. 386, 405 S.E.2d 911 (1991); State v. Hooper, 103 N.C. App. 662, 406 S.E.2d 643 (1991); State v. Baker, 109 N.C. App. 557, 428 S.E.2d 216 (1993); State v. Canup, 117 N.C. App. 424, 451 S.E.2d 9 (1994); City of Greenville v. Haywood, 130 N.C. App. 271, 502 S.E.2d 430 (1998); State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999).

§ 14-27.5A. Sexual battery.

(a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally disabled, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally disabled, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class A1 misdemeanor. (2003-252, s. 2.)

CASE NOTES

"Sexual Contact." — State was not required to show that the conduct of defendant, a massage therapist, in touching the two female clients of the salon where defendant worked resulted in penetration, as the crime of sexual battery involved sexual contact, as defined by G.S. 14-27.1(5), and through the use of force and against the will of the two clients in violation of G.S. 14-27.5A(a)(1). The State presented sufficient evidence to show that defendant touched, inter alia, the breasts and buttocks of the two female clients and that the female clients were petrified as defendant did so because they did not know what defendant planned to do next. State v. Viera, 189 N.C. App. 514, 658 S.E.2d 529, 2008 N.C. App. LEXIS 608 (2008).

Lesser Included Offense. — Since the indictment for first degree rape did not include the purpose element included in the sexual battery statute, it was insufficient to confer subject matter jurisdiction, and the trial court lacked jurisdiction to enter a judgment of defendant's guilt on that offense; thus, the court had to arrest judgment. State v. Kelso, 187 N.C. App. 718, 654 S.E.2d 28, 2007 N.C. App. LEXIS 2523 (2007).

§ 14-27.6: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(3).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

(a) If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

(b) If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel, and who is at least four years older than the victim engages in vaginal intercourse or a sexual act with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school, but before the victim ceases to be a student, the defendant is guilty of a Class G felony, except when the defendant is lawfully married to the student. The term "same school" means a school at which the student is enrolled and the defendant is employed, assigned, or volunteers. A defendant who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and is less than four years older than the victim and engages in vaginal intercourse or a sexual act with a victim who is a student, is guilty of a Class A1 misdemeanor. This subsection shall apply unless the conduct is covered under some other provision of law providing for greater punishment. Consent is not a defense to a charge under this section. For purposes of this subsection, the terms "school", "school personnel", and "student" shall have the same meaning as in G.S. 14-202.4(d). For purposes of this subsection, the term "school safety officer" shall include a school resource officer or any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 9; 1981, c. 63; c. 179, s. 14; 1993, c. 539, s. 1132; 1994, Ex. Sess., c. 24, s. 14(c); 1999-300, s. 2; 2003-98, s. 1.)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. As to office of coordinator of services for victims of sexual assault, see G.S. 143B-394.1 through 143B-394.3.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Hospital Patients. — In enacting this statute and making it applicable to private and charitable institutions, whose patients are nearly all voluntary, the General Assembly obviously used the word "custody" in its broadest sense, intending thereby to protect from abuse all hospital patients, voluntary and committed alike. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138 (1986), aff'd, 319 N.C. 358, 354 S.E.2d 486 (1987).

The protection of this section extends to voluntary patients in a private hospital. State v. Raines, 319 N.C. 358, 354 S.E.2d 486 (1987).

Where Defendant Was Acting as Agent of Sheriff. — In a prosecution for sexual activity by a custodian, the trial court did not err in barring in limine the introduction of a contract that, according to defendant, showed that he was an independent contractor and not an agent or employee of the sheriff's office, because as a matter of law defendant was acting as agent of sheriff when the crimes were allegedly committed; further, the trial court did not err in prohibiting the cross-examination of the sheriff and the health care services administrator regarding the contract, because the trial court properly excluded evidence of the contract at trial. State v. Wilson, 183 N.C. App. 100, 643 S.E.2d 620, 2007 N.C. App. LEXIS 844 (2007), aff'd, 362 N.C. 162, 655 S.E.2d 359 (2008), State v. Wilson, 183 N.C. App. 100, 643 S.E.2d 620, 2007 N.C. App. LEXIS 844 (2007).

Convictions for sexual activity by a custodian and attempted sexual activity by a custodian were affirmed because defendant, who was a mental health clinician employed by an independent contractor that provided services to prisoners in a county jail, was an agent of the county sheriff so that defendant was criminally liable when defendant committed sexual acts with a prisoner in violation of G.S. 14-27.7(a). State v. Wilson, 362 N.C. 162, 655 S.E.2d 359, 2008 N.C. LEXIS 32 (2008).

Job Placement Program Participant. — The sixteen-year-old who allegedly had sex with defendant recreational assistant was under the care, preservation, and protection of the live-in job placement program where defendant worked and was, therefore, within its "custody" as defined by this section; although the program participants enjoyed much freedom and were able to withdraw from the program at anytime, they got their food, clothing, and medical care from the program, and were subject to the program's "zero tolerance" drug, alcohol, and violence policy and disciplined for violating that policy and other rules. State v. Jones, 143 N.C. App. 514, 548 S.E.2d 167, 2001 N.C. App. LEXIS 291 (2001), cert. denied, 353 N.C. 731, 551 S.E.2d 846 (2001).

Second-Degree Rape and Second-Degree Sexual Offense Distinguished from Custodial Sexual Offense. — Second-degree rape and second-degree sexual offense require an act by force and against the will of another person. Custodial sexual offense does not. Custodial sexual offense requires that the perpetrator, or the perpetrator's principal or employer, have custody of the victim. Second-degree rape and second-degree sexual offense do not. Custodial sexual offense thus requires proof of a fact which second-degree rape and second-degree sexual offense do not, and both second-degree rape and second-degree sexual offense require proof of a fact which custodial sexual offense does not. Double jeopardy considerations thus are not implicated. State v. Raines, 319 N.C. 358, 354 S.E.2d 486 (1987).

Effect of Section on § 14-27.4. — Argument that indictment under G.S. 14-27.4 was subject to dismissal on grounds that that statute had been partially repealed by this section was without merit, since the two statutes were enacted as parts of the same legislative act, Session Laws 1979, c. 682. An intent to simultaneously enact and repeal a law could not be attributed to the General Assembly. State v. Nations, 319 N.C. 318, 354 S.E.2d 510 (1987).

Consent is no defense to a charge under this section. State v. Raines, 72 N.C. App. 300, 324 S.E.2d 279 (1985).

Marriage Not a Defense Where Victim Too Young to Lawfully Marry. — Defendant could not claim the defense of marriage in an action charging defendant with, inter alia, attempted statutory sex offense and statutory rape, because defendant and the child, who was only 13, could not lawfully be married. State v. Ewell, 168 N.C. App. 98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005).

Admissibility of Letter Written by Defendant. — In prosecution for first degree rape and intercourse by a substitute parent, the trial court did not commit prejudicial error in admitting into evidence, over objection, a letter which the defendant wrote to the victim's mother, in which defendant promised not to "bother" victim again, despite defendant's contention that what he had meant was that he would not discipline the victim anymore. State v. Moses, 316 N.C. 356, 341 S.E.2d 551 (1986).

Variance between Indictment and Proof. — Where the indictment alleged that defendant engaged "in a sexual act, to wit: performing oral sex" on the child involved, but the State's evidence showed only that the defendant placed his finger in victim's vagina, which by definition is a separate sex offense under the terms of G.S. 14-27.1(4), the court erred in denying defendant's motion for a directed verdict at the end of all the evidence, since the defendant was convicted of a crime which he had not been charged with. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Where the indictment charging defendant with violation of this statute indicated that the charge was based on defendant's having engaged in vaginal intercourse with the victim, and at trial, the state's evidence tended to show attempted rape, attempted anal intercourse, and fellatio, and the state failed to present any evidence of vaginal penetration the defendant's conviction of engaging in a sexual act by a substitute parent could not stand. State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95, cert. denied, 323 N.C. 367, 373 S.E.2d 549 (1988).

Indictment Sufficient. — Indictment for sex offense in a parental role that matched the form required by G.S. 14-27.7 was sufficient to inform defendant of the charges against him. State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005), rev'd in part on other grounds, 361 N.C. 406, 646 S.E.2d 362 (2007).

Factual basis for nolo contendere pleas to the charges of sexual activity by a substitute parent and crime against nature held adequate. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Sentencing of defendant for both crime against nature and sexual activity by a substitute parent involving the same victim did not violate the merger doctrine or subject him to double jeopardy. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Double Jeopardy Not Shown. — Defendant's convictions of two violations of this section, for engaging in a sexual act and in intercourse with a person over whom his employer had custody, following his earlier acquittal of second degree rape under G.S. 14-27.3 and committing a sex act on a person who was physically helpless under G.S. 14-27.5, and vacation of his conviction of engaging in a sex act by force and against victim's will in violation of G.S. 14-27.5 did not violate the double jeopardy clauses of U.S. Const., Amend. V and N.C. Const., Art. I, § 19, as the offenses that defendant was convicted of were not lesser included offenses of the crimes that he was earlier tried for. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138 (1986), aff'd, 319 N.C. 358, 354 S.E.2d 486 (1987).

Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense; in a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

Aggravating Factor in Sentencing Held Error. — Trial court erred in sentencing defendant, convicted of two violations of this section, by finding as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense," as evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the evidence necessary to convict defendant tended to show that he took advantage of his custodial position in committing the offenses involved. State v. Raines, 81 N.C. App. 299, 344 S.E.2d 138 (1986), aff'd, 319 N.C. 358, 354 S.E.2d 486 (1987).

A relationship of trust and confidence was needed to prove the custodial element of custodial sexual offense. The evidence that proved the aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense thus was necessary to prove the custodial element of the offense, and the finding of the aggravating factor was proscribed by G.S. 15A-1340.4(a). State v. Raines, 319 N.C. 358, 354 S.E.2d 486 (1987).

Where the trial court entered three separate judgments of conviction, it erred in using an element of an offense that defendant was convicted of, specifically the factor of abusing a position of trust, to prove a sentencing factor in aggravation. State v. Tucker, 156 N.C. App. 53, 575 S.E.2d 770, 2003 N.C. App. LEXIS 33 (2003), cert. granted, 357 N.C. 65, 579 S.E.2d 573 (2003).

Evidence Sufficient to Support Conviction. — Sufficient evidence supported convictions for taking indecent liberties with a child under G.S. 14-202.1, statutory sex offense under G.S. 14-27.7A(a), and sexual activity by a custodian, G.S. 14-27.7(a), where the 15-year-old victim, a patient in a behavioral hospital, testified that she had engaged in sexual activity with defendant, a mental health technician at the hospital, and where the victim's mother and sister also testified that the victim told them about her interactions with defendant, and that they heard firsthand telephone conversations between the victim and defendant regarding specific sexual activity. State v. Evans, 162 N.C. App. 540, 591 S.E.2d 564, 2004 N.C. App. LEXIS 180 (2004).

Sufficient evidence showed defendant assumed the position of a parent in the victim's home, as defendant paid for all of the victim's support, including food, shelter, gifts and spending money, and defendant represented himself as the victim's temporary custodian in seeking an evaluation of him for involuntary civil commitment for substance abuse; defendant did not dispute the other elements of the offense of sexual activity by a substitute parent. State v. Oakley, 167 N.C. App. 318, 605 S.E.2d 215, 2004 N.C. App. LEXIS 2185 (2004), cert. denied, — N.C. —, 610 S.E.2d 386 (2005).

Conviction for sexual offense by a person in a parental role was reversed where there was no evidence to support the finding that defendant and the victim had a relationship analogous to that of a parent and child; the evidence, taken in the light most favorable to the State, was sufficient to establish only that defendant babysat for the victims and was not the mother's boyfriend or a de facto stepfather. State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738, 2004 N.C. App. LEXIS 300 (2004), appeal dismissed, cert. denied, 358 N.C. 733, 601 S.E.2d 861 (2004).

Applied in State v. Goforth, 67 N.C. App. 537, 313 S.E.2d 595 (1984); State v. Nations, 319 N.C. 329, 354 S.E.2d 516 (1987); State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732, 1999 N.C. App. LEXIS 619 (1999).

Cited in State v. Cooke, 318 N.C. 674, 351 S.E.2d 290 (1987); State v. Teeter, 85 N.C. App. 624, 355 S.E.2d 804 (1987); State v. Parks, 96 N.C. App. 589, 386 S.E.2d 748 (1989); State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990); State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993); State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000); State v. Radford, 156 N.C. App. 161, 576 S.E.2d 134, 2003 N.C. App. LEXIS 69 (2003); State v. Hammett, 361 N.C. 92, 637 S.E.2d 518, 2006 N.C. LEXIS 1296 (2006); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-27.7A. Statutory rape or sexual offense of person who is 13, 14, or 15 years old.

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) A defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person. (1995, c. 281, s. 1.)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12.

CASE NOTES

Constitutionality. — Even though consent is not a defense to "statutory" rape under this section, the sentencing scheme does not violate the North Carolina Constitution. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Sentencing scheme under G.S. 14-27.7A reflects a rational legislative policy, is not disproportionate to the crime, and is therefore constitutional; further, the exemption for married couples from G.S. 14-27.7A(a) does not violate equal protection. State v. Clark, 161 N.C. App. 316, 588 S.E.2d 66, 2003 N.C. App. LEXIS 2047 (2003).

Double Jeopardy. — Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of N.C. G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Consent is not a defense to a crime codified under this section. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Mistake of age is not a defense to the crime codified under this section. State v. Anthony, 133 N.C. App. 573, 516 S.E.2d 195, 1999 N.C. App. LEXIS 604 (1999), appeal dismissed, cert. granted, 351 N.C. 109, 516 S.E.2d 195 (1999), aff'd, 528 S.E.2d 321 (2000).

Consent is not a defense to this statute although the legislature created it as a separate statute, rather than amending G.S. 14-27.2(a)(1). State v. Anthony, 351 N.C. 611, 528 S.E.2d 321, 2000 N.C. LEXIS 348 (2000).

Evidence of defendant's prior assault on another victim was admissible. to show common scheme and intent where the prior assault and the current charges were similar in nature: in both instances the victims, similar in age, visited various residences or places in which they were unfamiliar and then were taken by automobile to isolated areas at night; during both instances, defendant told the victims something was wrong with the automobile, asked the victims to get out of the automobile, and then proceeded to sexually assault them. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Defendant Not Entitled to Admission of Prior Assault Evidence. — The trial court did not abuse its discretion in denying admissibility of evidence of a victim's prior assault which the defendant claimed the victim fabricated so as to obtain a pregnancy test and which he wanted to introduce to demonstrate "habit" where it noted that the "two incidents" occurring "two years apart" were not sufficient to constitute a habit. State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000).

Conviction Overturned. — The defendant's pre-December 1995 conviction for statutory rape with a fourteen-year-old could not stand where G.S. 14-27.7A which made rape statutory if the victim is under fifteen years of age did not become effective until 1 December 1995, five days after defendant had sex with the fourteen-year-old. State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

Date of Offense Not Necessary for Statutory Rape Indictment. — The fact that an indictment charging the defendant with statutory rape did not specify the exact date the offense was committed was immaterial because the evidence at trial showed that this offense occurred in January 1996 when the victim was fourteen which age satisfied the requirements of this section. State v. Crockett, 138 N.C. App. 109, 530 S.E.2d 359, 2000 N.C. App. LEXIS 548 (2000).

When defendant was charged with statutory rape of a victim, under G.S. 14-27.7A(a), if the victim's testimony was insufficient to establish that defendant had sex with the victim twice in a certain month, the State nevertheless presented substantial evidence that defendant had sex with the victim at least six times between two dates, including at least four times in another certain month, and the variance between the period of time in the indictment within which the offenses occurred and the State's evidence at trial was not material and did not deprive defendant of the opportunity to adequately present a defense, so dismissal was not required. State v. Hueto, — N.C. App. —, 671 S.E.2d 62, 2009 N.C. App. LEXIS 62 (2009).

Jury Instruction on Crime Not Set Out in Indictment. — The court erred in entering judgment upon the defendant's conviction of a statutory sexual offense, a violation of this section, following instructions under this section where the indictment alleged a forcible sexual offense, a violation of G.S. 14-27.4. State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

Jury Instruction on Sex Offense Proper. — Trial court did not commit plain error in instructing the jury on a sex offense and accepting a guilty verdict thereon as there was evidence upon which the jury could have found that defendant committed a sexual act upon the victim and the jury instructions as a whole were correct State v. Tadeja, 191 N.C. App. 439, 664 S.E.2d 402, 2008 N.C. App. LEXIS 1503 (2008).

Indictment Sufficient. — Short-form indictment charging violation of G.S. 14-27.7A(a) was sufficient when it alleged that defendant unlawfully, willfully, and feloniously engaged in a sexual act with a person of the age of 13 years, that defendant was at least six years older than the victim, and that he was not lawfully married to the victim; the indictment complied with the requirements of G.S. 15-144.2(a) and was sufficient to put him on notice of the crime of which he was accused. State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

Indictment which was couched in the language of the statute was sufficient. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Indictment Insufficient. — While defendant abandoned error as to one of the six challenged indictments filed against him, each alleging charges of first-degree sexual offense, the trial court erred in failing to dismiss the remaining five upon defendant's motion as fatally defective, given that they erroneously charged two similar but distinct crimes and effectively charged neither. State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007), rev'd, 362 N.C. 169, 655 S.E.2d 831 (2008), State v. Hill, 185 N.C. App. 216, 647 S.E.2d 475, 2007 N.C. App. LEXIS 1712 (2007).

Indictment charging defendant with statutory sexual offense under G.S. 14-27.2, statutory sexual offense of a person who was 13, 14, or 15 years of age under G.S. 14-27.7A, taking indecent liberties with a child under G.S. 14-202.1, and forcible sexual offense under G.S. 14-27.5 that did not list the specific underlying sexual acts was valid, as the jury was instructed on the specific sexual acts that were to serve as the underlying act for each charged offense; when a short form indictment properly alleged the essential elements of the offense, it did not have to allege every matter required to be proved on the trial under G.S. 15-144.2(a), and indictments charging indecent liberties with a child or a sexual offense were valid even when they did not contain a specific allegation regarding which specific sexual act was committed. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Defendant's indictments for four counts of statutory sexual offenses were valid even though the indictments cited G.S. 14-27.7A, as the indictments put defendant on notice that defendant was being charged pursuant to G.S. 14-27.4(a)(1) with four counts of first-degree sexual offense against a child who was under the age of 13, where defendant was at least 12 years old and at least four years older than the victim; further, the jury was instructed pursuant to G.S. 14-27.4(a)(1). State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Instructions under This Section Insufficient for Indictment Brought under § 14-27.4. — Where the jury is instructed and reaches its verdict on the basis of the elements set out in this section, but defendant was indicted and brought to trial on the basis of the elements set out in G.S. 14-27.4, the indictment under which defendant was brought to trial could not be considered valid, and any judgment made thereon must be vacated. State v. Bowen, 139 N.C. App. 18, 533 S.E.2d 248, 2000 N.C. App. LEXIS 807 (2000).

The defendant was entitled to the Miranda warnings prior to the date of birth question elicited during booking, and the failure to give those warnings rendered his response inadmissible as evidence where defendant's age was an essential element of the crime charged, and the investigating officer, knew or should have known her question regarding his date of birth would elicit an incriminating response. State v. Locklear, 138 N.C. App. 549, 531 S.E.2d 853, 2000 N.C. App. LEXIS 626 (2000).

Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense. In a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

Continuous Course of Conduct Theory Not Recognized. — Denial of defendant's motion to dismiss one of the charges based on the argument that they were in the nature of a "continuous transaction" was proper, because North Carolina does not recognize the "continuous course of conduct" theory. State v. Cortes-Serrano, — N.C. App. —, 673 S.E.2d 756, 2009 N.C. App. LEXIS 259 (2009).

Defendant was entitled to a new trial on the two statutory rape charges, because the trial court's failure to include "not guilty by reason of unconsciousness" in the final mandate to the jury constituted plain error, as there was a reasonable likelihood that the jury applied the instructions on unconsciousness in a manner that lessened the State's burden of proof, given the jury's inconsistent verdicts. Since the evidence of unconsciousness arose out of the State's evidence, the State had the burden of proving defendant's consciousness beyond a reasonable doubt. State v. Tyson, — N.C. App. —, 672 S.E.2d 700, 2009 N.C. App. LEXIS 190 (2009).

Evidence Sufficient to Prove Attempt But Not Completed Crime. — Evidence that defendant demanded that victim perform fellatio, but the victim refused was sufficient to support a conviction for the attempted, but not the completed crime of statutory sexual offense. State v. Sines, 158 N.C. App. 79, 579 S.E.2d 895, 2003 N.C. App. LEXIS 943 (2003), cert. denied, 357 N.C. 468, 587 S.E.2d 69 (2003).

Evidence Was Sufficient to Support Conviction. — Evidence was sufficient to support a conviction for statutory rape, including the element of a required six-year age difference between defendant and the 15-year-old victim, where the victim accurately testified as to both of their birth dates, and a marriage certificate, which was admitted into evidence, set forth both of their ages; the statutory rape occurred before the marriage, and defendant and the pregnant victim proceeded with a divorce before defendant was indicted two months after the date of the marriage. State v. Howard, 158 N.C. App. 226, 580 S.E.2d 725, 2003 N.C. App. LEXIS 1049 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 460 (2003).

There was substantial evidence to withstand defendant's motions to dismiss because the evidence established that the victim, defendant's biological daughter, was between 13 and 15 years old, an essential element of statutory rape under section G.S. 14-27.7A(a), during the time she lived with defendant, and defendant engaged in almost daily sexual intercourse with her. There was also sufficient evidence of defendant's age because it was biologically impossible for defendant to be less than six years older than the victim and to be her father. State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402, 2003 N.C. App. LEXIS 2263 (2003).

Sufficient evidence supported convictions for taking indecent liberties with a child under G.S. 14-202.1, statutory sex offense under G.S. 14-27.7A(a), and sexual activity by a custodian, G.S. 14-27.7(a), where the 15-year-old victim, a patient in a behavioral hospital, testified that she had engaged in sexual activity with defendant, a mental health technician at the hospital, and where the victim's mother and sister also testified that the victim told them about her interactions with defendant, and that they heard firsthand telephone conversations between the victim and defendant regarding specific sexual activity. State v. Evans, 162 N.C. App. 540, 591 S.E.2d 564, 2004 N.C. App. LEXIS 180 (2004).

Evidence that the victim was 15 years old and had not yet turned 16 was sufficient to support defendant's statutory rape conviction under G.S. 14-27.7A(a); because the statute did not qualify the age of the person, the minor described in G.S. 14-27.7A(a) must be either 13, 14, or 15, not more or less than those ages. State v. Moore, 167 N.C. App. 495, 606 S.E.2d 127, 2004 N.C. App. LEXIS 2337 (2004).

Defendant's conviction for statutory rape was upheld on appeal where the record indicated that one of the victims was 14 years old, defendant was 36 years old, and they were not lawfully married at the time of the incident; further evidence in the case, considered in the light most favorable to the State, tended to show defendant forced the victim to engage in vaginal and anal intercourse, which evidence was based on the victim's testimony, corroborative testimony by the State's witnesses, and physical evidence. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Evidence was sufficient to support defendant's conviction for statutory rape, as it showed that he engaged in repeated acts of sexual intercourse with the victim when she was under the age of consent and he was an adult who was dating her mother; indeed, the evidence showed that she gave birth to his baby when she was still a minor. State v. Jones, 172 N.C. App. 308, 616 S.E.2d 15, 2005 N.C. App. LEXIS 1580 (2005).

When taken in the light most favorable to the state, the victim's testimony that defendant "stuck his fingers in her vagina" while she was 13 years old provided sufficient evidence to support defendant's conviction for statutory sexual offense of a person 13 years old. State v. Brown, 178 N.C. App. 189, 631 S.E.2d 49, 2006 N.C. App. LEXIS 1311 (2006).

Victim's statement the victim had sex with defendant and the principal's corroborating testimony that the victim said the victim had sex with defendant and contracted a sexually transmitted disease was sufficient to support a statutory rape conviction under G.S. 14-27.7A. State v. Kitchengs, 183 N.C. App. 369, 645 S.E.2d 166, 2007 N.C. App. LEXIS 1165 (2007).

Evidence supported defendant's conviction for rape, statutory rape, sex offense, statutory sex offense, and sex offense in a parental role as: (1) defendant attacked the 14-year-old victim over a period of hours; (2) defendant's expert testified that various wounds were inflicted while the victim was alive; (3) defendant raped the victim vaginally and anally while the victim was alive, leaving semen inside both her vagina and anus; (4) evidence from the victim's lung tissue showed the victim was alive for a substantial period of time after the brain injury was inflicted; and (5) after hitting the victim in the head, defendant walked around thinking about how to cover up the crime, attempted to clean the victim up, and then sexually assaulted her body, all part of the same episode. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

There was substantial evidence to support convictions for incest under G.S. 14-178(a), and two counts of statutory sex offense of a person who was 15 years old in violation of G.S. 14-27.7A(a), because: (1) the victim testified that defendant was her biological father and identified him in open court, and her birth certificate identified defendant as her father, providing direct evidence of defendant's paternity; and (2) there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was 15. State v. Ware, 188 N.C. App. 790, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

Evidence Sufficient to Withstand Motion to Dismiss. — Evidence that the victim was defendant's daughter and that they were not married, and that defendant pushed the victim down on his bed and said something sexual, but stopped after the victim told defendant that she had her period, was sufficient to withstand a motion to dismiss. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Denial of motion to dismiss statutory sex offense charge was proper where the state presented sufficient evidence of each element which tended to show defendant committed sexual assaults upon the victim, the victim was 13 years old at the time in question, and defendant was at least six years older than the victim, to whom defendant was not lawfully married. State v. Wallace, 179 N.C. App. 710, 635 S.E.2d 455, 2006 N.C. App. LEXIS 2166 (2006), cert. denied, appeal dismissed, 361 N.C. 436, 649 S.E.2d 896 (2007).

There was sufficient evidence of defendant's overt actions beyond mere preparation in defendant's attempt to have vaginal intercourse with his daughter for purposes of an attempted statutory rape of a person who is 13, 14, or 15 years old under G.S. 14-27.7A(a) and an attempted incest charge under G.S. 14-178(a)(ii) to go to the jury; defendant's repeated asking of his daughter to have intercourse with him, when combined with his comments that he wanted to be "inside her" and be "her first," and the repeated sexual acts, constituted sufficient evidence of overt sexual behavior from which it could be inferred that defendant intended to engage in vaginal intercourse with his victim. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Evidence Sufficient to Allow Charges to Go to Jury. — Testimony of the victim, the victim's mother, and defendant regarding the ages of defendant and the victim at time of the alleged commission of statutory rape was sufficient to allow the charges to go to the jury, the State was not required to produce birth certificates as evidence of the ages of the victim and defendant. State v. Cortes-Serrano, — N.C. App. —, 673 S.E.2d 756, 2009 N.C. App. LEXIS 259 (2009).

As the victim testified that defendant had vaginal intercourse with her when she was 13, 14, and 15 years of age, (3) defendant w, and defendant's testimony established that he was more than six years older than the victim and was not lawfully married to her, defendant's motion to dismiss statutory rape charges was properly denied. State v. Carter, — N.C. App. —, 679 S.E.2d 457, 2009 N.C. App. LEXIS 1174 (July 21, 2009).

Defendant Not Entitled to Jury Instruction on Mistake of Fact. — Defendant's request for a jury instruction on mistake of fact as to the victim's age was properly denied because statutory rape is a strict liability crime to which mistake of fact is no defense. State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006).

Applied in State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814, 2001 N.C. App. LEXIS 578 (2001); State v. Miller, 159 N.C. App. 608, 583 S.E.2d 620, 2003 N.C. App. LEXIS 1538 (2003).

Cited in State v. Tucker, 156 N.C. App. 53, 575 S.E.2d 770, 2003 N.C. App. LEXIS 33 (2003); State v. Whitman, — N.C. App. —, 635 S.E.2d 906, 2006 N.C. App. LEXIS 2167 (2006); In re J.L., 183 N.C. App. 126, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007); State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

§ 14-27.8. No defense that victim is spouse of person committing act.

A person may be prosecuted under this Article whether or not the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense. (1979, c. 682, s. 1; 1987, c. 742; 1993, c. 274, s. 1.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For comment, "Old Wine in New Bottles: The 'Marital' Rape Allowance," see 72 N.C.L. Rev. 261 (1993).

CASE NOTES

Editor's Note. *— The cases cited below were decided prior to the 1993 amendment which abolished the spousal defense to a prosecution for rape or sexual offense.*

Strict Construction of Section. — This section is in derogation of the common law, and must be strictly construed. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

This section is not a separate rape offense. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

This section does not enumerate additional elements of rape which must be proved by the State. Rather, it abolishes, in part, the common law defense of marriage. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Effect of Section Is to Bar Prosecution. — The wording of this section does not suggest that defendant must wait until prosecution is underway to offer proof concerning his marital status. This section has the effect of barring prosecution altogether. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Marriage as Plea in Bar. — Marriage is not a defense to be raised by defendant only at trial. Marriage as a defense to rape is raised by a plea in bar to prevent trial of cases which do not meet the criteria of this section. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Plea in Bar as Inquiry as to Status. — A plea in bar under this section is not an inquiry into what defendant did, but into whether defendant was married and not separated "pursuant to a written agreement or a judicial decree" (now not separated) at the time of the incident. This is an inquiry into status. An answer in the affirmative would bar prosecution of a defendant. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Living Separate and Apart. — As amended in 1987, this section only requires that a husband and wife be "living separate and apart." State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Under this section as it read prior to the 1987 amendment, the parties had to be "living separate and apart pursuant to a written agreement or a judicial decree." The only judicial decree which would constitute a judicial separation for such purposes was a decree for a divorce from bed and board. An ex parte order requiring defendant and his wife to stay away from one another and requiring defendant to halt his harassment of his wife did not rise to the level of a judicial decree of separation as was required by this section. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

This section does not require a separate form of indictment other than the one provided for by G.S. 15-144.1. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Sufficiency of Indictment. — Rape indictment drawn in accordance with G.S. 15-144.1 was sufficient enough to let defendant know that he was charged with the rape of his estranged wife and to allow him to prepare his defense. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

§ 14-27.9. No presumption as to incapacity.

In prosecutions under this Article, there shall be no presumption that any person under the age of 14 years is physically incapable of committing a sex offense of any degree or physically incapable of committing rape, or that a male child under the age of 14 years is incapable of engaging in sexual intercourse. (1979, c. 682, s. 1.)

CASE NOTES

Infants of fourteen and over are not entitled to any presumption of incapacity to commit rape. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970), decided under former § 14-21.

§ 14-27.10. Evidence required in prosecutions under this Article.

It shall not be necessary upon the trial of any indictment for an offense under this Article where the sex act alleged is vaginal intercourse or anal intercourse to prove the actual emission of semen in order to constitute the offense; but the offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercourse. (1979, c. 682, s. 1.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Penetration is an essential element of both rape and sodomy. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Penetration Without Emission Sufficient. — There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Jackson, 18 N.C. App. 234, 196 S.E.2d 568 (1973), decided under former § 14-21.

The terms carnal knowledge and sexual intercourse are synonymous. There is carnal knowledge or sexual intercourse in a legal sense if there is any slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Burell, 252 N.C. 115, 113 S.E.2d 16 (1960); State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

Evidence Sufficient to Support Finding of Penetration. — Testimony by the prosecutrix in a rape case that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration. State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980).

ARTICLE 8.

Assaults.

§ 14-28. Malicious castration.

If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class C felon. (1831, c. 40, s. 1; R.C., c. 34, s. 4; 1868-9, c. 167, s. 6; Code, s. 999; Rev., s. 3627; C.S., s. 4210; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1133; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Elements of the offense of maliciously maiming a privy member as condemned by this section are: (1) The accused must act with malice aforethought, (2) the act must be done on purpose and unlawfully, (3) the act must be done with intent to maim or disfigure a privy member of the person assaulted, and (4) there must be permanent injury to the privy member of the person assaulted. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Intent. — An intent to maim or disfigure a privy member is prima facie to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence to the contrary. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

The offense of maiming a privy member condemned by § 14-29 is a lesser included offense of this section, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member, not being necessary to conviction under G.S. 14-29. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming without Malice. — In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of this section, defendant's motion for nonsuit of the "felony charge" was properly denied where there was sufficient evidence to support conviction under G.S. 14-29 of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by G.S. 14-29 being a lesser included offense of this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Appeal from Sentence for Punishment. — Upon conviction of the criminal offense inhibited by this section, sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of N.C. Const., Art. I, § 14 (now see N.C. Const., Art. I,

§ 27), or discriminatory against the principal actor in committing the crime, when the others participating therein to a lesser extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. State v. Griffin, 190 N.C. 133, 129 S.E. 410 (1925).

Cited in State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

§ 14-29. Castration or other maiming without malice aforethought.

If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class E felon. (1754, c. 56, P.R.; 1791, c. 339, ss. 2, 3, P.R.; 1831, c. 40, s. 2; R.C., c. 34, s. 47; Code, s. 1000; Rev., s. 3626; C.S., s. 4211; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1134; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

History of Section. — See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

The words "without malice aforethought" were included in this section to differentiate it from G.S. 14-30, and make it clear and definite that allegation and proof of premeditation (prepense) are not a requirement in the prosecution of offenses under this section. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Proof of Malice Aforethought Not Necessary. — Proof of malice aforethought, or of a preconceived intention to commit the maiming, is not necessary. State v. Girgin, 23 N.C. 121 (1840).

Intent is an essential element of the offense under this section. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

This section does not purport to define an offense based on negligence or carelessness; it condemns an intentional offense. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

Where the import of instructions to the jury in a prosecution under this section was that something less than intentional conduct, gross carelessness or criminal negligence, for example, would suffice for conviction, a new trial was necessary. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

Lesser Included Offense of § 14-28. — The offense of maiming a privy member condemned by this section is a lesser included offense of G.S. 14-28, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member not being necessary to conviction under this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming Without Malice. — In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of G.S. 14-28, defendant's motion for nonsuit of the "felony charge" was properly denied where there was sufficient evidence to support conviction under this section of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by this section being a lesser included offense of G.S. 14-28. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Consent of Victim No Defense. — Under this section the elements of the offense of mayhem are the same as under the common law, and the consent of the victim does not constitute a defense in a prosecution under this statute. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Biting Or Biting Off Nose, Lip or Ear. — While biting off the nose, lip, or ear of another is a proscribed act under this section, merely biting the nose, lip, or ear of another is not. State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998).

Total Separation of Ear from Head Required for Conviction. — Maiming of a victim's ear occurs only when a victim's ear is totally severed from the victim's head or a part of a victim's ear is totally severed from the rest of the victim's ear; thus, defendant's motion to dismiss a maiming charge should have been granted where the State failed to prove that the victim's ear had been completely removed from the victim's head. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

§ 14-30. Malicious maiming.

If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall be punished as a Class C felon. (22 and 23 Car. II, c. 1 (Coventry Act); 1754, c. 56, P.R.; 1791, c. 339, s. 1, P.R.; 1831, c. 12; R.C., c. 34, s. 14; Code, s. 1080; Rev., s. 3636; C.S., s. 4212; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1135; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

History of Section. — See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

When Corpus Delicti Complete. — Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. State v. Crawford, 13 N.C. 425 (1830).

Indictment — Necessary Allegations. — An indictment, for biting off ear, must state the offense to be done on purpose, as well as unlawfully. State v. Ormond, 18 N.C. 119 (1834).

Same — Unnecessary Allegations. — But it need not be alleged whether it was the right or left ear. State v. Green, 29 N.C. 39 (1846).

Same — Sufficient Allegations. — An indictment charging the defendant with unlawfully, willfully, feloniously and with malice aforethought putting out the right eye of named person with her thumbs with intent to maim and disfigure named person charged a violation of this section. State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955).

Conviction Under This Section and § 14-32. — Elements of malice aforethought and intent to murder, maim or disfigure, necessary elements of this section, are not elements of G.S. 14-32(b). Additionally, use of a deadly weapon is required for a violation of G.S. 14-32(b), but not for this section; therefore, defendant was properly convicted of and punished for the offenses of assault with a deadly weapon inflicting serious injury and malicious maiming. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

"Malice Aforethought" Construed. — The words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. State v. Crawford, 13 N.C. 425 (1830).

Malicious Intent Express or Implied. — The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Irwin, 2 N.C. 112 (1794).

Proof of Grudges or Threatenings Not Necessary. — Proof of antecedent grudges, threatenings or an express design is not necessary. State v. Irwin, 2 N.C. 112 (1794).

What Constitutes Maiming. — To constitute maiming under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off — it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State v. Girgin, 23 N.C. 121 (1840).

Presumptions. — An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State v. Girgin, 23 N.C. 121 (1840).

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

First Blow or Sudden Affray. — The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N.C. 425 (1830).

Same — Accident or Self-Defense. — When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. State v. Evans, 2 N.C. 281 (1796); State v. Skidmore, 87 N.C. 509 (1882).

Cited in State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

If any person shall, of malice aforethought, knowingly and willfully throw or cause to be thrown upon another person any corrosive acid or alkali with intent to murder, maim or disfigure and inflicts serious injury not resulting in death, he shall be punished as a Class E felon. (1963, c. 354; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1136; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Necessary elements of the crime of malicious throwing of corrosive acid or alkaline are that the perpetrator (1) throw or cause the substance to be thrown (2) upon another person (3) with intent to murder, maim or disfigure. State v. Riddick, 316 N.C. 127, 340 S.E.2d 422 (1986).

Unnecessary for Jury to Find Defendant's Motive Was Intent to Murder. — In a prosecution for maliciously throwing a corrosive acid or alkali, it is not necessary for the jury to find that the intent to murder, maim, or disfigure was the sole or even the dominant motivation for defendant's actions. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Defendant May Not Complain if Jury Finds Intent to Murder. — One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries, is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce, to murder, maim, or disfigure. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Error in Charging on Lesser Included Offense Not Prejudicial. — In a prosecution for the malicious throwing of corrosive acid or alkali with the intent to murder, maim, or disfigure, any error by the trial court in charging on the lesser included offense of assault could not have been prejudicial to the defendant. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Evidence Held Insufficient. — Evidence of muriatic acid on the windowsill and front door of burglary victim's residence was not sufficient to support a conviction of malicious throwing of acid, as there was no evidence that defendant intended by use of the acid to murder, maim or disfigure anyone, that he actually threw or attempted to throw the acid, or that he threw it or attempted to throw it at some person. State v. Riddick, 316 N.C. 127, 340 S.E.2d 422 (1986).

Cited in Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

§ 14-31. Maliciously assaulting in a secret manner.

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class E felon. (1887, c. 32; Rev., s. 3621; 1919, c. 25; C.S., s. 4213; 1969, c. 602, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1137; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to an assault in this State injuring person in another State, see G.S. 15-132. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

The felony described in this section is often referred to as malicious secret assault and battery with a deadly weapon. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

Elements of Offense. — On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible, and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence was conflicting, it was an expression of opinion inhibited by G.S. 1-180 (now see G.S. 1-180.1), for the judge to charge the jury that if they believed the evidence, a cold-blooded and cruel assault had been committed. State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925).

The following elements must be proven beyond a reasonable doubt in order to establish the crime of secret assault: (1) secret manner; (2) malice; (3) assault and battery; (4) deadly weapon; and (5) intent to kill. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975); State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Legislative Intent. — This section specifies that a person has to assault another "with intent to kill such other person," and refers explicitly to "the person so assaulted." The language is clearly indicative of legislative intent that to find a defendant guilty of this offense, the jury must find unanimously that he committed the assault on a particular individual. State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

Construction With Other Provisions. — The General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both this section and G.S. 14-32(a). Although both sections contain three common elements, each contains specific additional elements not contained by the other. State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

Intent is a prescribed element of secret assault under this section. State v. Curie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Infliction of serious injury need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Effect of Words "or Otherwise." — The legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim expressio unius exclusio alterrius, thus including every other manner of making secret attempts, regardless of the attendant circumstances. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Instructions in a Disjunctive Form. — Instructions in a disjunctive form on the charge of maliciously assaulting in a secret manner were fatally ambiguous, thereby resulting in an uncertain verdict in violation of defendant's right to a unanimous verdict. State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

Indictment omitting the words "by waylaying or otherwise," was held sufficient. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Assault with Intent to Commit Murder. — Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for "Ku Klux" troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor. The act of 1887, ch. 32, restored the grade of the offense to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. State v. Telfair, 109 N.C. 878, 13 S.E. 726 (1891); State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

What Constitutes Secret Assault. — While it is not required for the conviction of a secret assault, under the provisions of this section, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence did not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary was reversible error. State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924).

In the context of an assault case, "lying in wait" is nothing more or less than taking the victim by surprise, an element of secret assault, a separate but joinable offense. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Same — Assault from Behind. — An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

Same — Assault by Means of Poison. — An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

Same — Assault Facing Victim. — Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. State v. Patton, 115 N.C. 753, 20 S.E. 538 (1894).

Same — Sufficiency of Evidence. — For sufficiency of evidence to prove a secret assault, see State v. Bridges, 178 N.C. 733, 101 S.E. 29 (1919).

The "secret manner" element of the crime was met, where the victim testified that he observed defendant running into the woods and did not know what defendant was doing at the time, and he also testified that he did not know why defendant wanted to shoot him. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Victim Must Not Know of Defendant's Purpose. — Regarding defendant's "secret manner," the victim does not have to be aware of the defendant's presence, but it is necessary that the victim not know the defendant's purpose. State v. Green, 101 N.C. App. 317, 399 S.E.2d 376 (1991).

Evidence Permissible to Show Malice. — As bearing on the question of malice and felonious intent, the State was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. State v. Miller, 189 N.C. 695, 128 S.E. 1 (1925).

Instruction. — For charge not sufficiently explaining the offense, see State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Verdict for Simple Assault. — Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. State v. Jennings, 104 N.C. 774, 10 S.E. 249 (1889).

An indictment charging a felonious assault with intent to kill as defined in this section, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. State v. High, 215 N.C. 244, 1 S.E.2d 563 (1939).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

In light of defendant's conviction for murder based on lying in wait, the trial court erred in refusing to arrest judgment on his conviction for secret assault. The legislature did not intend to punish a defendant both for a secret assault and for a murder when the assault is the very act that underlies the conviction for first-degree murder by lying in wait. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Secret Assault Underlying Conviction for Murder by Lying in Wait Not Punishable. — To provide for additional punishment for the assault underlying a conviction for murder by lying in wait would serve little purpose other than to augment paperwork, trial time, and the potential for error in an already overburdened court system. The legislature, in enacting the secret assault and murder by lying in wait statutes, did not intend this result, and courts will, and the court accordingly arrest a judgment entered upon the secret assault conviction for a defendant convicted of murder by lying in wait. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Purposes of Secret Assault and Murder by Lying in Wait Contrasted. — The purpose of the secret assault statute is to provide for the protection of society in cases of assault from ambush which do not result in the death of the victim, while the purpose of the murder by lying in wait statute is to provide for such protection in cases of assault from ambush which do result in the death of the victim. State v. Joyner, 329 N.C. 211, 404 S.E.2d 653 (1991).

Submission of Lesser Included Offense. — Where there was positive evidence that the defendant committed every element of the offense under this section charged in the bill of indictment, and there was no conflicting evidence as to any element of the offense, the defendant's contention that the jury might have convicted the defendant of the lesser included offense of assault with a deadly weapon if they had been given the opportunity did not support the submission of the lesser included offense to the jury. State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 844 (1978).

Disjunctive Instruction on Multiple Offenses Improper. — Where the trial court instructed the jury disjunctively, permitting consideration of two possible crimes for which defendant could be separately convicted and punished (i.e., secretly assaulting one victim and secretly assaulting another victim), and where the jury was permitted to consider these separate crimes in determining whether defendant was guilty of a single crime of secret assault under G.S. 14-31, the jury's verdict was fatally ambiguous because it could not be determined whether all the jurors found defendant assaulted victim, all found he assaulted other victim, all found both offenses, or some found one offense while some found the other offense; therefore, a new trial is necessary on the charge of secret assault. State v. Lyons, 102 N.C. App. 174, 401 S.E.2d 776, aff'd, 330 N.C. 298, 412 S.E.2d 308 (1991).

When Defendant Entitled to Judgment of Nonsuit. — If the State sought a conviction under this section and only proved that the assault was made in a secret manner, defendant would be entitled to a judgment of nonsuit. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Sentencing. — The General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both this section and G.S. 14-32(a). State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

While this section and G.S. 14-32(a) contain three common elements, each contains specific additional elements not contained by the other; therefore, read together, the plain language of the statutes indicates that consecutive sentences are permissible. State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

State's prayer for judgment on defendant's conviction for assault was not continued for an unreasonable period of time, because for that period of time judgment was active, and defendant failed to show that defendant suffered any actual prejudice from delay in sentencing. State v. Lea, 156 N.C. App. 178, 576 S.E.2d 131, 2003 N.C. App. LEXIS 82 (2003).

Applied in State v. Brock, 234 N.C. 390, 67 S.E.2d 282 (1951); State v. Stevens, 264 N.C. 737, 142 S.E.2d 588 (1965); State v. Lewis, 1 N.C. App. 296, 161 S.E.2d 497 (1968).

Cited in State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926); State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951); State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985); State v. Jewell, 104 N.C. App. 350, 409 S.E.2d 757 (1991); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993); State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998); State v. Streeter, 191 N.C. App. 496, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (2008).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon.

(c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class E felon. (1919, c. 101; C.S., s. 4214; 1931, c. 145, s. 30; 1969, c. 602, s. 2; 1971, c. 765, s. 1; c. 1093, s. 12; 1973, c. 229, ss. 1-3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1138; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to an assault in this State resulting in injury in another state, see G.S. 15-132. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note, "Farewell to the 'Serious Bodily Injury' Standard in Felonious Assault Cases: After State v. Everhardt a Defendant Can be Convicted if the Victim Sustains Serious Mental Injury," see 69 N.C.L. Rev. 1517 (1991).

CASE NOTES

I. General Consideration.
II. Other Crimes.
III. Elements of Offense.
IV. Indictment.
V. Deadly Weapon.
VI. Intent to Kill.
VII. Serious Injury.
VIII. Self-Defense.

IX. Instructions to Jury.
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XI. Sufficiency of Evidence.

I. GENERAL CONSIDERATION.

Section Creates New Offense. — By the enactment of this section the legislature intended to create a new offense of higher degree than the common-law crime of assault with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Purpose. — This section is designed for the protection of life or limb. State v. Cass, 55 N.C. App. 291, 285 S.E.2d 337, cert. denied, 305 N.C. 396, 290 S.E.2d 366 (1982).

Construction With Other Provisions. — The General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both subsection (a) of this section and G.S. 14-31. Although both sections contain three common elements, each contains specific additional elements not contained by the other. State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

Primary distinction between felonious assault under G.S. 14-32 and misdemeanor assault under G.S. 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements is present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Lowe, 150 N.C. App. 682, 564 S.E.2d 313, 2002 N.C. App. LEXIS 651 (2002).

The felony described in this section is often referred to as felonious assault. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

The offense defined in subsection (b) is a lesser included offense of the offense defined in subsection (a). State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Subsection (c) of this section creates another lesser offense of subsection (a), that of assault with a firearm with intent to kill. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Guilt of Lesser Degree of Offense. — Where the defendants were tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action would not be dismissed when the undisputed evidence tended to show the assault was made with a deadly weapon. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Not a Lesser-Included Offense of Attempted First Degree Murder. — Assault with a deadly weapon with intent to kill requires proof of an element not required for attempted first-degree murder, i.e., use of a deadly weapon, thus, it is not a lesser-included offense of attempted first-degree murder. State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998), review denied, 350 N.C. 311 (1999), appeal dismissed, cert. denied, 651 S.E.2d 225 (N.C. 2007).

Separate sentences for attempted first degree murder and assault with a deadly weapon with intent to kill did not result in double jeopardy where each offense required proof of at least one element that the other did not. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

Facts Not Showing Multiple Offenses. — In a felonious assault case, the mere fact that some of the shots entered from the front and some entered from the back did not make two offenses. State v. Dilldine, 22 N.C. App. 229, 206 S.E.2d 364 (1974).

The defendant's second assault charge should have been dismissed where the defendant testified that the gun went off while he struggled with the victim/his former wife after having already once shot her and the prosecution asserted that the defendant shot her later after he had abducted her but had no evidence to establish this assertion because the victim fainted shortly after the struggle. State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000).

Trial court did not err in dismissing four of the five assault with a deadly weapon with intent to kill charges filed against defendant, as the evidence showed defendant's firing of five bullets from a semi-automatic gun in rapid succession constituted one assault, not five assaults. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Aiding and Abetting Through Failure to Defend Victim. — A mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Trial court properly allowed the jury to consider a verdict of guilty of assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, solely on the ground that defendant mother was present when her child was brutally beaten by third party but failed to take all steps reasonable to prevent the attack or otherwise protect the child from injury. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

In a prosecution against defendant mother for assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, on the ground that defendant was present when third party brutally beat her child but failed to take all steps reasonable to prevent the attack or otherwise protect the child, testimony tending to show that the third party had committed other attacks against her children in the presence of the defendant was competent as it tended to exhibit a chain of circumstances in respect to the matter on trial which were so connected with the offense charged as to throw light upon the identity of the child's attacker and to make out the res gestae. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Aiding and Abetting Assault on Child Through Silence. — In a prosecution of defendant mother for aiding and abetting another in assault on defendant's one-year-old child, where the only evidence for the State tended to show that, during the assault, defendant did absolutely nothing, the totality of the circumstances warranted the inference by the jury that defendant knew her silent presence during the beating inflicted upon her son would be regarded by the principal as encouragement and support, particularly in light of testimony that defendant had witnessed prior beatings by the principal, indicating that defendant was aware of the severity of his treatment of her children; that defendant had never interfered in the past; that defendant had herself beaten her children in the principal's presence; and that defendant lied and instructed her children to lie to conceal the principal's complicity in the assault. State v. Walden, 53 N.C. App. 196, 280 S.E.2d 505 (1981), rev'd on other grounds, 306 N.C. 466, 293 S.E.2d 780 (1982).

Admissibility of Evidence. — See State v. Oxendine, 224 N.C. 825, 32 S.E.2d 648 (1945).

Evidence was sufficient to support conviction of assault with a deadly weapon inflicting serious injury where testimony revealed defendant went into the room where the victims were, defendant later reemerged from the room wearing one victim's jacket, the victim was undressed and lying in bed in an unlit bedroom, the victim was struck, was bleeding, and blacked out, and, as a result of the assault, the victim incurred a nasal fracture, sinus fracture, and closed head injury, and required surgery on her nose. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Conviction of assault with a deadly weapon inflicting serious injury was supported by sufficient evidence where testimony revealed that defendant hit the victim in the head, that the victim then fell to the ground, and that, as a result of the assault, the victim incurred a deep laceration over her left eye and required stitches, antibiotics, and a tetanus shot. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Evidence that defendant struck repeated blows to the victim's head and face with defendant's hands and fists, causing, inter alia, traumatic head injuries and extreme facial bruising and swelling, was sufficient to show that defendant used defendant's hands and fists as deadly weapons and that the victim suffered serious injuries, thereby supporting defendant's conviction for assault with deadly weapon inflicting serious injury. State v. Allen, — N.C. App. —, 667 S.E.2d 295, 2008 N.C. App. LEXIS 1820 (2008).

Denial of motion to dismiss charge of assault with a deadly weapon inflicting serious injury was proper, where the evidence showed that defendant drove off with the victim holding on to the car door, thereby dragging the victim along. State v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

Evidence of communicated threats was received with apparent approval in State v. Scott, 26 N.C. 409 (1844), and with explicit approval in State v. Turpin, 77 N.C. 473, 24 Am. R. 455 (1877). It was denied in State v. Byrd, 121 N.C. 684, 28 S.E. 353 (1897) and in State v. Skidmore, 87 N.C. 509 (1882), in an opinion which overlooked the two cases first cited. See 11 N.C.L. Rev. 20.

Evidence that defendant said nothing to prosecutrix at the time he shot her, but that two weeks before he shot her he told her he was going to kill her, was competent and properly admitted in evidence in a prosecution under this section. State v. Heard, 262 N.C. 599, 138 S.E.2d 243 (1964).

Testimony Properly Admitted Absent Showing of Prejudice. — In the appeal of a conviction for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury, where defendant assigned as error the failure of the trial court to sustain three objections made by defendant during the testimony of the victim, in which the victim stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she could still see the defendant's face when she closed her eyes; and that she had let the defendant take the money because he had a gun, the defendant may have been correct in his assertion that these answers were in places speculative or unresponsive, but neither the defendant nor the record showed that the errors were material or prejudicial, and absent such a showing defendant was not entitled to a new trial. State

v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

A police officer was properly allowed to testify concerning the type of pistol used in assault as the officer's testimony regarding the location of shell casings when a bullet was fired from two different weapons was based not upon any specialized expertise or training, but merely upon his own personal experience and observations in firing different kinds of weapons; defendant's due process rights were not violated by the destruction of the shell casings as the police had no duty to preserve the casings when defendant did not file a discovery request for the casings. State v. Fisher, 171 N.C. App. 201, 614 S.E.2d 428, 2005 N.C. App. LEXIS 1214 (2005).

Statement That Defendant Is Charged with "Equivalent of Attempted Murder". — In a prosecution under this section, where the court made the statement that defendant was charged with the "North Carolina equivalent of attempted murder" at the very beginning of defendant's trial, which was not repeated in the court's charge to the jury, and the statement was an apparent attempt to paraphrase a portion of the indictment, while it cannot be said that the trial court gave the jury a distorted view of the case through the use of the "stilted" language of the indictment, a distorted view was given through the use of an inaccurate and misleading paraphrase. "Intent to kill" and "attempted murder" do not mean the same thing. State v. Hall, 59 N.C. App. 567, 297 S.E.2d 614 (1982).

Great Monetary Loss as Aggravating Factor Was Proper. — Defendant was not entitled to a new sentencing hearing on his assault with a deadly weapon inflicting serious injury conviction where the victim's medical bills after being shot in the amount of $29,837.29 were "excessive" and surpassed those normally incurred from such an assault; defendant stipulated to the medical bills as he did not object to the State's recitation of the figure nor take exception to the amount of the medical expenses offered by the State in support of its argument for the existence of the non-statutory aggravating factor of great monetary loss. State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343, 2006 N.C. App. LEXIS 582 (2006).

Sentencing. — The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of an assault. State v. Barbour, 104 N.C. App. 793, 411 S.E.2d 411 (1991).

Aggravating Factors Must Be Indicated at the Sentencing Hearing. — It is error where the trial court did not make written findings nor indicate at the sentencing hearing what aggravating factor was being applied to the assault with a deadly weapon with intent to kill count. State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992).

Aggravating Factor Required Additional Evidence. — G.S. 15A-1340.16(d) was not violated because the prosecution was required to prove facts for the aggravated sentences that were in addition to the elements of defendant's crimes of second degree murder and assault with a deadly weapon inflicting serious injury. State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250, 2007 N.C. App. LEXIS 1037 (2007).

Applied in State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); State v. Muse, 229 N.C. 536, 50 S.E.2d 311 (1948); State v. Way, 231 N.C. 716, 58 S.E.2d 716 (1950); State v. Cooper, 238 N.C. 241, 77 S.E.2d 695 (1953); State v. Bridgers, 238 N.C. 677, 78 S.E.2d 756 (1953); State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956); State v. Williams, 246 N.C. 688, 99 S.E.2d 919 (1957); State v. Bullard, 253 N.C. 809, 117 S.E.2d 722 (1961); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962); State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962); State v. Godwin, 260 N.C. 580, 133 S.E.2d 166 (1963); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Cooper, 266 N.C. 644, 146 S.E.2d 663 (1966); Housing Auth. v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Hinton, 14 N.C. App. 253, 188 S.E.2d 17 (1972); State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972); State v. Moses, 17 N.C. App. 115, 193 S.E.2d 288 (1972); State v. Williams, 282 N.C. 576, 193 S.E.2d 738 (1973); State v. Coleman, 19 N.C. App. 389, 198 S.E.2d 764 (1973); State v. Brown, 19 N.C. App. 480, 199 S.E.2d 134 (1973); State v. Goff, 19 N.C. App. 588, 199 S.E.2d 502 (1973); State v. Brown, 21 N.C. App. 552, 204 S.E.2d 861 (1974); State v. Harding, 22 N.C. App. 66, 205 S.E.2d 544 (1974); State v. White, 24 N.C. App. 318, 210 S.E.2d 261 (1974); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975); State v. Ware, 31 N.C. App. 292, 229 S.E.2d 249 (1976); State v. Best, 31 N.C. App. 389, 229 S.E.2d 202 (1976); State v. Pugh, 48 N.C. App. 175, 268 S.E.2d 242 (1980); State v. Bailey, 49 N.C. App. 377, 271 S.E.2d 752 (1980); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982); State v. Daniels, 59 N.C. App. 63, 295 S.E.2d 508 (1982); State v. Boykin, 310 N.C. 118, 310 S.E.2d 315 (1984); State v. Brindle, 66 N.C. App. 716, 311 S.E.2d 692 (1984); State v. Miller, 69 N.C. App. 392, 317 S.E.2d 84 (1984); State v. Wester, 71 N.C. App. 321, 322 S.E.2d 421 (1984); State v. Fournier, 73 N.C. App. 465, 326 S.E.2d 84 (1985); State v. Durham, 74 N.C. App. 121, 327 S.E.2d 312 (1985); State v. Highsmith, 74 N.C. App. 96, 327 S.E.2d 628 (1985); State v. Hunt, 100 N.C. App. 43, 394

S.E.2d 221 (1990); State v. White, 355 N.C. 696, 565 S.E.2d 55, 2002 N.C. LEXIS 675 (2002); State v. Streeter, 191 N.C. App. 496, 663 S.E.2d 879, 2008 N.C. App. LEXIS 1482 (2008).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1933); State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Wagstaff, 235 N.C. 69, 68 S.E.2d 858 (1952); State v. McLaurin, 12 N.C. App. 23, 182 S.E.2d 280 (1971); Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975); State v. Pearson, 288 N.C. 34, 215 S.E.2d 598 (1975); State v. Hill, 34 N.C. App. 347, 238 S.E.2d 201 (1977); State v. Harris, 34 N.C. App. 491, 238 S.E.2d 642 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Chapman, 294 N.C. 407, 241 S.E.2d 667 (1978); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Nelson, 36 N.C. App. 235, 243 S.E.2d 392 (1978); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979); State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979); State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979); State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982); Bryant v. Cherry, 687 F.2d 48 (4th Cir. 1982); State v. Pettiford, 60 N.C. App. 92, 298 S.E.2d 389 (1982); State v. Morris, 60 N.C. App. 750, 300 S.E.2d 46 (1983); State v. Greene, 67 N.C. App. 703, 314 S.E.2d 262 (1984); State v. Whitfield, 310 N.C. 608, 313 S.E.2d 790 (1984); State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751 (1984); State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985); State v. King, 75 N.C. App. 618, 331 S.E.2d 291 (1985); State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399 (1987); State v. Edwards, 89 N.C. App. 520, 366 S.E.2d 520 (1988); State v. Tilley, 100 N.C. App. 588, 397 S.E.2d 368 (1990); State v. Williams, 330 N.C. 579, 411 S.E.2d 814 (1992); Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993); State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993); State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (1993); State v. Moore, 111 N.C. App. 649, 432 S.E.2d 887 (1993); Providence Wash. Ins. Co. v. Locklear ex rel. Smith, 115 N.C. App. 490, 445 S.E.2d 418 (1994); State v. Rambert, 116 N.C. App. 80, 446 S.E.2d 599 (1994); State v. Williams, 116 N.C. App. 225, 447 S.E.2d 817 (1994); State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995); State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995); State v. Williams, 119 N.C. App. 601, 458 S.E.2d 749 (1995); State v. Richardson, 341 N.C. 585, 461 S.E.2d 724 (1995); State v. Williams, 119 N.C. App. 601, 467 S.E.2d 244 (1995); State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996); State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997); State v. Richmond, 347 N.C. App. 412, 495 S.E.2d 677 (1998); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); State v. Jackson, 348 N.C. 644, 503 S.E.2d 101 (1998); State v. Blackwell, 135 N.C. App. 729, 522 S.E.2d 313, 1999 N.C. App. LEXIS 1241 (1999); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Coble, 351 N.C. 448, 527 S.E.2d 45, 2000 N.C. LEXIS 233 (2000); State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002); State v. Hunt, 153 N.C. App. 316, 569 S.E.2d 709, 2002 N.C. App. LEXIS 1120 (2002); State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637, 2007 N.C. App. LEXIS 834 (2007); State v. Cook, — N.C. App. —, 666 S.E.2d 795, 2008 N.C. App. LEXIS 1750 (2008).

II. OTHER CRIMES.

Assault With Deadly Weapon As Lesser Included Offense. — Assault with a deadly weapon under G.S. 14-33 is an essential element of the felony created and defined by this section, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967); State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968); State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968); State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Misdemeanor Assault Compared. — The primary distinction between felonious assault under this section and misdemeanor assault under G.S. 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Armed Robbery As Separate Offense. — The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in subsection (a) of this section is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in G.S. 14-87.

State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975); State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Although Felonious Assault May Be Committed During Perpetration of Armed Robbery. — The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Convictions of Armed Robbery and Felonious Assault Based on Separate Features of One Continuous Course of Conduct. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Discharging Firearm into Occupied Building Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes, and defendant was properly convicted of, and punished for, both offenses. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

Asportation of the victim is not an inherent or inevitable feature of an assault; therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Trial court did not err by submitting to the jury both attempted first-degree murder and assault with a deadly weapon inflicting serious injury, and by imposing consecutive sentences for the offenses, because each offense contained at least one element not included in the other; therefore, defendants were not been subjected to double jeopardy. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Defendant cannot be convicted of both assault with a deadly weapon inflicting serious injury and attempted murder upon the same victim, because they are mutually exclusive, and defendant who convicted of both was entitled to a new trial. State v. Yang, 174 N.C. App. 755, 622 S.E.2d 632, 2005 N.C. App. LEXIS 2623 (2005).

Conviction Under This Section and G.S. 14-30. — Elements of malice aforethought and intent to murder, maim or disfigure, necessary elements of G.S. 14-30, are not elements of subsection (b) of this section. Additionally, use of a deadly weapon is required for a violation of subsection (b), but not for G.S. 14-30; therefore, defendant was properly convicted of and punished for the offenses of assault with a deadly weapon inflicting serious injury and malicious maiming. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990).

Prosecution Under G.S. 14-34.2 and This Section Not Double Jeopardy. — Prosecution of defendants under G.S. 14-34.2 for assault on a law-enforcement officer with a firearm and under this section for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judgment was arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Cumulative punishments for offenses arising from the same act did not violate double jeopardy, where the defendant was convicted for assault with a deadly weapon with intent to kill and assault with a deadly weapon on a law enforcement officer, as each offense required proof of an element the other did not and the legislative purposes underlying the offenses were distinct. State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998).

Where the facts underlying the jury's guilty verdict for assault with a deadly weapon on a government official in violation of G.S. 14-34.2 were not the same facts underlying the jury's verdict of guilty for assault with a deadly weapon in violation of G.S. 14-32, and where the evidence showed that defendant completed the first assault on an officer by driving a truck over the officer's leg just before the officer pulled defendant from the truck and then completed the second instance of assault independently of the first assault by reentering the vehicle and driving it toward the officer, defendant's convictions on both charges did not violate double jeopardy; neither U.S. Const. amend. XIV nor N.C. Const. art. I, § 19, forbade the prosecution and punishment of defendant for those two separate and distinct crimes. State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N. C. Const. art. I, § 19. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Prosecution Under G.S. 14-32.4 and This Section Double Jeopardy. — Defendant could not be convicted and sentenced for both assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to G.S. 14-32(b), and assault inflicting serious bodily injury, G.S. 14-32.4, for the same conduct without violating the double jeopardy provisions of the United States and North Carolina Constitutions. State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003).

Prosecution Under § 14-318.2 and Subsection (b) Not Double Jeopardy. — Neither subsection (b) of this section not G.S. 14-318.2 proscribes a crime which is a lesser included offense of the other, and conviction or acquittal of one will not support a plea of former jeopardy against a charge for violation of the other. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Nor Is Prosecution Under § 14-27.6 and This Section. — In a criminal prosecution defendant was not subjected to double jeopardy where he was charged and convicted of assault with a deadly weapon with intent to kill inflicting serious injury and attempt to commit first-degree rape, though both crimes arose from the same series of events, since each offense charged included an element not common to the other offense. State v. Glenn, 51 N.C. App. 694, 277 S.E.2d 477 (1981).

Second-Degree Sexual Offense Is a Separate Offense. — Second-degree sexual offense and assault with a deadly weapon inflicting serious injury are separate and distinct offenses; each requires the proof of an element that the other does not, and neither is a lesser included offense of the other. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

Common Law Attempted Murder. — Defendant's counsel did not provide ineffective assistance by failing to move to dismiss a common law attempted murder charge against defendant, on the theory that common law attempted murder had been abrogated by G.S. 14-32(a), prohibiting assault with a deadly weapon with intent to kill inflicting serious injury; this statute did not abrogate common law attempted murder, as attempted murder could occur through many circumstances, requiring only (1) intent to kill and (2) an overt act which was more than mere preparation and committed with malice, premeditation, and deliberation. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Felony Murder. — Where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury under this section, which is a felony involving use of a deadly weapon, the crime was thus within the purview of the felony-murder statute. State v. Terry, 337 N.C. 615, 447 S.E.2d 720 (1994).

Conviction on Two Separate Counts Not Double Jeopardy. — Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, and assault with intent to commit rape, did not subject him to double jeopardy, since the elements for the two crimes are not the same. State v. Herring, 50 N.C. App. 298, 273 S.E.2d 29 (1981).

Where defendant dragged his wife by the hair into the house and then beat her with his gun, defendant's convictions of first-degree kidnapping in violation of G.S. 14-39(a) and assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b) did not violate double jeopardy under N.C. Const. art. I, § 19; the restraint and removal of the wife, which was the act of dragging her into the house, were separate from the commission of the assault, which was the act of beating the wife with the gun once the kidnapping had been completed. State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

Election Between Charges. — The trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury, since a defendant may be charged with more than one offense based on a given course of conduct, and even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Sentencing. — While this section and G.S. 14-31 contain three common elements, each contains specific additional elements not contained by the other; therefore, read together the plain language of the statutes indicates that consecutive sentences are permissible. State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

The General Assembly intended that consecutive sentences could be imposed against a defendant who contemporaneously violated both G.S. 14-31 and subsection (a). State v. Woodberry, 126 N.C. App. 78, 485 S.E.2d 59 (1997).

III. ELEMENTS OF OFFENSE.

In order for a conviction of crime under the provisions of this section as it stood before the 1969 amendment, there had to be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault did not necessarily include a battery, where serious injury was inflicted a battery was necessarily implied. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930); State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

To warrant the conviction of an accused of a felonious assault and battery under this section, as it stood before the 1969 amendment, on the theory that he participated in the offense as a principal in the first degree, the State had to produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) committed an assault and battery upon another; (2) committed the assault and battery with a deadly weapon; (3) committed the assault and battery with intent to kill the victim of his violence; and (4) thus inflict on the person of his victim serious injury not resulting in death. State v. Birchfield, 235 N.C. 410, 70 S.E.2d 5 (1952).

The essential elements of the crime of assault with a deadly weapon with intent to kill inflicting serious injury are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986); State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (1994).

Elements of a charge under subsection (b) are (1) as assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death. State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990); State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997).

The elements of a charge under subsection (b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death. State v. Woods, 126 N.C. App. 581, 486 S.E.2d 255 (1997).

Intent Is Not Prescribed Element Under Subsection (b). — Intent is not a prescribed element of assault with a deadly weapon inflicting serious injury under subsection (b) of this section. State v. Curie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

But Is Prescribed Under Subsection (c). — Intent is a prescribed element of assault with firearm with intent to kill under subsection (c) of this section. State v. Curie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Physical injury is certainly something more than emotional distress. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Secret manner and malice need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Victim Need Not Have Been Placed in Fear. — It is not necessary that the victim be placed in fear in order to sustain a conviction for assault. All that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

Defendant Must Be Present at Scene of Assault. — Where the evidence showed that defendant procured, counseled, commanded or encouraged others to commit an attempted armed robbery and that he was absent from the scene when the others committed a felonious assault in their attempt to carry out the armed robbery, the felonious assault charge against defendant should not have been submitted to the jury and the trial court should have arrested the judgment on that charge since, in order to be guilty of a felonious assault, a defendant must be present at the scene of the assault either actually or constructively. State v. Allen, 34 N.C. App. 260, 237 S.E.2d 869, cert. denied, 293 N.C. 741, 241 S.E.2d 516 (1977).

Illustrative Case. — Trial court did not err by not dismissing charges of assault with a deadly weapon with intent to kill filed against defendant, as the evidence presented showed defendant intended to kill a man when defendant fired a semi-automatic weapon five times at the man and the man only avoided being killed or seriously injured by jumping behind a tree. State v. Maddox, 159 N.C. App. 127, 583 S.E.2d 601, 2003 N.C. App. LEXIS 1438 (2003).

Jury could determine deliberation and premeditation beyond a reasonable doubt to support defendant's convictions for attempted murder and assault with a deadly weapon with intent to kill or inflicting serious injury as: (1) defendant entered the victim's house without the victim's permission; (2) a fight resulted when defendant broke the victim's television, and defendant pulled a knife on the victim; (3) defendant's girlfriend testified that ill-will had developed between defendant and the victim; (4) defendant left his house with a gun in his truck; and (5) after shooting the victim in the shoulder yelled out, "I got one now and I got one more to go." State v. Watkins, 181 N.C. App. 502, 640 S.E.2d 409, 2007 N.C. App. LEXIS 360 (2007).

IV. INDICTMENT.

Necessity of. — A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, under this section, and defendant may not be put to answer thereon but by indictment. State v. Clegg, 214 N.C. 675, 200 S.E. 371 (1939).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967); State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968).

In an indictment charging an assault with intent to kill "and murder" the words "and murder" were surplusage and placed no additional burden on the State. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

"A certain knife" was a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

Indictments which named two and one-half ton truck as the weapon used by defendant in committing assault and expressly alleged that it was a "deadly weapon" were sufficient to support the verdicts of guilty of felonious assault with a deadly weapon and the judgments based thereon. State v. Hinson, 85 N.C. App. 558, 355 S.E.2d 232, cert. denied, 320 N.C. 635, 360 S.E.2d 98 (1987).

Injury Need Not Be Described in Indictment. — In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

Effect of Omitting Averment of Serious Injury. — An indictment charging assault with intent to kill, without averment of the infliction of serious injury, charged a misdemeanor under this section as it stood prior to the 1969 amendment. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

An indictment which does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under this section; the offense charged was a misdemeanor under G.S. 14-33. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

Indictment Held Sufficient. — An indictment charging that defendant assaulted a named person with intent to kill and did inflict serious and permanent bodily injuries not resulting in death by setting his victim afire, was sufficient to charge an assault where serious injury was inflicted. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Offenses Not Included Under Indictment for Assault with Firearm with Intent to Kill. — An indictment for assault with a firearm with intent to kill would not support a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury and did not support the verdict of guilty of assault with a deadly weapon inflicting serious injury. State v. Bryant, 19 N.C. App. 676, 199 S.E.2d 744 (1973).

Variance Between Indictment and Evidence at Trial. — Trial court erred by denying defendant's motion to dismiss an assault charge where there was a fatal variance between the indictment and the evidence presented at trial regarding the type of deadly weapon used in the assault. State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876, 2004 N.C. App. LEXIS 177 (2004).

V. DEADLY WEAPON.

What Is a Deadly Weapon. — Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitaker, 29 N.C. App. 602, 225 S.E.2d 129 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

A deadly weapon is not one which must kill but one which under the circumstances of its use is likely to cause death or great bodily harm. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

May Depend upon Manner of Use. — The deadly character of a weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

And May Be Question of Law or Fact. — Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitaker, 29 N.C. App. 602, 225 S.E.2d 129 (1976); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must resolve the conflict. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

The trial judge correctly submitted to the jury, under proper instructions, the questions whether the bottle involved was a deadly weapon and whether serious injury was inflicted where a lone woman, attacked by five males, was held down by defendant while an accomplice rammed a bottle into her rectum with such force as to cause excessive bleeding, dilation of the rectum, and the infliction of multiple cuts, some deep and long, about the rectum. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Insufficient Evidence to Support Charge of Assault With Deadly Weapon. — Trial court erred in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious bodily injury because there was insufficient evidence to determine defendant's size and strength compared to that of the victim; mere observation by the jury of the victim and defendant's strength and size alone was not sufficient to support the deadly weapon element, as a result of which the State failed to prove the deadly weapon element of the offense. State v. Lawson, 173 N.C. App. 270, 619 S.E.2d 410, 2005 N.C. App. LEXIS 2036 (2005).

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, was sufficient for the jury to infer that the knife was a deadly weapon. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

Weapon Need Not Be Introduced as Evidence. — The introduction into evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use, and the injuries inflicted, in establishing the character of the weapon as deadly. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

A pistol or a gun is a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

An unexplained misfiring of a loaded pistol does not change its deadly character. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Knife. — Under the case law of this State, a knife with a three-inch blade constitutes a deadly weapon per se when used as a weapon in an assault. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

Trial court did not err in denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury, a violation of G.S. 14-32(b), because although defendant claimed the state presented no substantive evidence that the knife was a dangerous or deadly weapon, which was an essential element of assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), the state's evidence included the documents from the domestic violence hearing which were admitted as substantive evidence and tended to show that defendant stabbed his girlfriend five times with a knife causing wounds still visible some eight weeks after the assault. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Fire as Deadly Weapon. — Where the State's evidence tended to show that victim of assault was five years old and asleep at the time defendant set fire to house, this evidence was sufficient to justify the trial court in permitting the jury to find that fire was used as a deadly weapon, and to permit defendant's conviction for assault with a deadly weapon inflicting serious injury. State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986).

Metal walking cane is a weapon clearly capable of inflicting a lethal wound when used as a club. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

A baseball bat should be denominated a deadly weapon if viciously used. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Plastic Bag. — Given proper surrounding circumstances, a plastic bag is a deadly weapon. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

A defendant's fists could have been deadly weapons given the manner in which they were used and the relative size and condition of the parties. This section classifies assaults with deadly weapons either with intent to kill or inflicting serious injury as felonies. State v. Grumbles, 104 N.C. App. 766, 411 S.E.2d 407 (1991).

After considering the great disparity between defendant's size of six feet and five inches, and the victim's size, four feet and 11 inches, the jury found that defendant's hands were deadly weapons. State v. Brunson, 180 N.C. App. 188, 636 S.E.2d 202, 2006 N.C. App. LEXIS 2240 (2006), appeal dismissed, cert. denied, 361 N.C. 431, 648 S.E.2d 848; aff'd, 362 N.C. 81, 653 S.E.2d 144 (2007).

Evidence Sufficient to Go to Jury. — Denial of defendants' motions to dismiss was proper, where the evidence was sufficient to submit to the jury the question of whether second defendant's fists or the tree limbs, used to beat the victim, were of such character to constitute a deadly weapon. State v. Wallace, — N.C. App. —, 676 S.E.2d 922, 2009 N.C. App. LEXIS 711 (2009).

Substantial evidence existed to convict defendant of felony assault with a deadly weapon inflicting serious injuries because: (1) defendant weighed 175 pounds and the victim weighed 110 pounds; and (2) the victim had a shoe print on her back, handprint bruises on her arms, thighs, and buttocks, and had handprints on her neck, which were consistent with a choke hold. The jury determined that defendant's hands and feet constituted deadly weapons under G.S. 14-32(b). State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

Use of Deadly Weapon May Not Be Considered in Aggravation. — Since use of a deadly weapon is an element of the crime of felonious assault, it may not also be considered as a factor in aggravation. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of an assault under this section. State v. Braswell, 67 N.C. App. 609, 313 S.E.2d 216 (1984).

Evidence of Premeditation and Deliberation Not Required. — Defendant's convictions for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury did not violate his right to be free of double jeopardy; in order to obtain a conviction for attempted first-murder, the state had to prove premeditation and deliberation, whereas it did not have to prove those elements to obtain a conviction for assault with a deadly weapon, which was a different offense requiring both proof of the use of a deadly weapon and proof of serious injury. State v. Bethea, 173 N.C. App. 43, 617 S.E.2d 687, 2005 N.C. App. LEXIS 1907 (2005).

VI. INTENT TO KILL.

An intent to kill is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

No Presumption of Felonious Intent. — The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, to establish a presumption of felonious intent, or intent to kill. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

A person might intentionally and without justification or excuse assault another with a deadly weapon and inflict upon him serious injury not resulting in death, but such an assault would not establish a presumption of felonious intent, or the intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Intent to Kill May Be Inferred from Circumstances. — An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979); State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982); State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982); State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence; that is, by proving facts from which the fact sought to be proven may be reasonably inferred. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973); State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

In a case involving an assault with a deadly weapon inflicting serious injury with intent to kill, a motion to dismiss based on insufficient evidence was properly denied because the jury could have inferred an intent to kill due to the victim's multiple stab wounds with a knife. State v. Nicholson, 169 N.C. App. 390, 610 S.E.2d 433, 2005 N.C. App. LEXIS 601 (2005), appeal dismissed, cert. denied, 2006 N.C. App. LEXIS 2222 (Nov. 7, 2006), reported at 636 S.E.2d 341 (N.C. App. 2006).

Trial court did not err in refusing to eliminate the intent to kill element of defendant's assault with a deadly weapon with intent to kill inflicting serious injury charge under G.S. 14-32 as: (1) defendant and an accomplice had discussed intentionally forcing motorists off the highway in order to rob them; (2) defendant or the accomplice then deliberately threw a very large rock or concrete chunk through the driver's side windshield of a driver's car as it was approaching at approximately 55 or 60 miles per hour; and (3) it was easily foreseeable that such deliberate action could result in death, either from the impact of the rock on the driver or from the driver's losing control of the vehicle and becoming involved in a deadly automobile accident. State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009).

The State adequately established intent, malice, premeditation and deliberation where the defendant approached the victim several hours after the two had been involved in an altercation, got out of the car, pointed a gun at him, shot at the victim, first missing and then hitting him in the leg, and then continued to approach him with an angry look on his face, only retreating at the urging of his aunt. State v. Peoples, 141 N.C. App. 115, 539 S.E.2d 25, 2000 N.C. App. LEXIS 1290 (2000).

Explanation of Transferred Intent Did Not Shift Burden. — In trial on charges of assault with a deadly weapon with intent to kill, no presumption of any kind arose where the trial court merely fulfilled its duty by explaining the well-established rule of substantive law known as the doctrine of transferred intent, as it applied to the assault charged. Therefore, no unconstitutional burden shifting occurred. State v. Locklear, 331 N.C. 239, 415 S.E.2d 726 (1992).

Transferred Intent Sufficient. — The requisite mental state for assault with a deadly weapon with intent to kill inflicting serious injury is the intent to kill. Thus, where, the evidence tended to show that defendant possessed the intent to shoot and kill detective, under the doctrine of transferred intent, this intent sufficed as the intent element for the felony of assault upon detective's life with a deadly weapon with intent to kill inflicting serious injury. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

When defendant was charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injury, in violation of G.S. 14-32(a), for shooting at a police officer and inadvertently striking a bystander, the trial court properly refused to dismiss the intent to kill element with respect to the assault against the bystander, because defendant's intent to kill the police officer could properly be applied to the assault of the bystander. State v. Ramirez, 156 N.C. App. 249, 576 S.E.2d 714, 2003 N.C. App. LEXIS 117 (2003), cert. denied, 357 N.C. 255, 583 S.E.2d 286 (2003), cert. denied, 540 U.S. 991, 124 S. Ct. 487, 157 L. Ed. 2d 388 (2003).

Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979); State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982).

Natural Results of Deliberate Act. — A person who deliberately fired a pistol into the face of his victim at point-blank range has to be held to intend the normal and natural results of his deliberate act. The fact that the victim's life was spared could be cause for a salute to medical science, but it hardly changed the intent apparently present when defendant pulled the trigger. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Evidence of Other Offenses as Proof of Mental State or Intent. — When a specific mental state is an essential element of the crime charged, evidence of commission of another offense is admissible to establish requisite mental state or intent. The evidence of a threat with a knife two days earlier and a slap two weeks prior to the incident tended to show design or intent on the part of the defendant. State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

Whether defendant was so intoxicated as to prevent his forming the specific intent, required by this section, to rob and assault the victim, was a question of fact to be determined by the jury. State v. Robertson, 138 N.C. App. 506, 531 S.E.2d 490, 2000 N.C. App. LEXIS 642 (2000).

Trial court did not err in refusing to instruct the jury on misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) as a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32 as the instrument used to assault a driver was a rock which, when thrown at the driver's side windshield of the car being driven at about 55 or 60 miles per hour was large enough to shatter the windshield, bend the steering wheel, and fracture the driver's skull; based on the size of the rock and the manner in which it was used, the rock could only have been a deadly weapon. State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009).

Evidence Held Sufficient. — In a prosecution for assault with a deadly weapon with intent to kill, an altercation, the shooting and resulting death of decedent soon after defendant pointed the pistol at another's chest and pulled the trigger, and other circumstances, were sufficient evidence of intent to kill. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Evidence that defendant attacked the victim, placed her in his trunk and kept her there unconscious, seriously injured and bleeding for four hours, in addition to the use of a deadly weapon and the severity of the victim's injuries, was sufficient to show the element of an intent to kill in the assault charge. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

In a case in which defendant was convicted of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, the state presented sufficient evidence that defendant had the specific intent to kill his victims; the number of stab wounds and the manner in which the stabbings took place were all relevant factors for the jury to consider. State v. Pointer, 181 N.C. App. 93, 638 S.E.2d 909, 2007 N.C. App. LEXIS 93 (2007).

There was substantial evidence that defendant unlawfully entered a home with the intent to commit felonious assault under G.S. 14-32(c) for purposes of a burglary charge, even though the same evidence would also support an intent to murder theory as: (1) defendant and three conspirators kicked down the front door of a victim's house, wearing ski masks and carrying loaded guns, (2) they terrorized and assaulted the occupants, (3) co-defendant testified that they entered the home intending to kill at least one person, and (4) they abandoned their plan upon discovering that they had entered the wrong house. State v. Jordan, 186 N.C. App. 576, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

There was sufficient evidence of intent to support defendant's assault with a deadly weapon inflicting serious injury conviction as: (1) there was evidence that defendant had consumed 9 to 12 beers in a two-hour timeframe; (2) defendant's blood alcohol content was well-above the threshold for driving while impaired; (3) defendant got into a truck, ran over a sign, and continued driving; (4) defendant eventually ran off the road and crashed into the victims' truck; and (5) a violation of G.S. 20-138.1 constituted culpable negligence as a matter of law. State v. Davis, — N.C. App. —, 678 S.E.2d 385, 2009 N.C. App. LEXIS 1080 (July 7, 2009).

VII. SERIOUS INJURY.

Comparison to Language in § 14-27.2. — The language of G.S. 14-27.2, "serious personal injury," and the legislative context in which it arose, differs substantially from the language of this section, "serious injury." State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

The term "serious injury," as employed in subsection (a) of this section, means physical or bodily injury resulting from an assault with a deadly weapon. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

The term "inflicts serious injury," as used under this section, means physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious, but it must fall short of causing death. State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988).

And Includes Serious Mental Injury. — Serious injury, within the meaning and intent of that term as used in this section, includes serious mental injury caused by an assault with a deadly weapon. State v. Everhardt, 326 N.C. 777, 392 S.E.2d 391 (1990).

Because "serious injury" could include serious mental injury, the victim's testimony regarding the victim's mental condition, including the victim's dreams, after the alleged incident was admissible to support an element of the crime of felony aggravated assault on a handicapped person under G.S. 14-32.1. State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

Whether the assault is calculated to create a breach of the peace that would outrage the sensibilities of the community does not adequately or correctly describe the infliction of serious injury contemplated by this section. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Facts of Particular Case Are Determinative. — Whether serious injury has been inflicted must be determined according to the particular facts of each case. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Pearson, 27 N.C. App. 157, 218 S.E.2d 192, cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1975); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976); State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982); State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982); State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988).

Factors the courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Some factors the courts may consider in determining whether an injury is serious include, but are not limited to, pain and suffering, loss of blood, hospitalization and time lost from work. State v. Hensley, 90 N.C. 245, 368 S.E.2d 208 (1988).

Evidence that the victim was hospitalized is not necessary for proof of serious injury. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Rotenberry, 54 N.C. App. 504, 284 S.E.2d 197 (1981), cert. denied, 305 N.C. 306, 290 S.E.2d 705 (1982); State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

Serious physical injury may be proven even when it is not evident immediately upon the impact of the assault, as physical injury may later manifest itself as the result of psychological trauma. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

A "whiplash" injury may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Injury Must Fall Short of Causing Death. — The injury must be serious but it must fall short of causing death. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Under this section, if the State proves to the satisfaction of the jury beyond a reasonable doubt that assaultive conduct resulted in death, it has disproven the "serious injury" element, because "serious injury" necessarily must be injury that falls short of death. Thus, if a victim dies as the result of an assault, a defendant cannot be convicted of assault with a deadly weapon inflicting serious injury for that particular assaultive conduct. State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986).

"Serious injury" under subsection (b) of this section is the same as under subsection (a) of this section. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

"Serious injury" as employed in subsection (b) of this section, means physical or bodily injury resulting from an assault with a deadly weapon. State v. Musselwhite, 59 N.C. App. 477, 297 S.E.2d 181 (1982).

Although the indictment did not track the exact language of this section by using the term "serious injury", when read as a whole, it sufficiently stated facts which support every element of the crime charged and apprised defendant of the specific charge against him. State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997), appeal dismissed, cert. denied, 346 N.C. 284, 487 S.E.2d 559 (1997).

Evidence of Infliction of Serious Injury. —A pistol wound in the neck, close to the spinal cord, resulting in unconsciousness, with the bullet lodging in the neck, was sufficient evidence of serious injury, within the meaning of the statute, to submit the question of serious injury to the jury. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Where it was uncontradicted that a deadly weapon, a shotgun, was used to inflict physical injuries upon victim; that he suffered multiple wounds to both legs and knees, the left hip, arm and hand; that he was hospitalized for three days and three nights; and that he suffered great pain and continued to suffer pain as a result of some of the pellets remaining in his body, this evidence clearly showed that defendant inflicted serious injuries upon the victim. Evidence that there was not any significant open wound, bone destruction, tendon or ligament damage, and that the victim remained "neurovascularly intact," did not contradict or negate the evidence of serious injury, but only pointed out that the injuries could have been much more serious than the evidence showed. State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988).

Reasonable minds could not differ as to the seriousness of victim's physical injuries where a bullet ripped through her ear mere inches from her skull, she required emergency room treatment for a gunshot wound, powder burns and lacerations on her hand and head, and her testimony indicated that her physical injuries might have some permanency since she was still suffering from daily ringing in her ear at the time of trial. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

Evidence that the victim was hospitalized is not necessary for proof of serious injury. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

Testimony by the victim that defendant beat him in the head with the butt of defendant's gun, knocking him to the floor, then stood over him and attempted to throw a compressor at his head which struck his shoulder, and that as a result of the compressor striking his shoulder, he was badly bruised, was substantial evidence that defendant inflicted serious injury upon the victim when he struck him with the air conditioning compressor. State v. Ramseur, 338 N.C. 502, 450 S.E.2d 467 (1994).

Conviction upheld where victim suffered injuries including broken wrist, requiring steel plate and screws in his hand, chewed fingers, and gash to the head requiring stitches. State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563, 2001 N.C. App. LEXIS 546 (2001).

State presented sufficient evidence from which a jury could have found that a victim sustained serious injury as a result of defendant's assault, contrary to G.S. 14-32(b), where the victim was treated at a hospital for multiple lacerations to his forearm, small stab wounds to his leg, a deep laceration to his thumb, bruising to his back, and a puncture wound to his right orbital rim that caused a fracture of the bone; further, because of the wounds to his eye and thumb, the victim was referred to eye and hand specialists. State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804, 2004 N.C. App. LEXIS 819 (2004).

Jury found that the victim's injuries, including swollen, black eyes; bruises on the victim's neck, arms, back, and inner thighs; and redness on her vagina, and testimony that the victim suffered pain all over as a result of the beating sustained from defendant was sufficient to support a finding that the victim's injuries were serious. State v. Brunson, 180 N.C. App. 188, 636 S.E.2d 202, 2006 N.C. App. LEXIS 2240 (2006), appeal dismissed, cert. denied, 361 N.C. 431, 648 S.E.2d 848; aff'd, 362 N.C. 81, 653 S.E.2d 144 (2007).

Evidence showing that the victim went to the hospital, took pain medication for two weeks, walked with a limp for one to two weeks, and did not fully heal for approximately one month after being shot in the knee was sufficient to show that the victim sustained a serious injury as required to support defendant's conviction for assault with a deadly weapon inflicting serious injury. State v. Tice, 191 N.C. App. 506, 664 S.E.2d 368, 2008 N.C. App. LEXIS 1507 (2008).

Denial of defendants' motions to dismiss was proper, where the testimony of the emergency room doctor that the victim suffered a chest fracture and numerous bruises and contusions, and the testimony of the victim and the victim's wife that the victim's injuries hurt and the victim was having a lot of pain in the victim's chest tended to show that first defendant's alleged assault resulted in "serious injury." State v. Wallace, — N.C. App. —, 676 S.E.2d 922, 2009 N.C. App. LEXIS 711 (2009).

Question of Fact for Jury. — When an injury may or may not be serious depending upon its severity and the painful effect it may have on the victim, the issue is for the jury to determine upon the particular facts of each case. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Anorexia nervosa is by definition both physical and mental, and a jury could properly find it to be a serious injury. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Depression. — Where depression involved psychomotor retardation which has to do with the physical manifestations of the depressed mental condition, such a condition may be found by a jury to constitute serious injury. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Insomnia is a physical as well as a mental phenomenon, and a jury could properly find it to be a serious injury. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

The pain of severe, chronic headaches could be a serious physical injury, and whether a headache results from a blow to the head or a blow to the psyche is legally irrelevant since either headache may feel the same physically to the victim. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Serious Injury Not Shown. — While "a wrecked nervous system" is often considerably more painful and enduring than "wounded or lacerated limbs," under the circumstances of this case, serious injury could not be proven by showing serious mental injury. State v. Everhardt, 96 N.C. App. 1, 384 S.E.2d 562 (1989), aff'd, 327 N.C. 777, 392 S.E.2d 391 (1990).

Handgun was a deadly weapon per se; however, a conviction for assault with a deadly weapon inflicting serious injury, G.S. 14-32(b), was reversed where the trial court's erroneous admission of the victim's prior statement was the only direct evidence that the victim was struck with the weapon. State v. McCree, 160 N.C. App. 200, 584 S.E.2d 861, 2003 N.C. App. LEXIS 1727 (2003).

VIII. SELF-DEFENSE.

Applicability. — The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949); State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970); State v. Hall, 31 N.C. App. 34, 228 S.E.2d 637 (1976).

Use of Deadly Force Must Be Reasonably Necessary. — A defendant could assault a person with intent to kill only if such force was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. Likewise, a defendant could be absolved from criminal liability for the assault with intent to kill only if he acted in self-defense when he was in actual or apparent danger of suffering death or great bodily harm. State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970); State v. Dial, 38 N.C. App. 529, 248 S.E.2d 366 (1978).

To repel a felonious assault, a defendant may employ deadly force in his defense, but only if it reasonably appears necessary to protect himself against death or great bodily harm. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

Reasonableness of Apprehension of Death or Bodily Harm. — In determining the reasonableness of defendant's apprehension of death or great bodily harm the reasonableness of the apprehension must be determined by the jury on the basis of all facts and circumstances as they appeared to defendant at the time of the shooting. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Among the circumstances to be considered by the jury are the size, age and strength of defendant's assailant in relation to that of defendant; the fierceness or persistence of the assault upon defendant; whether the assailant had or appeared to have a weapon in his possession; and the reputation of the assailant for danger and violence. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Although a defendant need not submit in meekness to indignities or violence to his person merely because the affront does not threaten death or great bodily harm or offensive physical contact. The use of deadly force to prevent harm other than death or great bodily harm is therefore excessive as a matter of law. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

Defendant's evidence that victim had physically abused defendant in the past and had threatened to beat defendant approximately 30 minutes before the shooting was not sufficient to show that at the time of the shooting defendant was in actual or apparent danger of death or great bodily harm; therefore, absent any additional evidence to support defendant's argument, the court did not err in refusing to submit a self-defense instruction. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Voluntarily Entering Into a Fight. — If a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Where defendant entered into affray voluntarily and without lawful excuse or provocation, he was considered the aggressor and was therefore not entitled to a charge on self-defense. State v. Hall, 89 N.C. App. 491, 366 S.E.2d 527 (1988).

Defense of Home or Grounds. — In certain cases, a defendant may justify an intentional assault on the ground that it was made in an effort to defend his home from attack or to evict trespassers. State v. Dial, 38 N.C. App. 529, 248 S.E.2d 366 (1978).

The right of self defense is available only to a person who is without fault. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Burden of Proof. — In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Smith, 28 N.C. App. 314, 220 S.E.2d 858 (1976); State v. Turner, 29 N.C. App. 33, 222 S.E.2d 745 (1976).

Evidence of Dangerous Character of Victim. — Where the defendant pleads and offers evidence of self-defense, evidence of the character of the victim as a violent and dangerous fighting man is admissible if such character was known to the defendant, and further, such evidence is relevant on the question of the defendant's reasonable apprehension of death or bodily harm in his confrontation with the victim, and it may include specific acts of violence by the deceased. When such evidence is introduced by the defendant, the court, even in the absence of a request, should instruct the jury as to the bearing which this evidence might have on defendant's reasonable apprehension of death or great bodily harm from the attack to which his evidence pointed. State v. Powell, 51 N.C. App. 224, 275 S.E.2d 528 (1981).

In assault cases when defendant pleads and offers evidence of self defense, he may then offer evidence tending to show the bad general reputation of his assailant as a violent and dangerous fighting man. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Instruction as to Defendant's Knowledge of Victim's Violent and Dangerous Character. — When evidence tending to show the dangerous and violent character of a victim is introduced, the court, even in the absence of a request, should instruct the jury as to the bearing defendant's knowledge thereof might have on his reasonable apprehension of death or great bodily injury. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Jury Question on Amount of Force Used. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where defendant contended that the victim grabbed defendant by the hair and t-shirt to drag him into a cell for the purpose of a homosexual act, and that defendant then swung at the victim with a razor to get the victim to remove his hands, a jury question was raised as to whether defendant reasonably felt he was in imminent danger of a homosexual assault and whether he used more force than was reasonably necessary to repel the assault. State v. Molko, 50 N.C. App. 551, 274 S.E.2d 271 (1981).

Failure to instruct the jury with reference to defendant's right of self-defense in respect to repelling a nonfelonious assault was prejudicial error. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Evidence Allowed. — In trial for assault with a deadly weapon in which defendant claimed self-defense, the trial court did not err in admitting evidence that prior to wounding the victim, defendant placed a gun to the head of a fourteen year old boy and questioned him regarding stolen cocaine. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

IX. INSTRUCTIONS TO JURY.

Defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972).

When the lesser included offense of assault with a firearm resulting in serious bodily injury is supported by some evidence, a defendant is entitled to have the different permissible views arising on the evidence presented to the jury under proper instructions. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Assault with a deadly weapon, which was a misdemeanor under former G.S. 14-33(b)(1), was a lesser included offense of the felonies described in this section. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arose when and only when there was evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence was the determinative factor. State v. Williams, 31 N.C. App. 111, 228 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury, wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Failure to Submit Lesser Offense Held Error. — Where defendant stated, "I was trying to frighten her so she would move back so I could get in my car and leave," and this statement was bolstered by his earlier testimony that he fired a warning shot while at the rear of the house just prior to his shot which wounded the victim, the trial court should have instructed the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury. State v. Harrington, 95 N.C. App. 187, 381 S.E.2d 808 (1989).

Because of an evidence conflict about who actually cut the victim, the court should have granted defendant's request for an instruction on the lesser included charge of simple assault, including an instruction that simple assault is not an option if the jury determines that defendant was the person who cut the victim. State v. Andrews, 122 N.C. App. 274, 468 S.E.2d 597 (1996).

Under circumstances in which a trial court correctly found that the issue of whether a two-by-four board used to beat the victim was a deadly weapon was for the jury to determine, the trial court should have instructed the jury on the lesser included offense of assault inflicting serious injury, and the failure to do so constituted reversible error. State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291, 2007 N.C. App. LEXIS 2204 (2007).

Failure to Submit Lesser Offense Held Not Error. — Where all the evidence presented showed a shooting with a deadly weapon with an intent to kill and none of the evidence showed the lack of such intent, it was not error for the court to fail to submit to the jury the lesser offense described in subsection (b). State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Where the uncontradicted evidence was that defendant shot a police officer at close range in the face, this evidence did not justify submission of the issue of guilt of a lesser included offense. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Defendants in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury were not entitled to an instruction on the lesser included offense of assault with a deadly weapon where the evidence showed that the victim had been struck in the back of the head with a stick about two feet long; that he was hospitalized for nine days; that a neurosurgeon had to operate in order to repair the injuries to his skull; that fragments of bone had to be peeled back; and that his head was still indented from the injuries. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

The failure of the trial court to submit to the jury the lesser offense of simple assault was not error where the evidence showed that the defendant struck the victim in the head with a blackjack, since a blackjack is a deadly weapon per se. State v. Daniels, 38 N.C. App. 382, 247 S.E.2d 770 (1978).

In trial in which defendant was found guilty of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err by not instructing the jury on the lesser included offenses of (1) assault with a deadly weapon with intent to kill, and (2) assault with a deadly weapon, where there was no contradiction in the evidence of the infliction of serious injury to victim and likewise, contradiction in the evidence that a deadly weapon was used. State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986).

Where, in prosecution for assault with a deadly weapon inflicting serious injury, evidence indicated that defendant repeatedly beat the victim with a metal walking cane and that she suffered very serious injuries as a consequence, but there was no evidence which indicated that she was not beaten with the cane or that she was not seriously injured by it, even though some of the incidental details of the crime were inconsistent, the court's failure to charge on simple assault was not error, plain or otherwise. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

In trial for first-degree burglary, felonious breaking and entering, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill, where the only evidence which would negate the intent to kill was the defendant's denial that he would have killed victim, the trial court's refusal to submit a jury instruction on the lesser offenses of misdemeanor assault with a deadly weapon and misdemeanor breaking and entering was not error. State v. Owen, 111 N.C. App. 300, 432 S.E.2d 378 (1993).

Where all the evidence tended to show a shooting with a deadly weapon with the intent to kill, the trial court did not err in refusing to submit the lesser offense of assault with a deadly weapon inflicting serious injury. State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (1993).

Court was not required to submit the lesser-included offense of assault with a deadly weapon to the jury where the court determined, based on the evidence, that the victim's injury was "serious". State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997), appeal dismissed, cert. denied, 346 N.C. 284, 487 S.E.2d 559 (1997).

Instructions on assault with a deadly weapon and assault inflicting serious injury were not warranted where the defendant shot one victim three times at close range with a large caliber pistol and within seconds fired fatal shots into another, and where one of the victim's bones in an arm was broken in several places with the bullet exiting near the elbow, and another bullet passed through his right side and shoulder, with a third remaining lodged near his shoulder. State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249, 2001 N.C. App. LEXIS 174 (2001).

Where the defendant was charged with assault with a deadly weapon inflicting serious injury, he was not entitled to instructions on either simple assault or assault with a deadly weapon, where the evidence was undisputed that the victim had been seriously injured. State v. Uvalle, 151 N.C. App. 446, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002), cert. denied, 356 N.C. 692, 579 S.E.2d 95 (2003).

Trial court did not commit plain error when it failed to instruct the jury on the lesser included offense of assault with a deadly weapon inflicting serious injury as the evidence showed that defendant went into his home, retrieved a loaded gun, pointed the gun at the victim at close range, told the victim he was not leaving the alley that day, and then shot the victim in the back. It was irrelevant that defendant only shot the victim one time as the lack of multiple shots fired did not negate intent to kill. State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677, 2006 N.C. App. LEXIS 701 (2006).

Instruction on Meaning of "Assault". — It is incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term "assault." State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

Conviction of Simple Assault. — An instruction directing verdict of guilty of at least simple assault was not erroneous when the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926).

Omission of "Assault with a Deadly Weapon" from Charge to Jury. — When accused was indicted under this section for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, did not deprive the jury of the statutory authority to consider it. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

State Must Prove Murderous Intent. — Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raised a presumption of felonious intent was reversible error, the fact of murderous intent being for the State to prove. State v. Gibson, 196 N.C. 393, 145 S.E. 772 (1928).

The term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

In the absence of a special request for instructions from the defendant, the judge is not required to define "intent to kill." The meaning is obvious and no explanation is necessary. However, when a trial judge undertakes to define the term, he must do so correctly. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

Deadly Weapons. — Instruction was erroneous and prejudicial because it invaded the province of the jury to determine whether nightstick used by the defendant was a "deadly weapon." State v. Buchanan, 28 N.C. App. 163, 220 S.E.2d 207 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 161 (1976).

In prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and for attempted robbery with a dangerous weapon, where victim testified that she was stabbed with a pocketknife and treating physician testified that victim was bleeding profusely from all of her wounds when she arrived at hospital, that she lost from one to two quarts of blood, and that she had to be hospitalized for four days, the trial court did not err in instructing the jury that a knife is a dangerous or deadly weapon. State v. Mason, 79 N.C. App. 477, 339 S.E.2d 474, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Instruction as to Both Assault and Serious Injury. — The plain meaning of "inflicts serious injury," under G.S. 14-32(b) was that if a person committed an assault with a deadly weapon and serious injury resulted from that assault, the person was guilty of felonious assault, so a disjunctive jury instruction which did not allow a determination of whether the jury unanimously found that defendant both committed an assault with a deadly weapon and serious injury resulted from the use of that deadly weapon was fatally defective. State v. Lotharp, 148 N.C. App. 435, 559 S.E.2d 807, 2002 N.C. App. LEXIS 18 (2002).

Instruction As to Serious Injury. — Where the evidence was sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," was held not to be reversible error to the defendant's prejudice where all the evidence tended to show that serious injury was inflicted in violation of this section. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury was any physical injury that caused great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the State's evidence with respect to the injuries is uncontradicted and the injuries could not conceivably be considered anything but serious, the trial judge may instruct the jury that if they believe the evidence as to the injuries, then they will find that there was serious injury. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Where the defendant was charged with first-degree sexual offense, but he was convicted of second-degree sexual offense which does not include either use of a deadly weapon or the infliction of serious injury, the trial court did not err in failing to instruct the jury not to consider evidence of serious injury caused by the sexual offense in determining its verdict on the assault with a deadly weapon inflicting serious injury charge, for in convicting him of second-degree sexual offense the jury necessarily found that no serious injury was inflicted during that offense, and in convicting him of assault with a deadly weapon inflicting serious injury they necessarily found that the victim's only serious injury was inflicted during the assault with the deadly weapon. State v. Hensley, 91 N.C. App. 282, 371 S.E.2d 498, cert. denied, 323 N.C. 627, 374 S.E.2d 595 (1988), 490 U.S. 1008, 109 S. Ct. 1647, 104 L. Ed. 2d 161 (1989).

While there was sufficient evidence for the assault with a deadly weapon inflicting serious injury charge to withstand a motion to dismiss, the trial court's instruction to the jury that the gunshot wound was serious required remand because there was a reasonable possibility that the jury would find the injury not serious, and therefore find defendant not guilty. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Agreement Among Reasonable Minds. — In the absence of conflicting evidence, a trial judge may instruct the jury that injuries to a victim are serious as a matter of law if reasonable minds could not differ as to their serious nature. State v. Hedgepeth, 330 N.C. 38, 409 S.E.2d 309 (1991).

Failure to Instruct Jury on Shooting by Accident. — Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily harm, all of the evidence indicated that defendant intended to fire and did fire the shot or shots which resulted in injury to the victim, defendant was not entitled to an instruction on shooting by accident or misadventure. State v. Efird, 37 N.C. App. 66, 245 S.E.2d 226 (1978).

Failure to Define Accident. — In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Failure to Instruct Jury to Return Not Guilty Verdict if State Failed to Prove Any Elements of the Crime Charged. — Because defendant's plea of not guilty to a charge of assault with a deadly weapon inflicting serious injury with the intent to kill placed the burden upon the State to satisfy the jury beyond a reasonable doubt of every element of the offenses charged in the bill of indictment, defendant was entitled to a specific instruction that if the jury determined that the State failed to prove any of the elements of the charges, it should return a verdict of not guilty. The trial court's failure to include such an instruction necessitated a new trial. State v. McArthur, 186 N.C. App. 373, 651 S.E.2d 256, 2007 N.C. App. LEXIS 2202 (2007).

Self-Defense. — Instructions implying that defendant could not lawfully use force in self defense unless he was threatened with death or great bodily harm were erroneous. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Instructions implying that the burden of proof was on defendant to satisfy the jury that he acted in self defense have no application in criminal prosecutions for felonious assault or assault with a deadly weapon. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Instruction on self-defense was erroneous which told the jury that defendant could use no more force than necessary in defending himself. The law is that the defendant could use such force as was reasonably necessary or apparently necessary. One may fight in self defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

In a felonious assault prosecution, the language used by the court in instructing the jury on self defense effectively conveyed to the jury that it had to determine the reasonableness of defendant's belief in the necessity of force from the circumstances as they appeared to him at the time of the assault. State v. Cantrell, 24 N.C. App. 575, 211 S.E.2d 525 (1975).

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Trial court did not err in refusing defendant's request for an instruction on self-defense where the victim merely walked past defendant in the day room and exhibited no threatening behavior toward defendant before defendant assaulted him, where defendant was not afraid that victim would personally harm him, and where there was no evidence that victim had the financial ability to arrange for an assault against anyone, nor that he ever named defendant as being the target of any alleged assault. State v. Lovell, 93 N.C. App. 726, 379 S.E.2d 101 (1989).

Where Victim Is Initial Assailant Self-Defense Instruction Improper. — Trial court erred in its instructions to the effect that self defense was unavailable to defendant if he was the aggressor where the testimony of both victim and defendant pointed to the victim as the initial assailant. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Erroneous Instruction on Self-Defense. — Where although trial judge related in his summary some evidence that victim had threatened defendant prior to the shooting, judge failed to establish a relation between the previous incidents and defendant's claim of self-defense, and did not directly explain and apply the law of self defense to any of the evidence except to say that the jury should consider whether or not victim had a weapon in his pocket, this was error. State v. Tann, 57 N.C. App. 527, 291 S.E.2d 824 (1982).

Defense of Home. — Where there was evidence that defendant acted in defense of his home, an instruction on the defendant's right to act in self defense without an instruction also on the defendant's right to act in defense of home contained prejudicial error. State v. Edwards, 28 N.C. App. 196, 220 S.E.2d 158 (1975).

Instruction on Defendant's Right to Evict Prosecuting Witness. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to charge the jury on defendant's right to evict the prosecuting witness from defendant's home and in failing to define the force which could have been used to accomplish such eviction, since defendant did not present any evidence that he tried to remove the victim by a gentle laying on of hands prior to the shooting, nor was there any evidence that the victim ever threatened or used deadly physical force upon defendant. State v. Myers, 49 N.C. App. 197, 270 S.E.2d 574 (1980).

Evidence Sufficient to Require Instruction as to Defense of Third Person. — Evidence was sufficient to require an instruction as to the right of the defendant, indicted for a felonious assault with a deadly weapon with intent to kill, as a private citizen to interfere with and prevent the prosecuting witness from committing a felonious assault on a third person. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Where defendant saw the victim force his former girl friend from a dance hall and down the street several blocks, knew that victim had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that the victim was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that the victim reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Instruction Upheld. — Where the only issue before the jury was whether a shooting was accidental or intentional, judge's remark at end of instruction that "of course, pointing a gun at a person is not lawful conduct," did not affect the proceeding so that without the statement the verdict would have been different; therefore, there was no plain error. State v. Kinney, 92 N.C. App. 671, 375 S.E.2d 692 (1989).

Instruction Held Erroroneous. — As assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill and inflict serious injury, the trial court committed reversible error in submitting the former to the jury. State v.

Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002).

Defendant's conviction of assault with a deadly weapon inflicting serious injury was improper, as the jury verdict form did not include an option of finding defendant not guilty, nor did it include an option to find defendant guilty of simple assault. The instructions did not cure the omission of a "not guilty" option from the jury verdict form. State v. Jenkins, 189 N.C. App. 502, 658 S.E.2d 309, 2008 N.C. App. LEXIS 605 (2008).

X. VERDICT.

Terms of Verdict. — In a prosecution under this section a verdict of guilty of "assault with intent to harm but not to kill" was a complete and sensible verdict, and supported judgment for a simple assault, the words "without intent to kill but with intent to harm" being mere surplusage. State v. Sumner, 269 N.C. 555, 153 S.E.2d 111 (1967).

Erroneous Instruction — Not Cured by Verdict. — An instruction that defendant's admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant's guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, was not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury, matters in mitigation or excuse before he could successfully ask for a verdict of not guilty. State v. Carver, 213 N.C. 150, 195 S.E. 349 (1938).

Same — Cured by Conviction of Lesser Included Offense. — Any error in instructing the jury as to defendant's guilt or innocence of felonious assault under subsection (a) of this section was cured by the jury's verdict which found defendant guilty of the lesser included offense described in subsection (b). State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

Verdict Insufficient to Support Sentence Under This Section. — Although the indictment charged and the evidence showed that the deadly weapon used in an assault was a firearm, the jury's verdict of guilty of "assault with a deadly weapon with intent to kill" would not support a sentence of five years for assault with a firearm with intent to kill pursuant to subsection (c) but would support a maximum sentence of two years under G.S. 14-33. State v. Edmondson, 283 N.C. 533, 196 S.E.2d 505 (1973), decided prior to the 1973 amendment to this section.

XI. SUFFICIENCY OF EVIDENCE.

Evidence Favorable to Defendant. — In defendant's trial on charges of conspiracy to commit first degree murder, attempted first degree murder, and assault with a deadly weapon with intent to kill, the State did not have a duty to locate evidence favorable to defendant, and the trial court did not err by denying defendant's request that the State determine the identities of mental health professionals who were treating a prosecution witness and to provide defendant with that information, or by denying defendant access to mental health records concerning the witness that were made available to the court, after the court reviewed those records in camera and decided they did not contain exculpatory information. State v. Lynn, 157 N.C. App. 217, 578 S.E.2d 628, 2003 N.C. App. LEXIS 533 (2003).

Evidence of Infliction of Serious Injury. — Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, was sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of this section. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Where the evidence tended to show that the force of shotgun blasts into truck drove shards of glass into the arm and shoulder of victim, blood was observed on his arm, treatment for the injuries was given and officer testified that when he arrived at the hospital victim was very shaken, there was sufficient evidence of injury presented at trial to withstand defendants' motion to dismiss. State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (1994).

Despite a defendant's argument that the evidence as to his infliction of serious injury upon his victims was insufficient, the evidence was sufficient to establish the "serious bodily injury" element for his convictions for felonious child abuse inflicting serious injury under G.S. 14-318.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b). State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002).

Intent to Kill. — Defendant's intent to not only rob or to injure, but to kill was supported by evidence that defendant leapt onto the victim's back once he seized defendant's knife; that he struggled with him, causing him serious injury; that defendant threatened the victim before and after the scuffle without appearing to hear his acquiescence in his demands; that defendant had attempted to obtain and had subsequently regretted not being equipped with a gun at the assault; and that defendant had instead obtained and chosen to use an assault-type knife with finger-holes, designed to enable an assailant to repeatedly stab a victim without losing his grip. State v. Grigsby, 351 N.C. 454, 526 S.E.2d 460, 2000 N.C. LEXIS 236 (2000).

Use of Deadly Weapon. — The evidence was clearly sufficient to raise an inference of the use of a deadly weapon where the victim had what looked like a board print on his face and he was bleeding from his face and eyes, with a broken cheekbone. State v. Phillips, 87 N.C. App. 246, 360 S.E.2d 475 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 665 (1988).

The State's evidence that the defendant hit the victim with a log and that the victim suffered two hematomas near his brain and received 15 stitches sufficiently supported its theory that the defendant used a deadly weapon during the assault. State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777, 1999 N.C. App. LEXIS 1235 (1999).

Trial court did not err in denying defendant's motion to dismiss the charges because, although defendant's actions while driving were not impaired by alcohol, they were still sufficient to establish the culpable negligence needed to support both involuntary manslaughter and assault with a deadly weapon inflicting serious injury. A witness noticed inappropriate driving by both defendant and the decedent prior to their vehicles approaching a sharp curve, as they approached the curve, defendant attempted to pass the decedent and the witness despite having no visibility around the curve, and defendant's attempt to pass the vehicles at that particular time was in blatant disregard of safety concerns associated with that portion of the highway and a violation of G.S. 20-150. State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379, 2003 N.C. App. LEXIS 2268 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 33 (2004).

The court is not required to instruct on simple assault where the evidence is uncontradicted that the assault was committed with a deadly weapon per se. State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988).

Assault. — The State's evidence that the defendant participated in a fight and that one witness saw him hit the victim with a "branch or a log" sufficiently supported its theory that he assaulted the victim. State v. Cody, 135 N.C. App. 722, 522 S.E.2d 777, 1999 N.C. App. LEXIS 1235 (1999).

Where there is positive and uncontradicted evidence as to the element of a serious injury, an instruction on the lesser offense of assault with a deadly weapon is not required. State v. Hensley, 90 N.C. App. 245, 368 S.E.2d 208 (1988).

Failure to Instruct on Defense of Family Upheld. — Where although victim may have earlier assaulted defendant's wife, at the time of defendant's assault on the victim the wife was removed from any likely harm from the victim, the trial court committed no error in failing to instruct on defense of family. State v. Hall, 89 N.C. App. 491, 366 S.E.2d 527 (1988).

Evidence Sufficient to Support Use of Nonstatutory Aggravating Factors in Sentencing. — Where evidence presented tended to show defendant acquired personal information about his victim, adopted an alias, contacted him to schedule a meeting about his girlfriend in order to observe what the victim looked like, and several weeks later on the night of the offense, awaited the victim's return home, spoke his name when the latter passed by, and then fired four shots at him as he tried to escape, the circumstances of this felonious assault supported the trial court's finding of premeditation and deliberation, and tended to show a higher degree of culpability than other assault cases in which only the assaultive conduct itself is pertinent to the degree of culpability of the defendant; therefore, the use of nonstatutory factors to aggravate defendant's sentence was proper. State v. Smith, 92 N.C. App. 500, 374 S.E.2d 617 (1988), cert. denied, 324 N.C. 340, 378 S.E.2d 805 (1989).

It was error for the trial court to find as a factor in aggravation that assault with a deadly weapon resulting in serious injury was especially heinous, atrocious or cruel, where the victim received 50 stitches, was hospitalized for two weeks, lost the sight in one eye and had some amnesia, as it could not be said that the conduct of defendant was any more brutal than that inherent in any assault with a deadly weapon resulting in serious bodily injury. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451, appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Defendant's convictions on both assault with a deadly weapon inflicting serious injury and attempted voluntary manslaughter for shooting a person were mutually exclusive offenses and the trial court's consolidation of the offenses into a single judgment was error that mandated a new trial; for the jury to convict on both offenses, it had to find either that defendant did not have the intent to kill, which would support the assault offense, or that he had the intent to kill, but that such intent was negated by sudden provocation, which would support the attempted manslaughter charge. State v. Hames, 170 N.C. App. 312, 612 S.E.2d 408, 2005 N.C. App. LEXIS 1007 (2005), cert. denied, stay denied, 360 N.C. 70, 622 S.E.2d 496 (2005).

Sentence Supported by Evidence. — Evidence that assault victim was beaten, shot in the back of the head, driven over by a car, and left on the highway with his leg caught up underneath the car held to justify a sentence in excess of the presumptive term. State v. Poole, 82 N.C. App. 117, 345 S.E.2d 466 (1986), cert. denied, 318 N.C. 700, 351 S.E.2d 757 (1987).

No error occurred in the imposition of an aggravated sentence on defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury, because while G.S. 15A-1340.16 did not apply based on when the crime occurred, a common-law procedural mechanism existed for submitted aggravating factors to the jury in the form of a special verdict; overwhelming evidence was presented that defendant shot a rival gang member in the rival gang member's territory, supporting the aggravating factor that defendant committed the crime to further or benefit the purposes of a criminal street gang. State v. Roberson, 182 N.C. App. 133, 641 S.E.2d 347, 2007 N.C. App. LEXIS 491 (2007).

Evidence Sufficient to Support Guilt as to Multiple Victims. — Where the evidence supported the guilt of both defendants as to all of the felonious assaults, it made no difference which of the felonious assaults was the underlying felony, which defendant actually fired the fatal shots or whether defendants intended that the victim be killed. State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994).

The charging of both felonious assault and attempted murder as to each victim was not error although these charges arose out of the same incident; substantial evidence existed against defendant of every essential element of both. State v. Washington, 141 N.C. App. 354, 540 S.E.2d 388, 2000 N.C. App. LEXIS 1405 (2000), cert denied, 353 N.C. 396, 547 S.E.2d 427 (2001).

Evidence Sufficient to Support Conviction. — See State v. Cody, 225 N.C. 38, 33 S.E.2d 71 (1945); State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Strater, 272 N.C. 276, 158 S.E.2d 60 (1967); State v. Burns, 24 N.C. App. 392, 210 S.E.2d 524 (1975).

Evidence held sufficient to permit the jury to conclude that defendant was guilty of voluntary manslaughter and assault with a deadly weapon inflicting serious injury. State v. Shoemaker, 80 N.C. App. 95, 341 S.E.2d 603, cert. denied, 317 N.C. 340, 346 S.E.2d 145 (1986).

From evidence that five persons were injured by gunshots and the particular circumstances surrounding those shootings, i.e., a shootout between two rival gangs, the jury could reasonably infer that defendant, either solely or while acting in concert with others, inflicted injuries during the shootout, and accordingly, it was for the jury to decide whether the facts satisfied them beyond a reasonable doubt that defendant was guilty of assault with a deadly weapon. State v. Platt, 85 N.C. App. 220, 354 S.E.2d 332, cert. denied, 320 N.C. 516, 358 S.E.2d 529 (1987).

Evidence that as defendant drove two and one-half ton truck toward road where deputies were located, he was waving one arm out the window and screaming "Stand right there.... I'll kill you," and that he drove the truck straight at the deputies before colliding with two automobiles and running into ditch, raised reasonable inferences sufficient to take to the jury the issues of defendant's use of the truck as a deadly weapon and whether he acted with the requisite specific intent to kill the deputies. State v. Hinson, 85 N.C. App. 558, 355 S.E.2d 232, cert. denied, 320 N.C. 635, 360 S.E.2d 98 (1987).

Evidence held sufficient to support a finding that defendant committed each of the elements of assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Based on the evidence, defendant was properly found guilty of aiding and abetting the commission of the offense of assault with a deadly weapon inflicting serious injury not only because he [was] present when [the crime was] committed but because, by his actions, he clearly show[ed] his consent to the criminal purpose and contribution to its execution; based on the evidence, defendant was also properly found guilty of damage to personal property. State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995).

Conviction was affirmed where substantial evidence was presented that defendant assaulted his estranged wife with a broken bottle to survive defendant's motion to dismiss; and the evidence amply supported the trial court's instruction that a broken wine bottle was a dangerous and deadly weapon as a matter of law because it was likely to produce death or great bodily harm. State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003), cert. denied, 357 N.C. 254, 583 S.E.2d 43 (2003).

Evidence Insufficient to Sustain Verdict Against Defendant. — See State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

Evidence held insufficient to convict the defendant of robbery with a dangerous weapon in violation of G.S. 14-87 and assault with a deadly weapon inflicting serious bodily injury in violation of subsection (b) of this section. State v. Griffin, 84 N.C. App. 671, 353 S.E.2d 679, cert. denied, 319 N.C. 407, 354 S.E.2d 732 (1987).

§ 14-32.1. Assaults on handicapped persons; punishments.

(a) For purposes of this section, a "handicapped person" is a person who has:

(1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or

(2) Infirmity

which would substantially impair that person's ability to defend himself.

(b) through (d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 31, effective October 1, 1994.

(e) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault or assault and battery on a handicapped person is guilty of a Class F felony. A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:

(1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or

(2) Inflicts serious injury or serious damage to a handicapped person; or

(3) Intends to kill a handicapped person.

(f) Any person who commits a simple assault or battery upon a handicapped person is guilty of a Class A1 misdemeanor. (1981, c. 780, s. 1; 1993, c. 539, ss. 15, 1139; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 767, s. 31; 2006-179, s. 1.)

CASE NOTES

In order to convict an individual under G.S. 14-32.1(e), the jury must find that defendant knew or had reasonable grounds to know the victim was a handicapped person. The evidence supported defendant's conviction of aggravated assault on a handicapped person, and the conviction was affirmed, where defendant testified that she suffered from profound hearing loss, and that she was wearing a hearing aid on the evening that she was assaulted by defendant. State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509 (2004), cert. denied, 359 N.C. 196, 608 S.E.2d 65 (2004).

Testimony as to Mental Condition of Victim Relevant and Thus, Admissible. — Victim's testimony regarding the victim's mental condition, including the victim's dreams, after the alleged incident was relevant because the victim's mental state supported an element of the crime of felony aggravated assault on a handicapped person. State v. Lofton, — N.C. App. —, 667 S.E.2d 317, 2008 N.C. App. LEXIS 1815 (2008).

Cited in State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

§ 14-32.2. Patient abuse and neglect; punishments.

(a) It shall be unlawful for any person to physically abuse a patient of a health care facility or a resident of a residential care facility, when the abuse results in death or bodily injury.

(b) Unless the conduct is prohibited by some other provision of law providing for greater punishment:

(1) A violation of subsection (a) above is a Class C felony where intentional conduct proximately causes the death of the patient or resident;

(2) A violation of subsection (a) above is a Class E felony where culpably negligent conduct proximately causes the death of the patient or resident;

(3) A violation of subsection (a) above is a Class F felony where such conduct is willful or culpably negligent and proximately causes serious bodily injury to the patient or resident;

(4) A violation of subsection (a) is a Class H felony where such conduct evinces a pattern of conduct and the conduct is willful or culpably

negligent and proximately causes bodily injury to a patient or resident.

(c) "Health Care Facility" shall include hospitals, skilled nursing facilities, intermediate care facilities, intermediate care facilities for the mentally retarded, psychiatric facilities, rehabilitation facilities, kidney disease treatment centers, home health agencies, ambulatory surgical facilities, and any other health care related facility whether publicly or privately owned.

(c1) "Residential Care Facility" shall include adult care homes and any other residential care related facility whether publicly or privately owned.

(d) "Person" shall include any natural person, association, corporation, partnership, or other individual or entity.

(e) "Culpably negligent" shall mean conduct of a willful, gross and flagrant character, evincing reckless disregard of human life.

(e1) "Abuse" means the willful or culpably negligent infliction of physical injury or the willful or culpably negligent violation of any law designed for the health or welfare of a patient or resident.

(f) Any defense which may arise under G.S. 90-321(h) or G.S. 90-322(d) pursuant to compliance with Article 23 of Chapter 90 shall be fully applicable to any prosecution initiated under this section.

(g) Criminal process for a violation of this section may be issued only upon the request of a District Attorney.

(h) The provisions of this section shall not supersede any other applicable statutory or common law offenses. (1987, c. 527, s. 1; 1993, c. 539, s. 1140; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 535, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 7, 8; 1999-334, s. 3.15; 1999-456, s. 61(b); 2007-188, s. 1.)

Editor's Note. — At the direction of the Revisor of Statutes, a colon was substituted for a period at the end of the introductory paragraph of subsection (b).

Session Laws 1995, c. 535, s. 37, provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

Subsection (b), as amended by Session Laws 2007-188, s. 1, effective December 1, 2006, is applicable to offenses committed on or after that date.

§ 14-32.3. Domestic abuse, neglect, and exploitation of disabled or elder adults.

(a) Abuse. — A person is guilty of abuse if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, with malice aforethought, knowingly and willfully: (i) assaults, (ii) fails to provide medical or hygienic care, or (iii) confines or restrains the disabled or elder adult in a place or under a condition that is cruel or unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the abuse, the caretaker is guilty of a Class F felony. If the disabled or elder adult suffers injury from the abuse, the caretaker is guilty of a Class H felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(b) Neglect. — A person is guilty of neglect if that person is a caretaker of a disabled or elder adult who is residing in a domestic setting and, wantonly, recklessly, or with gross carelessness: (i) fails to provide medical or hygienic care, or (ii) confines or restrains the disabled or elder adult in a place or under a condition that is unsafe, and as a result of the act or failure to act the disabled or elder adult suffers mental or physical injury.

If the disabled or elder adult suffers serious injury from the neglect, the caretaker is guilty of a Class G felony. If the disabled or elder adult suffers injury from the neglect, the caretaker is guilty of a Class I felony.

A person is not guilty of an offense under this subsection if the act or failure to act is in accordance with G.S. 90-321 or G.S. 90-322.

(c) Repealed by Session Laws 2005-272, s. 1, effective December 1, 2005, and applicable to offenses committed on or after that date.

(d) Definitions. — The following definitions apply in this section:

(1) Caretaker. — A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.

(2) Disabled adult. — A person 18 years of age or older or a lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).

(3) Domestic setting. — Residence in any residential setting except for a health care facility or residential care facility as these terms are defined in G.S. 14-32.2.

(4) Elder adult. — A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being. (1995, c. 246, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 9; 2005-272, s. 1.)

Editor's Note. — Session Laws 2005-272, which repealed subsection (c) describing exploitation, in s. 3, provides: "This act becomes effective December 1, 2005, and applies to offenses committed on or after that date. Prosecutions for offenses committed before December 1, 2005, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-32.4. Assault inflicting serious bodily injury; strangulation; penalties.

(a) Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony. "Serious bodily injury" is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

(b) Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony. (1996, 2nd Ex. Sess., c. 18, s. 20.13(a); 2004-186, s. 9.1.)

CASE NOTES

What Is Serious Bodily Injury. — Proof of "serious bodily injury" requires proof of a more severe injury than the "serious injury" element of other assault offenses. State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

"Serious Bodily Injury" Upon a Law Enforcement Officer. — G.S. 14-34.7 was ambiguous because the statute's title referred to assaults inflicting "serious injury" while the statute text specified assaults inflicting "serious bodily injury" — under North Carolina law, the terms "serious injury" and "serious bodily injury" were not interchangeable; however, when interpreting ambiguous statutes, the principal goal is to effectuate the purpose of the legislature, and the "manifest purpose" of the legislature in enacting G.S. 14-34.7 was to make an assault inflicting "serious injury" or "serious bodily injury" against a law enforcement officer a felony. State v. Crawford, 167 N.C. App. 777, 606 S.E.2d 375, 2005 N.C. App. LEXIS 1 (2005), cert. denied, 359 N.C. 412, 612 S.E.2d 324 (2005).

Serious Bodily Injury Shown. — Evidence that the victim had to have his jaw wired shut for two months, causing him to lose a great deal of weight, and that he continued to suffer from back spasms as a result of two broken ribs, all as a result of his assault, was sufficient evidence of "serious bodily injury." State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

Evidence that defendant struck eight-year-old daughter on the buttocks with a board multiple times while disciplining her and that the blows caused a large bruise that was crusted around the outside, had a spot near the middle that was open and oozing, and was painful to the touch was sufficient for a jury to reasonably infer that defendant caused great pain and suffering, and the trial court did not err by denying defendant's motion to dismiss charges of felonious child abuse, in violation of G.S. 14-318.4(a), and felonious assault inflicting serious bodily injury, in violation of G.S. 14-32.4. State v. Williams, 154 N.C. App. 176, 571 S.E.2d 619, 2002 N.C. App. LEXIS 1397 (2002).

Evidence was sufficient to support defendants' convictions for assault inflicting serious bodily injury where the victim testified that his facial injuries were "very" painful, and that he suffered pain for about a month, and a doctor testified that the injuries suffered by the victim were the type that caused "severe" and "extreme" pain. State v. Brown, 177 N.C. App. 177, 628 S.E.2d 787, 2006 N.C. App. LEXIS 882 (2006).

There was substantial record evidence of a serious permanent disfigurement, and sufficient evidence to supported defendant's conviction of assault inflicting serious bodily injury, under circumstances in which defendant's assault caused the victim facial swelling, a scalp abrasion, a fractured nose, eye swelling, and an evulsed tooth. State v. Downs, — N.C. App. —, 635 S.E.2d 518, 2006 N.C. App. LEXIS 2111 (2006).

Evidence Held Sufficient. — Victim's testimony that defendant attacked the victim and that the victim feared for her life, which was ample evidence of an assault, and the fact that the victim received cuts and bruises on her neck as a result of being strangled, which was confirmed by photographic evidence, provided sufficient evidence of each essential element of assault by strangulation. State v. Little, 188 N.C. App. 152, 654 S.E.2d 760, 2008 N.C. App. LEXIS 97 (2008).

Conviction for assault inflicting serious bodily injury was supported by testimony that the victim had abdominal pain and a large bruise and swelling over the victim's left collarbone, which an x-ray revealed was broken, and that an emergency room nurse gathering rape the kit was unable to use a speculum because the victim was in so much pain, allowing jury to conclude that the victim's injuries created a protracted condition that caused extreme pain State v. Rouse, — N.C. App. —, 679 S.E.2d 520, 2009 N.C. App. LEXIS 1162 (July 21, 2009).

Sufficient evidence supported defendant's conviction of assault inflicting serious bodily injury, G.S. 14-32.4, as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Lesser Included Offense. — As assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill and inflict serious injury, the trial court committed reversible error in submitting the former to the jury. State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002).

Under G.S. 14-33(c)(2), the essential elements of assault on a female were assault upon a female person by a male person at least 18 years of age; in contrast, the offense of assault by strangulation, G.S. 14-32.4(b), required only that an individual assault another person and inflict physical injury by strangulation. Because each offense included at least one element not present in the other, assault on a female was not a lesser included offense of assault by strangulation and the trial court properly denied a lesser-included-offense instruction. State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Complete Inability to Breathe Not Requirement. — State was not required to prove that the victim had a complete inability to breathe in order to prove the elements of assault by strangulation. State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637, 2007 N.C. App. LEXIS 834 (2007).

Prosecution Under G.S. 14-32 and This Section Double Jeopardy. — Defendant could not be convicted and sentenced for both assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to G.S. 14-32(b), and assault inflicting serious bodily injury, G.S. 14-32.4, for the same conduct without violating the double jeopardy provisions of the United States and North Carolina Constitutions. State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003).

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N. C. Const. art. I, § 19. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Applied in State v. Wampler, 145 N.C. App. 127, 549 S.E.2d 563, 2001 N.C. App. LEXIS 546 (2001).

Cited in State v. Uvalle, 151 N.C. App. 446, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002); State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002); State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a Class 2 misdemeanor.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class 1 misdemeanor if, in the course of the assault, assault and battery, or affray, he:

(1) through (3) Repealed by Session Laws 1995, c. 507, s. 19.5(b);
(4) through (7) Repealed by Session Laws 1991, c. 525, s. 1;
(8) Repealed by Session Laws 1995, c. 507, s. 19.5(b);
(9) Commits an assault and battery against a sports official when the sports official is discharging or attempting to discharge official duties at a sports event, or immediately after the sports event at which the sports official discharged official duties. A "sports official" is a person at a sports event who enforces the rules of the event, such as an umpire or referee, or a person who supervises the participants, such as a coach. A "sports event" includes any interscholastic or intramural athletic activity in a primary, middle, junior high, or high school, college, or university, any organized athletic activity sponsored by a community, business, or nonprofit organization, any athletic activity that is a professional or semiprofessional event, and any other organized athletic activity in the State.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:

(1) Inflicts serious injury upon another person or uses a deadly weapon;
(2) Assaults a female, he being a male person at least 18 years of age;
(3) Assaults a child under the age of 12 years;
(4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties;
(5) Repealed by Session Laws 1999-105, s. 1, effective December 1, 1999; or
(6) Assaults a school employee or school volunteer when the employee or volunteer is discharging or attempting to discharge his or her duties as an employee or volunteer, or assaults a school employee or school volunteer as a result of the discharge or attempt to discharge that individual's duties as a school employee or school volunteer. For purposes of this subdivision, the following definitions shall apply:

a. "Duties" means:
   1. All activities on school property;
   2. All activities, wherever occurring, during a school authorized event or the accompanying of students to or from that event; and
   3. All activities relating to the operation of school transportation.

b. "Employee" or "volunteer" means:
   1. An employee of a local board of education; or a charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes;
   2. An independent contractor or an employee of an independent contractor of a local board of education, charter school authorized under G.S. 115C-238.29D, or a nonpublic school which has filed intent to operate under Part 1 or Part 2 of Article 39 of Chapter 115C of the General Statutes, if the independent contractor carries out duties customarily performed by employees of the school; and
   3. An adult who volunteers his or her services or presence at any school activity and is under the supervision of an individual listed in sub-sub-subdivision 1. or 2. of this sub-subdivision.

(7) Assaults a public transit operator, including a public employee or a private contractor employed as a public transit operator, when the operator is discharging or attempting to discharge his or her duties.

(8) Assaults a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes or a campus police officer certified pursuant to the provisions of Chapter 74G, Chapter 17C, or Chapter 116 of the General Statutes in the performance of that person's duties.

(d) Any person who, in the course of an assault, assault and battery, or affray, inflicts serious injury upon another person, or uses a deadly weapon, in violation of subdivision (c)(1) of this section, on a person with whom the person has a personal relationship, and in the presence of a minor, is guilty of a Class A1 misdemeanor. A person convicted under this subsection, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court.

A person committing a second or subsequent violation of this subsection shall be sentenced to an active punishment of no less than 30 days in addition to any other punishment imposed by the court.

The following definitions apply to this subsection:

(1) "Personal relationship" is as defined in G.S. 50B-1(b).

(2) "In the presence of a minor" means that the minor was in a position to have observed the assault.

(3) "Minor" is any person under the age of 18 years who is residing with or is under the care and supervision of, and who has a personal relationship with, the person assaulted or the person committing the assault. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620, 1911, c. 193; C.S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2; 1973, c. 229, s. 4; c. 1413; 1979, cc. 524, 656; 1981, c. 180; 1983, c. 175, ss. 6, 10; c. 720, s. 4; 1985, c. 321; 1991, c. 525, s. 1; 1993, c. 286, s. 1; c. 539, s. 16; 1994, Ex. Sess., c. 14, s. 3; c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 687, s. 1; 1995, c. 352, s. 1; 1995, c. 507, s. 19.5(b); 1999-105, s. 1; 2003-409, s. 1; 2004-26, s. 1; 2004-199, s. 7; 2005-231, s. 6.2.)

Legal Periodicals. — For note as to the "show of violence" rule in North Carolina relative to an assault on a female, see 36 N.C.L. Rev. 198 (1958).

As to credit for time served under a vacated judgment upon retrial and second conviction, see 44 N.C.L. Rev. 458 (1966).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

CASE NOTES

I. General Consideration.
II. Other Crimes.
III. Infliction of Serious Injury.
IV. Use of Deadly Weapon.
V. Assaults on Females.
VI. Assaults on Law-Enforcement Officers.
VII. Sufficiency of Evidence.
VIII. Punishment.

I. GENERAL CONSIDERATION.

There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common-law rules. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967); State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Common Law Definition. — An assault is an intentional offer or attempt by force or violence to do injury to the person of another. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

An assault is a show of violence causing a reasonable apprehension of immediate bodily harm. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

The common-law offense of assault is an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. State v. Sawyer, 29 N.C. App. 505, 225 S.E.2d 328 (1976).

The word "assault" has been defined as an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or violence must be sufficient to put a person of reasonable firmness in fear of immediate physical injury. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550, cert. denied, 323 N.C. 619, 374 S.E.2d 116 (1988).

Battery Defined. — A battery is the offensive touching of the person of another without his or her consent. City of Greenville v. Haywood, 130 N.C. App. 271, 502 S.E.2d 430 (1998), cert. denied, 349 N.C. 354 (1998).

Definitions of Assault Necessary. — Because a definition of assault was necessary for the jury to reach a verdict on the charge of assault on a law enforcement officer, the omission of the definition of assault in the jury instructions was prejudicial error. State v. Lineberger, 115 N.C. App. 687, 446 S.E.2d 375 (1994).

"Show of Violence" Rule. — In some cases of assault, North Carolina has adopted the "show of violence" rule which requires a reasonable apprehension on the part of the assailed witness of immediate bodily harm or injury which caused him to engage in a course of conduct he would not have otherwise followed. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

A criminal assault may be proven under the "show of violence" rule by evidence of apprehension of harm on the part of the person or persons assailed. State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Proof of Actual Apprehension Not Required. — While the civil tort of assault requires proof of actual apprehension of harmful contact on the part of the victim, criminal assault does not require proof of actual apprehension, so long as there is evidence of some overt act sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), modified on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

Where evidence discloses actual battery, whether victim is "put in fear" is inapposite. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

Emphasis Either on Intent of Accused or

Apprehension of Victim. — In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. Thus, either or both of two rules may be applied in prosecuting a person accused of an assault. The first places emphasis on the intent or state of mind of the person accused. Under the second, which is sometimes referred to as the "show of violence" rule, emphasis is shifted to a consideration of the apprehension of the person assailed and the reasonableness of that apprehension. State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979).

Implied Intent. — Even though intent is an essential element of criminal assault, the intent may be implied from culpable or criminal negligence if the injury or apprehension thereof is the direct result of intentional acts done under circumstances which show a reckless disregard for the safety of others and a willingness to inflict injury. State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

Intent is not a prescribed element of assault with a deadly weapon. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973); State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Ignorance of Number of Occupants in Vehicle Immaterial. — Where defendant's "show of violence" by firing at car placed both occupants in fear of immediate harm, defendant's ignorance regarding the number of occupants in the car was immaterial, since his actions were sufficient to constitute an assault with a deadly weapon on both occupants. Therefore, the trial court properly refused to dismiss one of the assault charges. State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Indictment Need Not Allege That Accused Was Male Person over 18. — Since it is not an essential element of the criminal offense under this section, it is not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Preliminaries to Consensual Intercourse Not Assault. — Although defendant's wrestling, kissing, and pressing himself against another without that other's consent may constitute assault, when such acts are merely the preliminaries to consensual sexual intercourse they can hardly suffice as an overt act of force and violence to do harm to another sufficient to put a reasonable person in fear of bodily harm. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

An affray is defined by the common law as a fight between two or more persons in a public place so as to cause terror to the people. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Court held that juvenile could not be adjudicated delinquent for violating G.S. 14-33(a) by engaging in a simple affray as the fight occurred on private property. In re May, 153 N.C. App. 299, 569 S.E.2d 704, 2002 N.C. App. LEXIS 1130 (2002), aff'd, 357 N.C. 423, 584 S.E.2d 271 (2003).

Instruction on Adequate Provocation. — Although instruction on adequate provocation included a reference to assault, the trial judge's instruction on adequate provocation did not require an additional instruction on the definition of assault. State v. Martin, 97 N.C. App. 604, 389 S.E.2d 414, cert. denied, 326 N.C. 803, 393 S.E.2d 902 (1990).

When Use of Force Justified. — One without fault in provoking or continuing an assault is privileged to use such force as is reasonably necessary to protect himself from bodily harm or offensive physical contact. State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

When Deadly Force May Be Used to Repel Assault. — Although a defendant need not submit in meekness to indignities or violence to his person merely because the affront does not threaten death or great bodily harm, he may not resort to the use of deadly force to protect himself from mere bodily harm or offensive physical contact. The use of deadly force to prevent harm other than death or great bodily harm is therefore excessive as a matter of law. State v. Hunter, 315 N.C. 371, 338 S.E.2d 99 (1986).

When Failure to Instruct on Self-Defense Erroneous. — If defendant's evidence, even though contradicted by the State, raises the issue of self-defense, it is error for the court not to charge on the defense. State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

When Instruction on Justification Improper. — Where there is no evidence from which a jury could find that defendant reasonably believed himself in need of protection, it would be improper for the court to instruct on justification. State v. Grant, 57 N.C. App. 589, 291 S.E.2d 913, cert. denied, 306 N.C. 560, 294 S.E.2d 225 (1982).

Failure to Dismiss Charge Held Error. —

The affray charge upon which respondent juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge barred further petitions based on that charge. Therefore, respondent was twice put in jeopardy for the same offense under G.S. 14-33 and the trial judge erred in failing to dismiss the petition. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Because the arrest warrant failed to charge defendant with the commission of a simple assault, G.S. 14-33(a), the trial court erred in failing to dismiss the charge as stated in the criminal pleading and the appellate court vacated defendant's conviction for assault. State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914, 2001 N.C. App. LEXIS 1076 (2001).

Career Offenders. — For career offender purposes under federal statute, the date the prior conviction was sustained should control, not the date of later sentencing; thus, defendant was properly determined to be a career offender under federal statute where prior felony offense had been amended to become a misdemeanor. United States v. Johnson, 114 F.3d 435 (4th Cir. 1997), cert. denied, 522 U.S. 903, 118 S. Ct. 257, 139 L. Ed. 2d 184 (1997).

Applied in State v. Barham, 251 N.C. 207, 110 S.E.2d 894 (1959); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966); State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969); State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972); State v. Harris, 14 N.C. App. 270, 188 S.E.2d 2 (1972); In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972); State v. Lowery, 15 N.C. App. 596, 190 S.E.2d 282 (1972); State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Parrott, 17 N.C. App. 332, 194 S.E.2d 162 (1973); State v. Keziah, 24 N.C. App. 298, 210 S.E.2d 436 (1974); State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Davis, 24 N.C. App. 683, 211 S.E.2d 849 (1975); State v. Thomas, 29 N.C. App. 757, 226 S.E.2d 163 (1976); State v. Mayes, 31 N.C. App. 694, 230 S.E.2d 563 (1976); State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979); State v. Maccia, 311 N.C. 222, 316 S.E.2d 241 (1984); State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984); State v. Durham, 74 N.C. App. 121, 327 S.E.2d 312 (1985); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992); State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004); In re J.F.M., 168 N.C. App. 143, 607 S.E.2d 304, 2005 N.C. App. LEXIS 166 (2005).

Cited in State v. Stansberry, 197 N.C. 350, 148 S.E. 546 (1929); State v. Griggs, 197 N.C. 352, 148 S.E. 547 (1929); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953); State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968); State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969); State v. Walker, 7 N.C. App. 548, 172 S.E.2d 881 (1970); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); State v. Walker, 277 N.C. 403, 177 S.E.2d 868 (1970); State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971); State v. Robinson, 15 N.C. App. 155, 189 S.E.2d 567 (1972); State v. Sasser, 21 N.C. App. 618, 205 S.E.2d 565 (1974); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); Denning v. Lee, 35 N.C. App. 565, 241 S.E.2d 706 (1978); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979); In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Jones, 41 N.C. App. 189, 254 S.E.2d 234 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979); State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226 (1980); Mazza v. Huffaker, 61 N.C. App. 170, 300 S.E.2d 833 (1983); State v. Barneycastle, 61 N.C. App. 694, 301 S.E.2d 711 (1983); State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984); State v. Dixon, 77 N.C. App. 27, 334 S.E.2d 433 (1985); State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985); Graham v. James F. Jackson Assocs., 84 N.C. App. 427, 352 S.E.2d 878 (1987); State v. Hinson, 85 N.C. App. 558, 355 S.E.2d 232 (1987); State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988); State v. Hunt, 100 N.C. App. 43, 394 S.E.2d 221 (1990); State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993); Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993); In re Kenyon N., 110 N.C. App. 294, 429 S.E.2d 447 (1993); State v. Moore, 111 N.C. App. 649, 432 S.E.2d 887 (1993); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993); Providence Wash. Ins. Co. v. Locklear ex rel. Smith, 115 N.C. App. 490, 445 S.E.2d 418 (1994); State v. Suggs, 117 N.C. App. 654, 453 S.E.2d 211 (1995); State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998); State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998); State v. Elliott, 137 N.C. App. 282, 528 S.E.2d 32, 2000 N.C. App. LEXIS 325 (2000); Carter v. Barker, 2000 U.S. App. LEXIS 17600 (4th Cir. July 21, 2000); State v. Nichols, 140

N.C. App. 597, 537 S.E.2d 825, 2000 N.C. App. LEXIS 1241 (2000); Keech v. Hendricks, 141 N.C. App. 649, 540 S.E.2d 71, 2000 N.C. App. LEXIS 1399 (2000); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002); State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002); In re Wilson, 153 N.C. App. 196, 568 S.E.2d 862, 2002 N.C. App. LEXIS 1074 (2002); In re O'Neal, 160 N.C. App. 409, 585 S.E.2d 478, 2003 N.C. App. LEXIS 1789 (2003); State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005); State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5, 2007 N.C. App. LEXIS 89 (2007); State v. Hinton, 361 N.C. 207, 639 S.E.2d 437, 2007 N.C. LEXIS 33 (2007); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. Whaley, 362 N.C. 156, 655 S.E.2d 388, 2008 N.C. LEXIS 31 (2008); State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008).

II. OTHER CRIMES.

Assault with Deadly Weapon an Included Offense Under § 14-32. — Assault with a deadly weapon is an essential element of the felony created and defined by G.S. 14-32, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Assault with a deadly weapon, which is a misdemeanor under subdivision (b)(1) of this section, is a lesser included offense of the felonies described in G.S. 14-32. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Williams, 31 N.C. App. 111, 228 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

Assault on Government Employee. — Assault on a government employee was a class A1 misdemeanor; a trial court possessed the discretion to enter a delinquency Level 3 based on a juvenile adjudication of assault on a government employee, and the juvenile's "high" prior delinquency history. In re D.A.S., 183 N.C. App. 107, 643 S.E.2d 660, 2007 N.C. App. LEXIS 828 (2007).

Felonious Assault Compared. — The primary distinction between felonious assault under G.S. 14-32 and misdemeanor assault under this section is that a conviction of felonious assault requires a showing that a deadly weapon was used and serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that either a deadly weapon was used or serious injury resulted, the offense is punishable only as a misdemeanor. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Misdemeanor Assault Inflicting Serious Injury. — Where the appellate court found sufficient evidence from which the jury could believe that fists and a commode lid were not used as deadly weapons but did inflict serious injury on victim, the trial court was required to give the instruction on the lesser included offense of misdemeanor assault inflicting serious injury. State v. Lowe, 150 N.C. App. 682, 564 S.E.2d 313, 2002 N.C. App. LEXIS 651 (2002).

Trial court did not err in refusing to instruct the jury on misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) as a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury under G.S. 14-32 as the instrument used to assault a driver was a rock which, when thrown at the driver's side windshield of the car being driven at about 55 or 60 miles per hour was large enough to shatter the windshield, bend the steering wheel, and fracture the driver's skull; based on the size of the rock and the manner in which it was used, the rock could only have been a deadly weapon. State v. Liggons, — N.C. App. —, 670 S.E.2d 333, 2009 N.C. App. LEXIS 1 (2009).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under G.S. 14-32; the offense charged was a misdemeanor under this section. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

Any party charged with an affray may be charged with the lesser included offense of an assault. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Crime of Armed Robbery Includes Assault with Deadly Weapon. — The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon.

State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Assault with a deadly weapon is not a lesser included offense of attempted armed robbery. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550, cert. denied, 323 N.C. 619, 374 S.E.2d 116 (1988).

Convictions of Armed Robbery and Assault with Deadly Weapon Arising Out of Same Conduct. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested, because in such case the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Since discharging a firearm into an occupied vehicle is not essential to support an assault with a deadly weapon, and an assault on a person is not an essential element of discharging a firearm into an occupied vehicle, defendant was not placed in double jeopardy by receiving convictions for both offenses. State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Assault on a female is not a lesser included offense of rape, because assault on a female contains elements not present in the greater offense of rape. State v. Herring, 322 N.C. 733, 370 S.E.2d 363 (1988).

Assault is not a lesser included offense of attempted rape. State v. Robinson, 97 N.C. App. 597, 389 S.E.2d 417, cert. denied, 326 N.C. 804, 393 S.E.2d 904 (1990).

Simple assault is a lesser included offense of assault with intent to commit rape. State v. Little, 51 N.C. App. 64, 275 S.E.2d 249 (1981).

When Assault Not Lesser Included Offense of Rape. — Where evidence showed that defendant hit victim while having intercourse with her, and in its proof of second-degree rape, the State did not need to rely on this evidence of defendant's blow, since there was ample evidence that he had used other forceful measures to subdue her and subject her to intercourse against her will, the evidence revealed two distinct offenses involving distinct occurrences, and was not of a greater offense and lesser included offense. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

When Assault May Be Withdrawn from Consideration in Rape Trial. — Where under the evidence the jury could not reasonably find that defendant's intercourse with female was consensual and therefore that he did not commit the offense of second degree rape as charged in the indictment, but that he did commit the lesser included offense of assault on a female, it was not error to withdraw the lesser included offense from the jury's consideration. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Assault on Female by Male over Age 18 Not Included in Statutory Rape. — The offense of assault on a female by a male over the age of 18, subdivision (b)(2) of this section, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Nor Is Assault on Child Under Age 12 Included. — The offense of assaulting a child under the age of 12, subdivision (b)(3), of this section, is not, as a matter of law, a lesser included offense of first-degree rape of a child of the age of 12 or less, under G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

One is guilty of a misdemeanor assault under subdivision (b)(3) of this section if he assaults a child under the age of 12 years. This crime has an essential element, an assault, which is not also an essential element of the crime of first-degree rape of a child of the age of 12 years or less. Section 14-27.2(a)(1) provides that a person is guilty of first-degree rape only if he "engages in vaginal intercourse" with the young victim; no concomitant assault is required. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

Vaginal intercourse with a child under 12 is not itself an assault, since the crime of assault has essential elements which are not also essential elements of statutory rape. For example, assault generally requires proof of state of mind of either the defendant or the victim — the defendant's intent to do immediate bodily harm or the victim's reasonable apprehension of such harm. The statutory rape law, G.S. 14-27.2(a)(1), does not contain a state of mind element, however. Assault on a child under 12, subdivision (b)(3) of this section, is not, therefore, a lesser included offense of first-degree rape of a child under 12, G.S. 14-27.2(a)(1). State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982).

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963); State v. Walker, 4 N.C. App. 478, 167 S.E.2d 18 (1969).

Assault on a female is not a lesser in-

cluded offense of attempted second-degree rape, because the assault offense contains essential elements which are not contained in the attempted rape offense. State v. Wortham, 318 N.C. 669, 351 S.E.2d 294 (1987), disapproving State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983), insofar as the result in Freeman in the assault on a female conviction conflicts with this decision; State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Nor of First-Degree Sexual Offense. — To convict for first-degree sexual offense, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least 18 years of age. Therefore, the crime of assault on a female has at least three elements not included in the crime of first-degree sexual offense and cannot be a lesser included offense of first-degree sexual offense. State v. Bagley, 321 N.C. 201, 362 S.E.2d 244 (1987), cert. denied, 485 U.S. 1036, 108 S. Ct. 1598, 99 L. Ed. 2d 912 (1988).

Assault Not Lesser Included Offense of Taking Indecent Liberties with Child. — Since assault is not an essential element of taking indecent liberties with a child, the crime of assault on a child under the age of 12 years cannot be a lesser included offense of taking indecent liberties with a child. State v. Holman, 94 N.C. App. 361, 380 S.E.2d 128 (1989).

Failure to Submit Question of Guilt of Simple Assault. — Where in a prosecution for assault with a deadly weapon the evidence tended to show assault on a female at least, it was not error to fail to submit the question of guilt of simple assault. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969); State v. Barnhill, 37 N.C. App. 612, 246 S.E.2d 579 (1978); State v. Patton, 302 N.C. App. 80, 341 S.E.2d 744 (1986).

Failure to Instruct as to Lesser Offense Held Not Error. — Since the evidence that defendant used a deadly weapon was uncontradicted, he was not entitled to a charge on assault inflicting serious injury. State v. Springs, 33 N.C. App. 61, 234 S.E.2d 193, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Where the only dispute in a rape prosecution is whether an admitted act of sexual intercourse was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female need not be submitted to the jury, because lesser included offenses must be submitted only where there is evidence to support them. State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

Where there was no dispute that defendant, who was charged with felonious assault with a deadly weapon inflicting serious injury, used a "deadly weapon," to cause the victim's injuries, or that those injuries were serious, he was not entitled to an instruction on the lesser included offense of misdemeanor assault State v. Uvalle, 151 N.C. App. 446, 565 S.E.2d 727, 2002 N.C. App. LEXIS 752 (2002), cert. denied, 356 N.C. 692, 579 S.E.2d 95 (2003).

Use of Conviction in Another Jurisdiction. — Trial court erred in sentencing defendant as a level IV offender on his conviction of second-degree murder, as the trial court erred in finding that a prior New York conviction of N.Y. Penal Law § 120.05 was substantially similar to North Carolina's offense of simple assault set forth in G.S. 14-33(a), as the North Carolina offense required serious injury to the victim and the New York offense did not; furthermore, under G.S. 14-2.5, an attempt to commit a misdemeanor or a felony is punishable under the next lower classification as the offense the offender attempted to commit, and defendant's prior New York conviction for attempted second-degree assault should have been treated as a class 3 misdemeanor, which would have not had any point value for prior record purposes. State v. Hanton, 175 N.C. App. 250, 623 S.E.2d 600, 2006 N.C. App. LEXIS 45 (2006).

III. INFLICTION OF SERIOUS INJURY.

Conviction of misdemeanor assault requires proof of infliction of or attempt to inflict serious injury, while conviction of common-law robbery does not. State v. Malloy, 53 N.C. App. 369, 280 S.E.2d 640 (1981).

Evidence Insufficient to Show Felony Child Abuse but Sufficient for Misdemeanor Assault Charge. — Remand for resentencing on felony child abuse inflicting serious physical injury was improper because the indictment failed to allege an essential element required for proof of that crime: that injury be inflicted by a parent or any other person providing care to or supervision of a child less than 16 years of age; however, the indictment and jury verdict did support a conviction for class A1 misdemeanor assault. State v. Locklear, 178 N.C. App. 732, 632 S.E.2d 516, 2006 N.C. App. LEXIS 1641 (2006).

Serious Injury Shown. — Evidence that defendant struck eight-year-old daughter on the buttocks with a board multiple times while disciplining her and that the blows caused a large bruise that was crusted around the outside, had a spot near the middle that was open and oozing, and was painful to the touch was sufficient for a jury to reasonably infer that defendant caused great pain and suffering, and any error which occurred because the trial court allowed the jury to consider defendant's guilt or innocence on the charge of felonious assault inflicting serious bodily injury was rendered harmless by the jury's verdict finding defendant not guilty of that charge but guilty of the lesser included offense of misdemeanor assault inflicting serious injury, in violation of G.S. 14-33(c)(1). State v. Williams, 154 N.C. App. 176, 571 S.E.2d 619, 2002 N.C. App. LEXIS 1397 (2002).

Serious damage includes serious physical injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

But May Include Damage Other Than Bodily Injury. — Serious damage may include damage other than bodily injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

And Does Not Necessarily Involve Use of Deadly Weapon. — The term serious damage done embraces results other than those arising from the use of a deadly weapon. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Factors the courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work. State v. Owens, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

IV. USE OF DEADLY WEAPON.

A deadly weapon is any instrument which is likely to produce death or great bodily harm, and the deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

May Be Question of Fact For Jury. — Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Under circumstances in which a trial court correctly found that the issue of whether a two-by-four board used to beat the victim was a deadly weapon was for the jury to determine, the trial court should have instructed the jury on the lesser included offense of assault inflicting serious injury, and the failure to do so constituted reversible error. State v. Tillery, 186 N.C. App. 447, 651 S.E.2d 291, 2007 N.C. App. LEXIS 2204 (2007).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

A criminal assault may be committed with an automobile. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Defendant was not entitled to a jury instruction on the lesser offense of misdemeanor assault on a government official under G.S. 14-33(c)(4) because defendant used a deadly weapon — his car — when he drove into a deputy's car; thus the evidence only supported the charge of felony assault on a government official under G.S. 14-34.2. State v. Batchelor, 167 N.C. App. 797, 606 S.E.2d 422, 2005 N.C. App. LEXIS 9 (2005).

Evidence Held Sufficient. — The intentional firing of a high-powered rifle into or near a home, frightening the inmates and causing them to seek safety in the back of the house, would be sufficient evidence to make out a case of assault with a deadly weapon. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

V. ASSAULTS ON FEMALES.

Subdivision (b)(2) of this section establishes classifications by gender which serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

The General Assembly was entitled to take note of the differing physical sizes and strengths of the sexes, and reasonably to conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Victims Need Not Be Under 12 Years of Age Under G.S. 14-33(c)(2). — Defendant's claim that G.S. 14-33(c) was intended to be limited to victims less than 12 years old was rejected, as even though G.S. 14-33(c)(3) required that victims be less than 12 years old, nothing in § 14-33(c)(2), the section under which defendant was convicted, required the female victim to be under a certain age; the only elements required for an assault under G.S. 14-33(c)(2) were that the victim be a female, and that the perpetrator be a male who was at least 18 years old. State v. Mueller, 184

N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

The 1911 amendment to this section was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over 18 years of age, upon a woman, for it was always a crime for a man, or a boy over 18 years of age, to assault a woman. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

The essential elements of the crime of assault upon a female are (1) assault and (2) upon a female person by a male person. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978); State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983); State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), modified on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

Murder Indictment Not Containing All Elements of Assault upon Female. — Because an indictment for murder did not contain allegations to include the necessary elements of the crime of assault upon a female, the indictment did not support the verdict of guilty of assault upon a female. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

The marital relationship does not afford a license to commit assault. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Assault is a requisite element of assault on a female, and is defined as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. State v. Jeffries, 57 N.C. App. 416, 291 S.E.2d 859, cert. denied and appeal dismissed, 306 N.C. 561, 294 S.E.2d 374 (1982).

Fact that defendant is a male person need not be alleged specifically when the indictment charges a rape or related offense, since defendant's sex may be assumed from the nature of the offense charged. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

The classifications based upon age found in subdivision (b)(2) of this section do not violate the Fourteenth Amendment. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Defendant's Age Not Essential Element of Crime. — Although this section prescribes a greater punishment if defendant is over 18 years of age, defendant's age is not an essential element of the crime of assault upon a female and need not be alleged. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981); State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), modified on other grounds, 318 N.C. 669, 351 S.E.2d 294 (1987).

It was not necessary for the defendant's age to be stated in the bill of indictment to convict him for an assault on a female, when the proof clearly showed that he was over 18 at the time of the alleged assault, and on the trial no question was made as to that fact. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Age a Collateral Matter — How Determined. — Whether defendant was over 18 years of age is a collateral matter, wholly independent of defendant's guilt or innocence in respect of the assault charged; and it would seem appropriate that his age be determined under a special issue. Unless the necessity therefor is eliminated by defendant's admission, this issue must be resolved by a jury, not by a court. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Presumption That Accused Is over 18. — Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Fact That Accused Is Under 18 Is Matter of Defense. — The presumption is that the male person charged is over 18 years of age; and the fact, if it be a fact, that he is not over 18 years of age, relevant solely to punishment, is a matter of defense. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Burden to Prove Age Below 18. — The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945); State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958); State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Plea of Not Guilty as Putting Accused's Age in Issue. — Although not an essential averment, if in fact the indictment charged that the defendant was a male person over the age of 18 years, it could be considered, nothing else appearing, that the defendant's plea of not guilty was a denial of this nonessential averment; but where as in the instant case the indictment did not so charge it could not be said that the defendant, simply by his plea of not guilty, put in issue whether he was over 18 years of age at the time of the alleged assault. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the greater offense. State v. Love, 127 N.C. App. 437, 490 S.E.2d 249 (1997).

Assault on Female Not a Lesser Included Offense of Assault by Strangulation. — Under G.S. 14-33(c)(2), the essential elements of assault on a female were assault upon a female person by a male person at least 18 years of age; in contrast, the offense of assault by strangulation, G.S. 14-32.4(b), required only that an individual assault another person and inflict physical injury by strangulation. Because each offense included at least one element not present in the other, assault on a female was not a lesser included offense of assault by strangulation and the trial court properly denied a lesser-included-offense instruction. State v. Brunson, 187 N.C. App. 472, 653 S.E.2d 552, 2007 N.C. App. LEXIS 2421 (2007).

Effect of Admission by Accused That He Is over 18. — When a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he is over 18 years of age at the time of the alleged assault and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury. His testimony, under such circumstances, relating to such collateral issue, relevant solely to punishment, must be considered an admission on which the court may rely in the trial of the cause and in pronouncing judgment. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Amendment of Warrant. — Where defendant entered a plea of guilty to a warrant charging an assault upon a female and nothing more, the trial court was without authority, upon a later amendment of the warrant to charge that defendant was a male person over 18 years of age, to enter judgment on the amended warrant in the absence of a verdict of a jury or a plea of guilty by defendant to the warrant as amended, and sentence in excess of that permitted by law for the offense originally charged in the warrant would be set aside and cause remanded for trial upon the warrant as amended. State v. Terry, 236 N.C. 222, 72 S.E.2d 423 (1952).

Evidence Sufficient to Go to Jury. — There was sufficient evidence presented for a jury to decide the question of whether defendant committed an assault on a female by fondling a victim's breasts for an assault on a female charge under G.S. 14-33(c)(2) and for the jury to infer that defendant awoke the victim on the day the assault occurred in the same manner as defendant had on many other mornings, by fondling the victim's breasts, as the victim testified that: (1) during the week, defendant would wake the victim up by putting defendant's hands up the victim's bra or putting defendant's hands down the victim's pants; (2) defendant awoke the victim this way almost every day; and (3) on the date at issue, the victim woke up the same way as the victim did every morning, and the victim got dressed and went to school. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Amendment of Jury Instruction. — Trial court did not err in amending the jury instructions to read that the assault, in violation of G.S. 14-33(c)(2), could have been committed if defendant intentionally touched, however slight, the body of the alleged victim. State v. West, 146 N.C. App. 741, 554 S.E.2d 837, 2001 N.C. App. LEXIS 1075 (2001).

Prior Contempt Adjudication Resulted in Double Jeopardy. — Defendant's prosecution on the change of assault on a female under subdivision (b)(2) of this section, subsequent to his being held in contempt for violating a violence protective order, was barred by the Double Jeopardy Clause, and his conviction for assault on a female was accordingly vacated. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

The age of defendant relates only to the punishment. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

An assault on a female, committed by a man or boy over 18 years of age, is not simple assault; it is a misdemeanor punishable in the discretion of the court. State v. Barnhill, 37 N.C. App. 612, 246 S.E.2d 579 (1978).

Sentence Under Verdict of "Guilty of Simple Assault on a Female". — In a prosecution for an assault with intent to commit rape a verdict of "guilty of simple assault on a female" supports a sentence for an assault on a female by a male person over the age of 18 years when the defendant's own evidence discloses that he was over 18 years of age at the time of the commission of the assault, and no question of defendant's age is raised during the trial. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969).

Sentence on Conviction of Assault upon Female. — One lawfully convicted of assault upon a female may be sentenced to a longer term of imprisonment, if the evidence shows him to be, and he is found to be, over 18 years of age, than would be proper in the absence of such evidence and finding, even though the indictment under which he was tried does not allege his age. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Sodomy as Assault and Battery. — Sodomy is but an extremely aggravated form of assault and battery. City of Greenville v. Haywood, 130 N.C. App. 271, 502 S.E.2d 430 (1998), cert. denied, 349 N.C. 354 (1998).

Substantial evidence supported the defendant's conviction of assault on a female where witness, who was a female, testified that defendant, a male over age 18, "hit me across the chest . . . ." State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

VI. ASSAULTS ON LAW-ENFORCEMENT OFFICERS.

The clear legislative intent in enacting former subdivision (b)(4) of this section was to provide greater punishment for those who place themselves in open defiance of duly constituted authority by assaulting public officers who are on duty. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

This section is designed to protect the State's law enforcement officers from bodily injury and threats of violence. State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984).

Burden on State. — To obtain a conviction under this section, the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt that the party assaulted was a law-enforcement officer performing the duty of his office, and that the defendant knew his victim was a law-enforcement officer. State v. Rowland, 54 N.C. App. 458, 283 S.E.2d 543 (1981).

Knowledge on the part of the accused is an essential element of the crime of assault with a firearm upon a law enforcement officer. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Assault on Officer Is Primary Conduct Proscribed. — In the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972); State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

An assault upon an officer while he is discharging or attempting to discharge a duty of his office was an offense punishable under former subdivision (b)(4) of this section, regardless of its effects or intended effects upon the officer's performance of his duties. The particular duty the officer was performing when assaulted was not of primary importance, it only being essential that the officer was performing or attempting to perform any duty of his office. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman could survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Under former subdivision (b)(4) of this section, the particular duty the officer was performing when assaulted was not of primary importance, it only being essential that the officer was performing or attempting to perform any duty of his office. Thus a magistrate's order failing to allege specifically the duty of office which the public officer was discharging or attempting to discharge is not for that reason defective. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

"Serious Injury" and "Serious Bodily Injury". — G.S. 14-34.7 was ambiguous because the statute's title referred to assaults inflicting "serious injury" while the statute text specified assaults inflicting "serious bodily injury" — under North Carolina law, the terms "serious injury" and "serious bodily injury" were not interchangeable; however, when interpreting ambiguous statutes, the principal goal is to effectuate the purpose of the legislature, and the "manifest purpose" of the legislature in enacting G.S. 14-34.7 was to make an assault inflicting "serious injury" or "serious bodily injury" against a law enforcement officer a felony. State v. Crawford, 167 N.C. App. 777, 606 S.E.2d 375, 2005 N.C. App. LEXIS 1 (2005), cert. denied, 359 N.C. 412, 612 S.E.2d 324 (2005).

Evidence Showing Officer Discharging Duty of Office. — Although a warrant charging a violation of former subdivision (b)(4) of this section was sufficient if it alleged only in general terms that the officer was discharging or attempting to discharge a duty of his office at the time the assault occurred, without alleging specifically what that duty was, to sustain a conviction of violating that statute it was still necessary that the State present evidence and that the jury find under appropriate instructions from the court that the officer was discharging or attempting to discharge some duty of his office when the defendant assaulted him. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Where evidence established that defendant did assault a deputy sheriff by swinging his elbow at him, either offensively or in trying to free himself; and that this assault occurred while the deputy sheriff was discharging or attempting to discharge a duty of his office, such conduct violated former subdivision (b)(4), and arrest therefor was thus lawful and proper. State v. Sampley, 60 N.C. App. 493, 299 S.E.2d 460, appeal dismissed, 308 N.C. 390, 302 S.E.2d 257 (1983).

Officers who were investigating a minor accident were performing a duty of their office, even though G.S. 20-166.1(e) only requires law enforcement departments to investigate collisions resulting in injury or death, and defendant therefore could properly be convicted of violating former subdivision (b)(4). State v. Adams, 88 N.C. App. 139, 362 S.E.2d 789 (1987).

Off-Duty Officers in Uniform. — Where officers were off-duty members of the police department, were working in full police uniform and were carrying sidearms, the officers' employment had been arranged through the police department, the officers were required to follow department mandated rules and guidelines and furthermore, at the time they were assaulted, the officers were attempting to place defendant under arrest, there was sufficient evidence presented at trial to establish a violation of subdivision (b)(4) of this section. State v. Lightner, 108 N.C. App. 349, 423 S.E.2d 827 (1992).

Presumption That Public Officer is Acting Lawfully. — The offense under former subdivision (b)(4) of assaulting a public officer when such officer is discharging or attempting to discharge a duty of his office presupposed lawful conduct of the public officer in discharging or attempting to discharge a duty of his office. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

A person resisting an illegal arrest is not resisting an officer within the discharge of his official duties. Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

Where the evidence is so conflicting as to raise the question of whether the law officer is acting lawfully, the jury must be properly instructed by the trial judge. State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

A charge under this section requires all the essential elements of a charge under G.S. 14-223. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Lesser Included Offense. — Misdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner; therefore, defendant was not entitled to such a jury instruction in a case where defendant spat in an officer's face. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Failure to Instruct Jury on Lesser-Included Offense of Misdemeanor Assault of Government Official Was Reversible Error. — Trial court erred in failing to submit the lesser-included offense of misdemeanor assault on a government official to the jury and this failure amounted to prejudicial error that could not be cured by defendant's subsequent conviction for felony assault with a deadly weapon on a government official because it could not be known whether the jury would have convicted defendant of a lesser degree if so permitted. State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29, 2007 N.C. App. LEXIS 1978 (2007).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an officer and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

There is a distinction between the offenses of resisting an officer under G.S. 14-223 and assault on an officer under former subdivision (b)(4) of this section. In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Trial court did not err in refusing defendant's request for a jury instruction that the incident that occurred at the patrol car was separate from that occurring at defendant's car and that evidence of the latter was not proof that defendant obstructed and delayed the officer, as the offenses of assaulting a government officer and obstruction and delay of a public officer were separate; the jury could find, without violating the Double Jeopardy Clause, that the evidence of defendant's conduct that occurred after she left the patrol car was supportive of a charge of obstructing and delaying, even though the district court had found that the same conduct was insufficient to constitute an assault. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Conviction of Both Resisting Arrest and Assault on Officer. — Where a defendant had been tried under two warrants, one for violating G.S. 14-223 and the other for violating former subdivision (b)(4), and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody, the defendant had been twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protected a defendant from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence, the defendant was twice convicted and sentenced for the same criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Election Between Duplicate Charges. — In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. State v. Hardy, 33 N.C. App. 722, 236 S.E.2d 709 (1977), aff'd in part and rev'd in part, 298 N.C. 191, 257 S.E.2d 426 (1979).

Trial court did not violate the Double Jeopardy Clause by admitting evidence of events occurring after defendant left a patrol car in defendant's subsequent trial for obstruction and delay of a public officer under G.S. 14-223, even though defendant had been acquitted of an assault upon a government officer charge under G.S. 14-33(c)(4), as the acquittal could have resulted from findings that defendant did not attempt to do immediate physical injury to the officer, did not use sufficient force to put a reasonable person in fear of immediate bodily harm, or was defending herself from the excessive use of force; as there was more than one possible explanation from for the acquittal, defendant failed to meet her burden to establish collateral estoppel. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Defendant's convictions for malicious conduct by a prisoner and habitual misdemeanor assault did not charge the same offense, and, thus, did not violate the double jeopardy clause; although the conduct alleged in both indictments was identical, the evidence needed to prove both malicious conduct by a prisoner and habitual misdemeanor assault based on an assault on a government employee was different, which meant separate offenses were involved. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Excessive Force by Officer. — In all cases where the charge is assault on a law officer in violation of former subdivision (b)(4) of this section, or assault of a law officer with a firearm (G.S. 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Where defendant has been illegally restrained under U.S. Const., Amend. IV., he has the right to use only such force as reasonably appears necessary to prevent the unlawful restraint of his liberty. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

Defendant's act of striking officer in the

face was an unnecessary show of force in response to the officer's retention of his license and request to search his car. Defendant was, therefore, properly charged under former subdivision (b)(4) of this section. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

The bystander coming to the aid of an arrestee is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Instruction on Use of Reasonable Force to Resist Excessive Force. — When there is evidence tending to show the excessive use of force by a law-enforcement officer in making an arrest, the trial court is required to instruct the jury that the force used against the law-enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

VII. SUFFICIENCY OF EVIDENCE.

Assault on Female. — Evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, was sufficient to convict of an assault upon a female, etc., and a motion as of nonsuit thereon could not be granted, though such evidence was insufficient for a conviction of the intent to ravish her. State v. Hill, 181 N.C. 558, 107 S.E. 140 (1921).

Evidence that a man, 23 years of age, several times accosted a girl 15 years of age, on the streets of a town, with improper solicitation, which resulted in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, had caused her to become nervous and to lose sleep at night, was held to be such evidence of violence, begun to be executed with ability to effectuate it, as would come within the intent and meaning of this section making it a crime for a man or boy over 18 years of age to assault any female person. State v. Williams, 186 N.C. 627, 120 S.E. 224 (1923).

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence was insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

In State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947), the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence held sufficient to be submitted to the jury in a prosecution for assault on a female. State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956).

For discussion of sufficiency of evidence to justify an inference of intent to rape, see State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983).

Assault on Child. — There was ample evidence to support the verdict of guilty of assault on a child under 12 years of age. State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Evidence Sufficient. — Taken in the light most favorable to the State, the evidence was sufficient to support a finding that the defendant committed an assault inflicting serious injury because the testimony established that the defendant struck the victim in the left cheek; clawed at the victim's face; grabbed the victim's bottom lip; ripped the victim's bottom lip open; stuck his hand back in the victim's mouth and ripped the victim's soft tissue out from under the victim's tongue; and pulled his hand out of the victim's mouth, breaking the victim's jaw in the process. State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002).

Evidence that defendant, a gang member, (1) on one night met with other gang members to participate in an initiation of gang members, (2) participated in obtaining bullets to support gang missions, (3) asked to be allowed to shoot a victim that was abducted by other gang members, and (4) grumbled when he was not chosen to shoot and kill the victim, was sufficient to show that defendant joined with one or more persons to kidnap, rob, assault with a deadly weapon, and attempt to murder the victim, and was constructively present when the crimes were carried out. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

State produced sufficient evidence to support a conviction of assault with a deadly weapon where testimony revealed that defendant went into the room where the victims were, later reemerged from the room wearing one victim's jacket, and that at the time of the assault, the victim was undressed and facing downward in an unlit bedroom, was hit in the head from behind, and dragged to the ground, where he was then kicked while facing downward. State v. Yarrell, 172 N.C. App. 135, 616 S.E.2d 258, 2005 N.C. App. LEXIS 1428 (2005).

Through the testimony of a middle school teacher that defendant, a juvenile, dragged her and struggled while the teacher was trying to prevent defendant from assaulting another student, the State had presented enough evidence for a charge of assault on a state employee in violation of G.S. 14-33(c)(4) to withstand a motion to dismiss. Thus, defense counsel was not ineffective for failing to renew the motion at the close of all of the evidence. In re A.V., 188 N.C. App. 317, 654 S.E.2d 811, 2008 N.C. App. LEXIS 80 (2008).

There was substantial evidence that defendant assaulted a victim under G.S. 14-33(c)(1) because (1) defendant had attempted to engage the victim in play fighting and was rebuffed, (2) the victim shoved defendant in an attempt to relay to defendant the victim's feelings about "play fighting," (3) defendant was in close proximity when the victim was struck, and (4) defendant was taunting the victim when the victim regained consciousness. In re C.B., 187 N.C. App. 803, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

Evidence Insufficient. — In State v. Silver, 227 N.C. 352, 42 S.E.2d 208 (1947), the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

VIII. PUNISHMENT.

Constitutionality. — When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

A sentence of imprisonment which is within the limitation authorized by statute cannot be held cruel or unusual in the constitutional sense. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

When no imprisonment time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual punishment in violation of N.C. Const., Art. I, § 14 (see now N.C. Const., Art. I, § 27). State v. Crandall, 225 N.C. 148, 33 S.E.2d 861 (1945).

Right to Unanimous Jury Verdict not Violated. — Defendant was not deprived of defendant's right to a unanimous jury verdict as to charges of first-degree statutory sexual offense under G.S. 14-27.2, statutory sexual offense against a person who was 13, 14, or 15 years old under G.S. 14-27.4(a)(1), taking indecent liberties with a child under G.S. 14-202.1, second-degree forcible sexual offense under G.S 14-27.5, and assault on a female by a male at least 18 years of age under G.S. 14-33(c)(2) as: (1) the indictments were valid absent the inclusion of the specific acts that constituted the alleged sexual offenses; (2) the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts which were to serve as the underlying basis for each offense; (3) the jury was instructed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim; (4) there was nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets; and (5) the jury was polled following the announcement of the verdicts. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Sentencing. — State met its burden of proving defendant's prior conviction in Virginia, for inflicting bodily injury on an employee of a juvenile detention center in violation of Va. Code Ann. § 18.2-55, was "substantially similar" to a Class A1 or Class 1 misdemeanor as required by G.S. 15A-1340.14(e), for the purpose of considering prior convictions for sentencing defendant for murder, kidnapping, rape, and burglary convictions in North Carolina. Indeed, the Virginia conviction was substantially similar to bodily injury caused in violation of G.S. 14-33(c), a class A1 misdemeanor, for North Carolina purposes. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

Extent of Sentence. — While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the fine and imprisonment, or both, is in the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

Assault with a deadly weapon is a general misdemeanor, punishable by fine or imprisonment or both, at the discretion of the court. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

And the maximum legal sentence therefor is two years. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except that where no deadly weapon has been used and no serious damage done, the punishment may not exceed a fine of $50.00 or imprisonment for 30 days, unless the assault comes within one of the exceptions appearing in this section. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the exceptions and they remain general misdemeanors. State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958); State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

This section deals with punishment for various types of assault, all common-law offenses. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

This section does not create a new offense as to assaults on a female, but only provides for different punishments for various types of assault. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967).

Subsection (b) of this section and its subdivisions do not create additional or separate offenses. Instead, those subdivisions provide for differing punishments when the presence or absence of certain factors is established. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Although not elements of the crimes prohibited, the factors in subsection (b) of this section and its subdivisions must be shown to exist in order for the evidence to support a judgment imposing one of the greater sentences provided. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Double Jeopardy. — Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of N.C. G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Double Punishment Prohibited. — Where defendants were charged with assault on a law-enforcement officer with a firearm under G.S. 14-34.2 and assault with a deadly weapon with intent to kill under G.S. 14-32, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law-enforcement officer with a firearm, and this result would punish defendants twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Trial court violated defendant's right to be free of double jeopardy when it sentenced him for both assault with a deadly weapon inflicting serious injury under G.S. 14-32(b) and misdemeanor assault inflicting serious injury under G.S. 14-33(c)(1) based on an incident in which defendant punched his girlfriend into a wall and stabbed her multiple times in the arm and leg; because defendant's convictions under G.S. 14-32(b) provided for greater punishment than G.S. 14-32.4 or 14-33(c), the trial court could not convict and sentence defendant under two statutes for the same conduct in each incident without violating the double jeopardy provisions of USCS Const. Amend. 5 and N. C. Const. art. I, § 19. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Sentence Held Erroneous. — In prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant could be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible under the indictment and evidence, and the court was without power to sentence the appealing defendant to more than 30 days' imprisonment. State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937).

Where in a trial of an indictment, under G.S. 14-32, defendant was convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there was error, as the offense described in the verdict was at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the court as provided by this section. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof did not support judgment of imprisonment in the State's prison from two to five years. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

Effect of Acquittal on Part of Verdict. — The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, did not entitle him to his discharge on his motion in arrest of judgment. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

Sentence Suspended on Condition of Payment of Fine Improper. — Where defendant was found guilty of simple assault and the judgment imposed a jail sentence of 30 days which was suspended on condition that defendant pay a fine of $50.00 and costs of court, the judgment was not within the limits of this section. The penalty for violation of this section is phrased in the disjunctive. The imposition of a fine in addition to a jail sentence, exceeded the limitations of the statute, and the judgment was improper. State v. Allen, 42 N.C. App. 727, 257 S.E.2d 649 (1979).

OPINIONS OF ATTORNEY GENERAL

Effect of 1969 Amendment. — This section, as rewritten in 1969, did not create new offenses. It merely classified assaults, assault and battery and affray as simple or aggravated and provided the amount of punishment which could be administered depending upon the elements of aggravation found. Opinion of Attorney General to Mr. Charles B. Winberry, 7th Judicial District Prosecutor, 40 N.C.A.G. 154 (1969).

§ 14-33.1. Evidence of former threats upon plea of self-defense.

In any case of assault, assault and battery, or affray in which the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of bodily harm, and also as bearing upon the amount of force which reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (1969, c. 618, s. 2.)

CASE NOTES

Evidence of threats is admissible in assault cases upon a plea of self-defense; therefore, it follows that, under proper factual circumstances, such evidence is admissible upon a plea of defense of others. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Prior threats are admissible in assault cases where the defendant claims self-defense when the evidence of the threats is properly presented. State v. Butler, 21 N.C. App. 679, 205 S.E.2d 571 (1974).

§ 14-33.2. Habitual misdemeanor assault.

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation. A conviction under this section shall not be used as a prior conviction for any other habitual offense statute. A person convicted of violating this section is guilty of a Class H felony. (1995, c. 507, s. 19.5(c); 2004-186, s. 10.1.)

Editor's Note. — This section, as amended by Session Laws 2004-186, s. 10.1, is applicable to offenses committed on or after that date.

Legal Periodicals. — Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes, see 24 Campbell L. Rev. 115 (2001).

CASE NOTES

Double Jeopardy. — Habitual misdemeanor assault statute does not violate the double jeopardy provisions of the United States and North Carolina Constitutions. State v. Carpenter, 155 N.C. App. 35, 573 S.E.2d 668, 2002 N.C. App. LEXIS 1624 (2002).

Recidivist statutes, or repeat-offender statutes, survived double jeopardy challenges because they increased the severity of the punishment for the crime being prosecuted, and they did not punish a previous crime a second time; the Apprendi and Blakely holdings did not extend to the habitual misdemeanor assault statute, G.S. 14-33.2. State v. Massey, — N.C. App. —, 635 S.E.2d 528, 2006 N.C. App. LEXIS 2141 (2006).

Habitual Misdemeanor Assault as Substantive Offense. — A close analysis of the precise wording of the habitual offender statutes reveals the intent of the General Assembly that habitual misdemeanor assault be a substantive offense rather than merely a status for purposes of sentence enhancement. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

Indictments. — Indictment was insufficient to charge defendant with the felony of habitual misdemeanor assault where the absence of any indictment alleging violation of G.S. 14-33.2, habitual misdemeanor assault, rendered the principal indictment one which charged the defendant with only the misdemeanor of assault on a female. State v. Williams, 153 N.C. App. 192, 568 S.E.2d 890, 2002 N.C. App. LEXIS 1081 (2002).

Court erred in failing to dismiss the habitual misdemeanor assault charge where defendant was not properly arraigned; the State introduced no evidence of five prior convictions and failed to present evidence of an essential element of the charge requiring that the conviction for habitual misdemeanor assault be vacated. State v. Burch, 160 N.C. App. 394, 585 S.E.2d 461, 2003 N.C. App. LEXIS 1799 (2003).

The habitual misdemeanor assault statute does not violate the prohibition on ex post facto laws found in both the United States Constitution, Art. I, § 10, cl. 1, and the North Carolina Constitution, Art. I, § 16, by increasing the penalty for these crimes after the offenses were committed, since it does not impose punishment for previous crimes, but rather imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of such behavior. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

G.S. 14-33.2 did not punish defendant for prior conduct, but rather for current conduct to a greater degree, due to his previous similar offenses, and thus did not violate the prohibition on ex post facto laws. State v. McCree, 160 N.C. App. 200, 584 S.E.2d 861, 2003 N.C. App. LEXIS 1727 (2003).

Argument Regarding Ex Post Facto Effect of Law Disallowed. — Because G.S. 7A-97 presents no mandatory requirement that defendant be allowed to argue his version of the law, trial court properly exercised its discretion in preventing defendant from showing the jury a copy of this section, including its effective date, to support his argument that because two of the offenses named in the indictment occurred prior to its enactment they should not have been considered in determining the issue of his guilt on this charge. State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000).

Prior Offenses Need Not Have Occurred on Separate Occasions. — G.S. 13-33.2 does not require that the prior misdemeanors supporting the finding that a defendant is an habitual offender occur on five separate occasions. State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005).

Cited in State v. Jenkins, 137 N.C. App. 367, 527 S.E.2d 672, 2000 N.C. App. LEXIS 316 (2000).

§ 14-34. Assaulting by pointing gun.

If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor. (1889, c. 527; Rev., s. 3622; C.S., s. 4216;

1969, c. 618, s. 2½; 1993, c. 539, s. 17; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(d).)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Intentional Pointing Pistol Must Be Without Legal Justification. — The literal provisions of this section are subject to the qualification that the intentional pointing of a pistol is in violation thereof only if done willfully, that is, without legal justification. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); State v. Adams, 2 N.C. App. 282, 163 S.E.2d 1 (1968); State v. Spinks, 39 N.C. App. 340, 250 S.E.2d 90 (1979).

An officer, in making a lawful arrest, is not justified in pointing a loaded weapon at the person to be arrested except in good faith upon necessity, real or apparent. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

Legal justification must be made to appear, whether it be an individual who intentionally points a pistol at his assailant in the exercise of a perfect right of self-defense or an officer who does so in good faith in the discharge of his official duty and when necessary or apparently necessary either to defend himself or to make a lawful arrest or otherwise to perform his official duty. But the mere fact that he is an officer engaged in the performance of an official duty does not perforce exempt him from the provisions of this section. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

The pointing of a gun without legal justification is a violation of this section. State v. Walker, 34 N.C. App. 485, 238 S.E.2d 666 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

The rule is well established that a violation of this section requires the intentional pointing of a gun without legal justification or excuse. State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979).

The pointing of a gun need only be done without legal justification to constitute assault under this section. In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

And Is Negligence Per Se. — If any person intentionally points a pistol at any person, this action is in violation of this section and constitutes an assault. Moreover, such action, being in violation of the statute is negligence per se; and if the pistol accidentally discharges, the injured person may recover damages for actionable negligence. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

And Constitutes Assault with a Deadly Weapon. — It is axiomatic that if the gun or pistol used is in fact a deadly weapon, then the pointing thereof is an assault with a deadly weapon. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a pistol is a deadly weapon and is pointed at the person of another, then such pointing is an assault with a deadly weapon. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

The absence of legal justification is not an element of the offense to be established by the State; rather, the presence of legal justification is a defense which must arise upon the evidence. State v. Gullie, 96 N.C. App. 366, 385 S.E.2d 556 (1989).

Instruction on Legal Justification Not Required Absent Evidence. — Although defendant relied upon the legal justification of self-defense, where the record revealed that defendant presented no evidence sufficient to invoke the benefit of the doctrine, and that instead, defendant's case was entirely grounded upon his denial that he had a gun in his possession during the confrontation, this obviated the necessity for the court to instruct the jury on the issue of legal justification. State v. Gullie, 96 N.C. App. 366, 385 S.E.2d 556 (1989).

Gun Need Not Be Loaded. — In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of this section. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Accidental Discharge of Pointed Gun Resulting in Death Constitutes Manslaughter. — When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

Where one points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. State v. Coble, 177 N.C. 588, 99 S.E. 339 (1919); State v. Boldin, 227 N.C. 594, 42 S.E.2d 897 (1947).

Where one engages in an unlawful and dangerous act, such as "fooling with an old gun", i.e., using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. State v. Hovis, 233 N.C. 359, 64 S.E.2d 564 (1951); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

If a person intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the person was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the person would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a person points a pistol at another in sport, as a joke, or to cause fright merely, believing and, perhaps, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he is guilty of manslaughter. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Question of Guilt for Jury. — Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. State v. Turnage, 138 N.C. 566, 49 S.E. 913 (1905); State v. Limerick, 146 N.C. 649, 61 S.E. 568 (1908).

Discharging Firearm into Occupied Building Distinguished. — Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Pointing Pistol in Pocket. — An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Defendant Charged with Communicating Threats and Assault Was Not Subject to Double Jeopardy. — Where the defendant was charged with communicating threats and assault by pointing a gun, he was not subjected to double jeopardy, even though the charges arose out of the same incident, since the elements of the two offenses differed. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Where there was no evidence that defendant intentionally pointed his pistol at anyone this section did not apply, and an instruction that the violation of the statute, proximately resulting in injury and death, would constitute manslaughter, must be held for error. The State's evidence of a statement by defendant to the effect that he was "dry firing" the pistol did not amount to evidence that defendant intentionally pointed the weapon at deceased, though it was competent upon the question of culpable negligence. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Evidence Sufficient. — Defendant who pointed gun at the prosecutor was, under the circumstances, guilty of an assault at common law, if not under this section. State v. Scott, 142 N.C. 582, 55 S.E. 69 (1906).

Evidence was sufficient to withstand defendant's motion to dismiss a charge of assault by pointing a gun at the victim where the victim testified that defendant pointed a gun directly at her and told her not to move, and where the victim also identified defendant both in a photo lineup and in court as the person who pointed a gun at her. State v. McCree, 160 N.C. App. 200, 584 S.E.2d 861, 2003 N.C. App. LEXIS 1727 (2003).

Variance Between Pleading and Proof. — Where warrant charged defendant with assaulting prosecutrix with a deadly weapon, to wit, a pistol, by pointing the pistol at her, her testimony that the defendant pointed a "gun" at her was sufficient to carry the case to the jury as tending to show a violation of this section. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

Applied in State v. Head, 214 N.C. 700, 200 S.E. 415 (1939); State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953); State v. Hammonds, 1 N.C. App. 448, 161 S.E.2d 749 (1968); State v.

Thacker, 18 N.C. App. 547, 197 S.E.2d 248 (1973); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974); State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

Cited in Whitlow v. Southern Ry., 217 N.C. 558, 8 S.E.2d 809 (1940); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972); State v. Blanton, 20 N.C. App. 66, 200 S.E.2d 425 (1973); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250 (1980); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Dixon, 77 N.C. App. 27, 334 S.E.2d 433 (1985); United States v. Thompson, 891 F.2d 507 (4th Cir. 1989); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); Integon Specialty Ins. Co. v. Austin, 151 N.C. App. 593, 565 S.E.2d 736, 2002 N.C. App. LEXIS 749 (2002); State v. Forrest, 168 N.C. App. 614, 609 S.E.2d 241, 2005 N.C. App. LEXIS 392 (2005).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

(a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.

(b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony.

(c) If a person violates this section and the violation results in serious bodily injury to any person, the person is guilty of a Class C felony. (1969, c. 341; c. 869, s. 7; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 755; 1993, c. 539, s. 1141; 1994, Ex. Sess., c. 24, s. 14(c); 2005-461, s. 1.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Editor's Note. — The amendments made to this section by Session Laws 2005-461, s. 1, were effective December 1, 2005, and applicable to offenses committed on or after that date.

CASE NOTES

Purpose of Section. — The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

This section was enacted for the protection of occupants of the premises, vehicles, and other property described in the statute. A violation is a serious crime. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

The purpose of this section is to protect occupants of the buildings, vehicles or other property described in the statute. State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988).

Construction with G.S. 14-34.5. — Defendant's consecutive sentences for assault with a firearm on a law enforcement officer, in violation of G.S. 14-34.5, and discharging a firearm into occupied property, in violation of G.S. 14-343.1, did not violate double jeopardy because one crime required proof of a law enforcement officer then performing his duties, and the other crime required proof of willful and wanton discharge of a firearm into occupied property, so different elements constituted each offense. State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101, 2002 N.C. App. LEXIS 1631 (2002).

Elements of Offense. — The elements of the offense prohibited by this section are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Knowledge Requirement. — Although this section does not contain an express knowledge requirement with respect to the building or vehicle being occupied, the Supreme Court has interpreted the section so as to add a knowledge requirement. State v. James, 342 N.C. 589, 466 S.E.2d 710 (1996).

General Intent Crime — Intoxication No Defense. — Discharging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform the act because it is a general intent crime. Since intoxication does not negate a general intent, it was not necessary for the court to charge on intent or intoxication as a defense. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994), cert. denied, 515 U.S. 1169, 115 S. Ct. 2634, 132 L. Ed. 2d 873, reh'g denied, 515 U.S. 1183, 116 S. Ct. 32, 132 L. Ed. 2d 913 (1995).

When Section Violated. — A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979); State v. Hicks, 60 N.C. App. 718, 300 S.E.2d 33 (1983); State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

The repeated discharge of a firearm toward the house and the resultant striking of the house by the bullets so discharged is evidence of something more than the firing of a stray bullet which accidentally strikes the dwelling. Such conduct manifests an intentional disregard of and indifference to the rights and safety of others, and supports elements of the offense of discharging a firearm into an occupied dwelling to require its submission to the jury. State v. Watson, 66 N.C. App. 306, 311 S.E.2d 381 (1984); State v. Cain, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 379, 342 S.E.2d 899 (1986).

Same — Building Must Be Occupied. — This section is not violated unless the accused discharges or attempts to discharge the firearm into a building while it is occupied. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Occupied Automobile. — A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building when he has reasonable grounds to believe that the building might be occupied by one or more persons. State v. Watson, 66 N.C. App. 306, 311 S.E.2d 381 (1984).

The state established that defendant discharged his firearm into an occupied vehicle where one victim testified that he was struck by a bullet while his right foot was still in the car, another victim was shot while sitting in the car, and there were bullet holes in the car. State v. Martin, 131 N.C. App. 38, 506 S.E.2d 260 (1998).

A firearm can be discharged "into" occupied property even if the firearm itself is inside the property, so long as the person discharging it is not inside the property. State v. Mancuso, 321 N.C. 464, 364 S.E.2d 359 (1988); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

The trial court properly denied defendant's motion to dismiss charges of discharging a firearm into occupied property under G.S. 14-34.1; there was substantial evidence from which a jury could have found that defendant fired "into" occupied property, as a witness indicated that although defendant was almost leaning inside the car, he was definitely standing outside and in the crease of the door when he shot the victim. State v. Alexander, 152 N.C. App. 701, 568 S.E.2d 317, 2002 N.C. App. LEXIS 972 (2002).

"Enclosure." — For the purposes of G.S. 14-34.1, an apartment within an apartment building is an "area" that is "surrounded on all sides" or "closed in"; thus, an apartment is an enclosure as that term is used in G.S. 14-34.1. State v. Cockerham, 155 N.C. App. 729, 574 S.E.2d 694, 2003 N.C. App. LEXIS 18 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 702 (2003).

Apartment. — Where defendant was entirely inside his apartment unit when he fired a shot into an adjacent unit, defendant fired into occupied property within the meaning of G.S. 14-34.1. State v. Cockerham, 155 N.C. App. 729, 574 S.E.2d 694, 2003 N.C. App. LEXIS 18 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 702 (2003).

Multiple Shots as Multiple Violations. — Substantial evidence existed that defendant who killed his wife discharged his firearm into the victim's truck seven times, therefore validating seven distinct violations of this section. State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999).

Because the evidence showed that defendant fired seven shots toward the victim's car and that one bullet hole was found in the victim's car, it did not violate the double jeopardy clauses of the North Carolina and federal constitutions to impose three separate sentences for three counts of attempted discharge of a firearm into occupied property or to sentence defendant both for the three attempt counts and for one completed offense. Each shot fired at the victim's car was a separate offense under G.S. 14-34.1. State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008).

Subsequent Shots as Aggravating Factor. — In sentencing for discharging a firearm into occupied property, that defendant shot at least two times into the house could properly be used as a basis for aggravation. The crime of discharging a weapon into an occupied building is accomplished when the defendant shoots once into the structure, and any further acts of shooting are above and beyond that necessary to prove the offense for which defendant is convicted. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Endangering Toddler. — In sentencing for discharging a firearm into an occupied building, finding that the shooting endangered a two-year-old child could be considered as an additional nonstatutory aggravating factor. State v. Jones, 104 N.C. App. 251, 409 S.E.2d 322 (1991).

Any rational trier of fact could have found that defendant intended to fire into vehicle in which victim was sitting when he was killed from evidence that defendant pointed his pistol toward the vehicle and fired the pistol so that a bullet went into the vehicle. State v. Wheeler, 321 N.C. 725, 365 S.E.2d 609 (1988).

The attempt to draw a sharp line between a "willful" act and a "wanton" act in the context of this section would be futile. The elements of each are substantially the same. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

Assault with Deadly Weapon Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Since discharging a firearm into an occupied vehicle is not essential to support an assault with a deadly weapon, and an assault on a person is not an essential element of discharging a firearm into an occupied vehicle, defendant was not placed in double jeopardy by receiving convictions for both offenses. State v. Messick, 88 N.C. App. 428, 363 S.E.2d 657, cert. denied, 323 N.C. 368, 373 S.E.2d 553 (1988).

Discharging a firearm into occupied property and assault with a deadly weapon with intent to kill inflicting serious injury are separate and distinct offenses which serve distinct purposes, and defendant was properly convicted of, and punished for, both offenses. State v. Morston, 336 N.C. 381, 445 S.E.2d 1 (1994).

Assault with Deadly Weapon and Assault by Pointing Gun Are Not Lesser Included Offenses. — Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Violation of this section is an unspecified felony within the purview of § 14-17. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

And Can Result in Conviction of First-Degree Murder. — A homicide committed in the perpetration of the felony under this section can result in conviction for murder in the first degree under the felony-murder rule of G.S. 14-17. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Conviction for first-degree felony murder based on the underlying felony of discharging a firearm into occupied property is proper. State v. Wall, 304 N.C. 609, 286 S.E.2d 68 (1982).

The offense of discharging a firearm into occupied property may serve as the underlying felony for a first-degree murder conviction based on the felony-murder rule. State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986), declining to adopt the "merger doctrine" to bar the application of the felony-murder rule to homicides committed during perpetration of the felony of discharging a firearm into occupied property.

A person has committed the felony of firing into an occupied vehicle under this section, which will support a conviction of felony murder under G.S. 14-17, if he intentionally, without legal justification or excuse, discharges a firearm into an occupied vehicle with knowledge that the vehicle is then occupied by one or more persons, or when he has reasonable grounds to believe that the vehicle might be occupied by one or more persons. State v. Wheeler, 321 N.C. 725, 365 S.E.2d 609 (1988).

Jury could reasonably have found from the evidence that defendant's continuing to drive while passenger repeatedly discharged his gun amounted to a disregard for the rights and safety of others that proximately caused victim's death, and could, therefore, based on this evidence, have reasonably found her guilty of involuntary manslaughter. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Discharging a firearm into an occupied structure is a felony which will support a first degree felony murder prosecution. When persons act in concert to commit the felony of discharging a firearm into an occupied structure, each person is guilty not only of that felony but for any homicide committed in its perpetration. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

No double jeopardy existed where defendant was convicted of both discharging a firearm into a vehicle and felony murder, because North Carolina does not recognize the merger doctrine. State v. Jackson, 189 N.C. App. 747, 659 S.E.2d 73, 2008 N.C. App. LEXIS 689 (2008), review denied, appeal dismissed, 668 S.E.2d 569 (2008), cert. denied, 129 S. Ct. 1532 (U.S. 2009).

Solicitation to commit shooting into occupied property. — Court affirmed defendant's conviction of solicitation to commit shooting into occupied property; it was not plain error for the trial court to admit testimony about defendant's alleged threats to kill and engage in a swap of drugs for stolen goods with a detective because given the strength of the other evidence that defendant solicited the shooting, the admission was not fundamental error, and the admission of other testimony from the detective was offered to provide background to the meeting between the detective, defendant, and defendant's friend and was not so prejudicial that it resulted in a miscarriage of justice. State v. Benardello, 164 N.C. App. 708, 596 S.E.2d 358, 2004 N.C. App. LEXIS 974 (2004).

Indictment. — An indictment under this section, which charges the offense substantially in the words of the statute, contains allegations sufficient to apprise an accused of the offense with which he is charged and to enable the court to proceed to judgment. State v. Walker, 34 N.C. App. 271, 238 S.E.2d 154, cert. denied, 293 N.C. 743, 241 S.E.2d 516 (1977).

Indictment which failed to state that the defendant knew or should have known that the dwelling was occupied by one or more persons was not defective, and the trial court did not err in denying the defendant's motion to dismiss for failure of the indictment to charge a crime under this section. State v. Walker, 34 N.C. App. 271, 238 S.E.2d 154, cert. denied, 293 N.C. 743, 241 S.E.2d 516 (1977).

Prosecution on two counts of discharging a firearm into occupied property did not violate double jeopardy provisions, even though 3606 and 3608 Jonquil Street were apartments located within the same building; the facts alleged in the second count of the indictment — that the building was located at 3608 Jonquil Street and was occupied by one set of victims — would not have sustained defendant's conviction for shooting into 3606 Jonquil while that residence was occupied by another set of victims. State v. Ray, 97 N.C. App. 621, 389 S.E.2d 422 (1990).

Intentional Shooting Can Result in Involuntary Manslaughter. — It is not true that in order to entitle defendant to an instruction on involuntary manslaughter, the discharge of a weapon must necessarily be unintentional. An intentional shooting at an object can amount to culpable negligence, which is one of the states of mind required for an instruction on involuntary manslaughter. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Instruction on Involuntary Manslaughter Not Warranted. — In trial for first degree murder by reason of killing during the perpetration of a felony, evidence was sufficient to support a finding that defendant intended to shoot into residence within the meaning of this section and since defendant presented no evidence of involuntary manslaughter, trial judge did not err in failing to submit involuntary manslaughter as a possible verdict. State v. Clark, 325 N.C. 677, 386 S.E.2d 191 (1989).

In felony murder trial for murder committed during the act of discharging a firearm into an occupied building, a felony under this section, where defendant's sole and unequivocal defense was that he was nowhere near the area on the night in question, an instruction on the offense of involuntary manslaughter was not warranted by the evidence. State v. Brewer, 325 N.C. 550, 386 S.E.2d 569 (1989), cert. denied, 495 U.S. 951, 110 S. Ct. 2215, 109 L. Ed. 2d 541 (1990).

Instruction on Involuntary Manslaughter Required. — In a prosecution for first degree felony murder on the theory that murder occurred while defendant was driving due to the discharge by her passenger of a firearm into an occupied structure in violation of this section, the trial court erred in failing to submit to the jury an alternative verdict of guilty of involuntary manslaughter. State v. Thomas, 325 N.C. 583, 386 S.E.2d 555 (1989).

Instruction Held Proper. — Where the court instructed the jury that the intent required under this section was a specific intent which could be negated by the voluntary intoxication of the defendant, the charge to the jury is free from prejudicial error. State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

Where the trial judge specifically instructed the jury that before it could find the defendant guilty it must find beyond a reasonable doubt that the defendant acted "intentionally," this was clearly proper. State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

A correct charge under this section would provide that the accused would be guilty if the defendant intentionally, without legal justification or excuse, discharged a firearm into an occupied vehicle with knowledge that the vehicle was occupied by one or more persons or when he had reasonable grounds to believe that the vehicle might be occupied by one or more persons. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

A correct charge would provide that the accused would be guilty if he intentionally, without legal justification or excuse, discharged a firearm into an occupied building with knowledge that the building was then occupied by one or more persons, or when the accused had reasonable grounds to believe that the building might be occupied by one or more persons. State v. Burris, 27 N.C. App. 656, 219 S.E.2d 807 (1975).

Although a preferable instruction to the jury would use the language "intentionally discharged a firearm," there was no prejudicial error by the use of the language "intentionally used a firearm." State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Trial court properly instructed the jury on theory of acting in concert in prosecution for discharging a firearm into an occupied dwelling, where there was evidence tending to show that defendant and two companions were standing together at the scene of the incident and all were armed; that after a shot was fired from victims' dwelling, defendant and his companions all fired shots; that a witness saw all three men fire shots at the dwelling but could not tell whose shots struck the dwelling, and that defendant made conflicting statements as to whether he had fired into the dwelling or had fired only into the air. State v. Musselwhite, 54 N.C. App. 68, 283 S.E.2d 149 (1981), aff'd, 305 N.C. 295, 287 S.E.2d 897 (1982).

Instruction Held Erroneous. — It was held that an instruction to the jury on a charge under this section was erroneous where it contained provision that the jury must find that "the gun was discharged; and first and last, that the defendant acted willfully or wantonly which means that he must have known that one or more persons were in the dwelling or apartment," in that it equated willful and wanton conduct with knowledge of occupancy of the building. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Instruction that equates willful and wanton conduct with knowledge of occupancy of the building and thereby attempts to condense two separate elements of the crime into one is in error. State v. Furr, 26 N.C. App. 335, 215 S.E.2d 840 (1975).

In a prosecution for willfully or wantonly discharging a firearm into an occupied dwelling in violation of this section, the trial court erred in giving an instruction which equated willful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot. State v. Leeper, 27 N.C. App. 420, 219 S.E.2d 253 (1975).

Defendant was awarded a new trail on charges of discharging a firearm into occupied property because the trial court, when it gave the final mandate as to the charge, did not instruct the jury that it could return a verdict of not guilty as to that charge if it found that defendant acted in self-defense. Further, because there was evidence that defendant was not the initial aggressor and his right to stand his ground was at least a substantial feature of his defense of self-defense; the trial court's failure to instruct the jury that defendant had no duty to retreat was plain error. State v. Davis, 177 N.C. App. 98, 627 S.E.2d 474, 2006 N.C. App. LEXIS 696 (2006).

Multiple Convictions Justified. — Having examined the indictments and the underlying facts of each conviction, Supreme Court concluded that defendant's conviction and sentencing on three counts of discharging a firearm into occupied property did not violate double jeopardy principles. State v. Rambert, 341 N.C. 173, 459 S.E.2d 510 (1995).

Multiple Convictions Not Justified. — Defendant's first-degree burglary conviction would be reversed where the State failed to allege that dwelling house was occupied at the time of breaking and entering and where the offense of burglary and the offense of discharging a firearm into occupied property were mutually exclusive, since defendant could not be entering the dwelling and firing "into" it from the outside at the same time. State v. Surcey, 139 N.C. App. 432, 533 S.E.2d 479, 2000 N.C. App. LEXIS 899 (2000).

Illustrative Case. — The evidence supported defendant's conviction under this section, where the victim testified that she personally saw the defendant shoot into her residence, and her testimony was corroborated by her previous statement to the police. State v. Davis, 130 N.C. App. 675, 505 S.E.2d 138 (1998).

Evidence Held Sufficient. — Victim's testimony that defendant continued shooting after he entered the apartment was sufficient to support a conviction for discharging a firearm into occupied property. State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005), aff'd in part, modified in part, 360 N.C. 377, 627 S.E.2d 604 (2006).

Substantial evidence existed from which a jury could have found that defendant had reasonable grounds to believe that the restaurant was occupied when he fired the shots in its direction; prior to the subject incident, the restaurant had stayed open until 3:00 a.m., and the restaurant was located in an area where other establishments were open until the early morning hours. State v. Everette, 172 N.C. App. 237, 616 S.E.2d 237, 2005 N.C. App. LEXIS 1437 (2005), aff'd in part, rev'd in part, 361 N.C. 646, 652 S.E.2d 241 (2007), Goldston v. State, 173 N.C. App. 416, 618 S.E.2d 785, 2005 N.C. App. LEXIS 2012 (2005).

Trial court properly denied defendant's motions for dismissal and to set aside the verdict on a charge of discharging a firearm into an occupied property, in violation of G.S. 14-34.1, as there was sufficient evidence to present the charge to the jury and sufficient evidence to uphold the verdict, based on defendant having fired shots into a restaurant in the early morning hours, resulting in damage to the property;

the restaurant was closed at the time but the lights were still on although turned down, other nearby establishments were still open, and there were people crowding the streets near the premises, such that it was inferrable that defendant had reasonable grounds to believe that the premises might have been occupied when the shots were fired. State v. Everette, 361 N.C. 646, 652 S.E.2d 241, 2007 N.C. LEXIS 1107 (2007).

Testimony that defendant intended to discharge the gun and that a bullet penetrated an exterior apartment wall was sufficient to support defendant's conviction for felony discharging a firearm into an occupied property under G.S. 14-34.1. State v. Canady, 191 N.C. App. 680, 664 S.E.2d 380, 2008 N.C. App. LEXIS 1498 (2008).

Applied in State v. Tripp, 9 N.C. App. 518, 176 S.E.2d 892 (1970); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Tinsley, 283 N.C. 564, 196 S.E.2d 746 (1973); State v. Evans, 19 N.C. App. 731, 200 S.E.2d 213 (1973); State v. Locklear, 26 N.C. App. 300, 215 S.E.2d 859 (1975); State v. Butcher, 31 N.C. App. 572, 230 S.E.2d 191 (1976); State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); State v. Cannon, 341 N.C. 79, 459 S.E.2d 238 (1995).

Cited in State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971); State v. Hewitt, 34 N.C. App. 109, 237 S.E.2d 311 (1977), aff'd, 294 N.C. 316, 239 S.E.2d 833 (1978); State v. Heaton, 39 N.C. App. 233, 249 S.E.2d 856 (1978); State v. Brooks, 61 N.C. App. 572, 301 S.E.2d 421 (1983); State v. King, 75 N.C. App. 618, 331 S.E.2d 291 (1985); State v. Edwards, 89 N.C. App. 529, 366 S.E.2d 520 (1988); State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990); State v. Cook, 334 N.C. 564, 433 S.E.2d 730 (1993); State v. Beasley, 118 N.C. App. 508, 455 S.E.2d 880 (1995); State v. Pickens, 346 N.C. 628, 488 S.E.2d 162 (1997); State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Millsaps, 356 N.C. 556, 572 S.E.2d 767, 2002 N.C. LEXIS 1251 (2002); State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003); State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).

§ 14-34.2. Assault with a firearm or other deadly weapon upon governmental officers or employees, company police officers, or campus police officers.

Unless a person's conduct is covered under some other provision of law providing greater punishment, any person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State or of any political subdivision of the State, a company police officer certified pursuant to the provisions of Chapter 74E of the General Statutes, or a campus police officer certified pursuant to the provisions of Chapter 74G, Chapter 17C or Chapter 116 of the General Statutes, in the performance of his duties shall be guilty of a Class F felony. (1969, c. 1134; 1977, c. 829; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1981, c. 535, s. 1; 1991, c. 525, s. 2; 1993, c. 539, s. 1142; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 687, s. 2; 1995, c. 507, s. 19.5(i); 2005-231, s. 6.1.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Effect of Use of Excessive Force by Officer in Making Lawful Arrest. — While the use of excessive force in a lawful arrest may subject a law-enforcement officer to civil or criminal liability, it does not take the officer outside the performance of his duties for purposes of this section. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

In all cases where the charge was assault on a law officer in violation of former G.S. 14-33(b)(4), or assault on a law officer with a firearm (this section), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

State Need Not Prove Lack of Excessive

Force. — In a prosecution for assault on a police officer, it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Assault May Be Justified If Excessive Force Used. — Where there is evidence tending to show the use of excessive force by the law officer in making an arrest, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Prosecution Under This Section and § 14-32 Not Double Jeopardy. — Prosecution of defendants under this section for assault on a law-enforcement officer with a firearm and under G.S. 14-32 for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Where a defendant was charged and convicted for assault upon a law officer with a firearm while he was in the performance of his duties and also for assault on the same officer with a deadly weapon with intent to kill inflicting serious injuries, the defendant was not placed in double jeopardy, however, judgment was arrested in the case charging the lesser included offense of assault upon the officer with a firearm while he was in the performance of his duties because the constitutional guarantee against double jeopardy protects a defendant from multiple punishment for the same offense. State v. Byrd, 50 N.C. App. 736, 275 S.E.2d 522, cert. denied, 303 N.C. 316, 281 S.E.2d 654 (1981).

Cumulative punishments for offenses arising from the same act did not violate double jeopardy, where the defendant was convicted for assault with a deadly weapon with intent to kill and assault with a deadly weapon on a law enforcement officer, but each offense required proof of an element the other did not and the legislative purposes underlying the offenses were distinct. State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998).

Where the facts underlying the jury's guilty verdict for assault with a deadly weapon on a government official in violation of G.S. 14-34.2 were not the same facts underlying the jury's verdict of guilty for assault with a deadly weapon in violation of G.S. 14-32, and where the evidence showed that defendant completed the first assault on an officer by driving a truck over the officer's leg just before the officer pulled defendant from the truck and then completed the second instance of assault independently of the first assault by reentering the vehicle and driving it toward the officer, defendant's convictions on both charges did not violate double jeopardy; neither U.S. Const. amend. XIV nor N.C. Const. art. I, § 19, forbade the prosecution and punishment of defendant for those two separate and distinct crimes. State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

And Election Between Charges Not Required. — The trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law-enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury since a defendant may be charged with more than one offense based on a given course of conduct, and even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Assault with Deadly Weapon Is Lesser Included Offense. — Where defendants were charged with assault on a law-enforcement officer with a firearm and assault with a deadly weapon with intent to kill, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law-enforcement officer with a firearm, and this result would punish defendants twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Defendant was not entitled to a jury instruction on the lesser offense of misdemeanor assault on a government official under G.S. 14-33(c)(4) because defendant used a deadly weapon — his car — when he drove into a deputy's car; thus the evidence only supported the charge of felony assault on a government official under G.S. 14-34.2. State v. Batchelor, 167 N.C. App. 797, 606 S.E.2d 422, 2005 N.C. App. LEXIS 9 (2005).

Failure to Instruct Jury on Lesser-Included Offense of Misdemeanor Assault of Government Official Was Reversible Error. — Trial court erred in failing to submit the lesser-included offense of misdemeanor assault on a government official to the jury and this failure amounted to prejudicial error that could not be cured by defendant's subsequent conviction for felony assault with a deadly weapon on a government official because it could not be known whether the jury would have convicted defendant of a lesser degree if so permitted. State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29, 2007 N.C. App. LEXIS 1978 (2007).

Jury Instruction on Box-Cutter as a Deadly Weapon Was Not Error. — Officers' testimony supported the trial court's instruction to the jury that a razor knife (box-cutter) was a deadly or dangerous weapon as a matter of law, for the purpose of the charge of assault with a deadly weapon against government officers, because the assaulted officers testified that defendant lunged at them in an attempt to cut them and kept charging at them. State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886, 2004 N.C. App. LEXIS 188 (2004).

The trial court erred by amending the jury verdict after deliberation to enhance the defendant's conviction to the felony of assault with a deadly weapon upon a government official, pursuant to this section, where the trial court only instructed the jury on the charge of assault on a government official and the State's motion to amend the verdict did not comport with any of the challenges allowable under G.S. 15A-1240. State v. Brogden, 137 N.C. App. 579, 528 S.E.2d 391, 2000 N.C. App. LEXIS 423 (2000).

Intent Is Presumed from Act. — In order to return a verdict of guilty of assault with a firearm upon a law-enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

Intent was sufficiently established by evidence that defendant operated a truck dangerously while an officer was hanging on the window and that defendant had a reckless disregard for the safety of the officer; defendant's motion to dismiss for lack of evidence of intent was properly denied since the State did not have to establish actual intent where such intent could be inferred from defendant's conduct. State v. Spellman, 167 N.C. App. 374, 605 S.E.2d 696, 2004 N.C. App. LEXIS 2380 (2004).

The diminished capacity defense is not available to negate the general intent required for a conviction of assault with a deadly weapon on a government officer. State v. Page, 346 N.C. 689, 488 S.E.2d 225 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998).

The indictment need not allege the particular duty, but need only allege that the law enforcement officer was performing a duty of his office at the time the assault occurred. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984).

This is no compelling reason to insist that an indictment charging the felony offense of assault with a firearm on a law enforcement officer performing a duty of his office should require more, as to the particular duty being performed, than that required to charge a violation in a warrant of former G.S. 14-33(b)(4), which made it a misdemeanor offense to assault a law enforcement officer while he was discharging or attempting to discharge a duty of his office. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984).

It was not error to find as an aggravating factor that the offense was for the purpose of preventing a lawful arrest, where, while the offense charged does not require that the officer actually be in the process of arresting the defendant in order to be "performing a duty of his office," there was evidence tendered at trial from which the trial judge could find as an aggravating factor that the offense was committed for the purpose of preventing a lawful arrest. State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984).

Knowledge is an essential element of the crime of assault with a firearm upon a law enforcement officer. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Knowledge is an essential element of this offense. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied, 318 N.C. 701, 351 S.E.2d 759 (1987).

Defendant Must Have Known That Victim Was Fireman. — Conviction under this section requires not only that the jury find that the victim was a fireman, but also that the defendant knew or had reasonable grounds to know that the victim was a fireman. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied, 318 N.C. 701, 351 S.E.2d 759 (1987).

Failure to Charge on Element of Knowledge. — Defendant's convictions for assault with a firearm upon a law enforcement officer would be vacated where the trial judge failed to instruct on the element of knowledge and the cases would be remanded to permit resentencing on the charge of assault with a deadly weapon, a lesser included offense. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Knowledge Shown by Evidence. — Evidence that two of the three vehicles in which the volunteer firemen arrived were displaying rotating red lights, that one of the firemen was wearing a jacket which bore fire department insignia, and that two of the three firemen verbally identified themselves to defendant as firemen called to extinguish barn fire was sufficient to show that defendant knew or had reasonable grounds to know that the victims whom defendant was charged with assaulting were firemen. State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied, 318 N.C. 701, 351 S.E.2d 759 (1987).

Evidence held sufficient to meet the requirements of this section. State v. Adams, 88 N.C. App. 139, 362 S.E.2d 789 (1987).

Where defendant instigated a dog's attack on the police officers, made no objection to a jury instruction that the dog was under defendant's control, and did not identify the instruction as plain error, as required by N.C. R. App. 10(b)(2), 10(c)(4), the dog was a deadly weapon under G.S. 14-34.2 because defendant used it in a deadly manner and the police officers perceived it to be deadly in its use; as a result, the trial court properly denied defendant's motion to dismiss. State v. Cook, 164 N.C. App. 139, 594 S.E.2d 819, 2004 N.C. App. LEXIS 741 (2004).

Trial court properly denied defendant's motion to dismiss the assault with a deadly weapon on a government officer charge because, in light of the evidence showing that a gun was only inches from defendant's outstretched hand and that defendant was actively, forcefully, and to some degree successfully resisting officers' attempt to arrest him, defendant's failure to physically touch the weapon did not preclude the commission of an assault with the firearm. State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579, 2007 N.C. App. LEXIS 75 (2007).

State presented substantial evidence from which a jury could have found that defendant's submerging the deputy in the river was likely to produce death or great bodily harm, and thus the evidence supported the conclusion that "hands and water" were in this case a deadly weapon. State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29, 2007 N.C. App. LEXIS 1978 (2007).

Admissibility of Result of Breathalyzer Test. — Where defendant was not driving or operating a vehicle at the time of the alleged assault on a police officer, the court erred in admitting testimony showing the result of a breathalyzer test. State v. Powell, 18 N.C. App. 732, 198 S.E.2d 70, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Erroneous Admission of Irrelevant Motive Evidence Held Non-Prejudicial. — Since the State presented evidence that defendant assaulted a deputy sheriff by dragging the officer with his car, any error committed in admitting evidence of another traffic stop where defendant also fled in a vehicle was non-prejudicial. State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005), cert. denied, 360 N.C. 67, 621 S.E.2d 881 (2005).

Applied in State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); State v. Berry, 13 N.C. App. 310, 185 S.E.2d 463 (1971); State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Norton, 14 N.C. App. 136, 187 S.E.2d 364 (1972); State v. Hammock, 22 N.C. App. 439, 206 S.E.2d 773 (1974); State v. Polk, 29 N.C. App. 360, 224 S.E.2d 272 (1976); State v. Thomas, 29 N.C. App. 757, 226 S.E.2d 163 (1976); State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979); State v. Jackson, 74 N.C. App. 92, 327 S.E.2d 270 (1985); State v. Evans, 105 N.C. App. 236, 412 S.E.2d 146 (1992).

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973); State v. Dunlap, 298 N.C. 725, 259 S.E.2d 893 (1979); State v. Edgerton, 86 N.C. App. 329, 357 S.E.2d 399 (1987); State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988); State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990); State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993); Kelly v. Bencheck, 921 F. Supp. 1465 (E.D.N.C. 1996); State v. Locklear, 136 N.C. App. 716, 525 S.E.2d 813, 2000 N.C. App. LEXIS 138 (2000); State v. Lockhart, 181 N.C. App. 316, 639 S.E.2d 5, 2007 N.C. App. LEXIS 89 (2007).

§ 14-34.3. Manufacture, sale, purchase, or possession of teflon-coated types of bullets prohibited.

(a) It is unlawful for any person to import, manufacture, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any teflon-coated bullet.

(b) This section does not apply to:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties;

(2) Importers, manufacturers, and dealers validly licensed under the laws of the United States or the State of North Carolina who possess for the purpose of sale to authorized law-enforcement agencies only;

(3) Inventors, designers, ordinance consultants and researchers, chemists, physicists, and other persons employed by or under contract with a manufacturing company engaged in making or doing research designed to enlarge knowledge or to facilitate the creation, development, or manufacture of more effective police-type body armor.

(c) Any person who violates any provision of this section is guilty of a Class 1 misdemeanor. (1981 (Reg. Sess., 1982), c. 1272, s. 1; 1993, c. 539, s. 18; 1994, Ex. Sess., c. 24, s. 14(c); 1999-456, s. 33(a).)

§ 14-34.4. Adulterated or misbranded food, drugs, or cosmetics; intent to cause serious injury or death; intent to extort.

(a) Any person who with the intent to cause serious injury or death manufactures, sells, delivers, offers, or holds for sale, any food, drug, or cosmetic that is adulterated or misbranded, or adulterates or misbrands any food, drug, or cosmetic, in violation of G.S. 106-122, is guilty of a Class C felony.

(b) Any person who with the intent to wrongfully obtain, directly or indirectly, anything of value or any acquittance, advantage, or immunity communicates to another that he has violated, or intends to violate, subsection (a) of this section, is guilty of a Class C felony. (1987, c. 313, s. 1.)

§ 14-34.5. Assault with a firearm on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

(a) Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony.

(b) Anyone who commits an assault with a firearm upon a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class E felony. (1995, c. 507, s. 19.5(j); 1995 (Reg. Sess., 1996), c. 742, s. 10; 1997-443, s. 19.25(gg).)

CASE NOTES

In General. — The elements required for conviction of the crime of assault with a firearm on a law enforcement officer are (1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his or her duties. State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103, 2001 N.C. App. LEXIS 990 (2001).

Construction With Other Assault Provisions. — Assault by pointing a gun in violation of G.S. 14-34 is not a lesser-included offense of assault with a firearm on a law enforcement officer because the latter offense does not include the element of pointing a gun at a person; however, assault with a deadly weapon in violation of G.S. 14-33(c)(1) is a lesser-included offense of assault with a firearm on a law enforcement officer since a firearm is considered a deadly weapon. The same conduct cannot be used to convict on both assault with a deadly weapon and assault with a firearm on a law enforcement officer. State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

Construction with G.S. 14-34.1. — Defendant's consecutive sentences for assault with a firearm on a law enforcement officer, in violation of G.S. 14-34.5, and discharging a firearm into occupied property, in violation of G.S. 14-34.1, did not violate double jeopardy because one crime required proof of a law enforcement officer then performing his duties, and the other crime required proof of willful and wanton discharge of a firearm into occupied property, so different elements constituted each offense. State v. Sellers, 155 N.C. App. 51, 574 S.E.2d 101, 2002 N.C. App. LEXIS 1631 (2002).

Exclusionary Rule Did Not Bar Evidence of Assault on Law Enforcement Officer. — Trial court properly denied defendant's motion to suppress evidence in the trial of his charge of assault on a law enforcement officer because, even if the police officers' entry into defendant's home was unlawful, the exclusionary rule did not operate to exclude evidence of defendant's assault on the law enforcement officers. State v. Parker, 188 N.C. App. 616, 655 S.E.2d 860, 2008 N.C. App. LEXIS 192 (2008).

Sufficiency of Indictment. — Indictment that charged the offense in the language of G.S. 14-34.5(a) was sufficient even though it did not aver that defendant knew the assault victim was a police officer. State v. Thomas, 153 N.C. App. 326, 570 S.E.2d 142, 2002 N.C. App. LEXIS 1188 (2002), appeal dismissed, 356 N.C. 624, 575 S.E.2d 759 (2002).

Evidence Sufficient. — In a prosecution for assault with a firearm on a law enforcement officer, where the evidence showed that defendant struck a police officer, struggled with the officer, removed the officer's handgun from its holster, took aim at the officer, and fired a shot at the officer, the element of assault was properly proven. State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103, 2001 N.C. App. LEXIS 990 (2001).

To be guilty of the offense of assault with a firearm on a law enforcement officer under G.S. 14-34.5, the defendant must have known or had reasonable grounds to know that the victim was a law enforcement officer; evidence was sufficient that defendant knew he was shooting at officers where: (1) two plain clothes officers approached defendant with one only slightly behind the other; (2) one identified himself as a police officer, and defendant asked the other why he was under arrest; (3) both officers assisted in helping subdue defendant when he struggled; (4) defendant grabbed one officer's radio while he was calling for backup, and he grabbed the gun of the other officer while resisting their arrest; and (5) he clearly assaulted the officer when he grabbed the other officer's gun and fired a shot in the first officer's direction. State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567, 2004 N.C. App. LEXIS 269 (2004).

Applied in State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207, 2002 N.C. App. LEXIS 1472 (2002).

§ 14-34.6. Assault or affray on a firefighter, an emergency medical technician, medical responder, emergency department nurse, or emergency department physician.

(a) A person is guilty of a Class A1 misdemeanor if the person commits an assault or an affray on any of the following persons who are discharging or attempting to discharge their official duties:

(1) An emergency medical technician.
(2) A medical responder.
(3) An emergency department nurse.
(4) An emergency department physician.
(5) A firefighter.

(b) Unless a person's conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class I felony if the person violates subsection (a) of this section and (i) inflicts serious bodily injury or (ii) uses a deadly weapon other than a firearm.

(c) Unless a person's conduct is covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person violates subsection (a) of this section and uses a firearm. (1995, c. 507, s. 19.6(a); 1996, 2nd Ex. Sess., c. 18, s. 20.14B(b); 1997-9, s. 2; 1997-443, s. 11A.129A; 1998-217, s. 1.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 507, s. 19.6(a) having been 14-34.5.

§ 14-34.7. Assault inflicting serious injury on a law enforcement, probation, or parole officer or on a person employed at a State or local detention facility.

(a) Unless covered under some other provision of law providing greater punishment, a person is guilty of a Class F felony if the person assaults a law enforcement officer, probation officer, or parole officer while the officer is discharging or attempting to discharge his or her official duties and inflicts serious bodily injury on the officer.

(b) Anyone who assaults a person who is employed at a detention facility operated under the jurisdiction of the State or a local government while the employee is in the performance of the employee's duties and inflicts serious bodily injury on the employee is guilty of a Class F felony, unless the person's conduct is covered under some other provision of law providing greater punishment. (1996, 2nd Ex. Sess., c. 18, s. 20.14B(a); 1997-443, s. 19.25(hh); 2001-487, s. 41.)

CASE NOTES

"Serious Injury" and "Serious Bodily Injury". — G.S. 14-34.7 was ambiguous because the statute's title referred to assaults inflicting "serious injury" while the statute text specified assaults inflicting "serious bodily injury" — under North Carolina law, the terms "serious injury" and "serious bodily injury" were not interchangeable; however, when interpreting ambiguous statutes, the principal goal is to effectuate the purpose of the legislature, and the "manifest purpose" of the legislature in enacting G.S. 14-34.7 was to make an assault inflicting "serious injury" or "serious bodily injury" against a law enforcement officer a felony. State v. Crawford, 167 N.C. App. 777, 606 S.E.2d 375, 2005 N.C. App. LEXIS 1 (2005), cert. denied, 359 N.C. 412, 612 S.E.2d 324 (2005).

§ 14-34.8. Criminal use of laser device.

(a) For purposes of this section, the term "laser" means light amplification by stimulated emission of radiation.

(b) It is unlawful intentionally to point a laser device at a law enforcement officer, or at the head or face of another person, while the device is emitting a laser beam.

(c) A violation of this section is an infraction.

(d) This section does not apply to a law enforcement officer who uses a laser device in discharging or attempting to discharge the officer's official duties. This section does not apply to a health care professional who uses a laser device in providing services within the scope of practice of that professional nor to any other person who is licensed or authorized by law to use a laser device or uses it in the performance of the person's official duties.

(e) This section does not apply to laser tag, paintball guns, and other similar games and devices using light emitting diode (LED) technology. (1999-401, s. 1.)

§ 14-34.9. Discharging a firearm from within an enclosure.

Unless covered under some other provision of law providing greater punishment, any person who willfully or wantonly discharges or attempts to discharge a firearm, as a part of a pattern of criminal street gang activity, from within any building, structure, motor vehicle, or other conveyance, erection, or enclosure toward a person or persons not within that enclosure shall be punished as a Class E felon. (2008-214, s. 2.)

Editor's Note. — Session Laws 2008-214, s. 6, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

ARTICLE 9.

Hazing.

§ 14-35. Hazing; definition and punishment.

It is unlawful for any student in attendance at any university, college, or school in this State to engage in hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to subject another student to physical injury as part of an initiation, or as a prerequisite to membership, into any organized school group, including any society, athletic team, fraternity or sorority, or other similar group." Any violation of this section shall constitute a Class 2 misdemeanor. (1913, c. 169, ss. 1, 2, 3, 4; C.S., s. 4217; 1969, c. 1224, s. 1; 1993, c. 539, s. 19; 1994, Ex. Sess., c. 24, s. 14(c); 2003-299, s. 1.)

§ 14-36: Repealed by Session Laws 2003-299, § 2, effective December 1, 2003, and applicable to offenses committed on or after that date.

§ 14-37: Repealed by Session Laws 1979, c. 7, s. 1.

§ 14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.

In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8; C.S., s. 4220.)

ARTICLE 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or

(4) Holding such other person in involuntary servitude in violation of G.S. 14-43.12.

(5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of G.S. 14-43.11.

(6) Subjecting or maintaining such other person for sexual servitude in violation of G.S. 14-43.13.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 746, s. 2; 1993, c. 539, s. 1143; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 509, s. 8; 2006-247, s. 20(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "That this shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Subsection (a), as amended by Session Laws 2006-247, s. 20(c), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For case law survey on kidnapping, see 41 N.C.L. Rev. 445 (1963).

For a note analyzing the recent amendment codifying the definition of kidnapping, see 12 Wake Forest L. Rev. 434 (1976).

For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

- I. General Consideration.
- II. Kidnapping, Generally.
- III. Holding Victim for Ransom or as Hostage.
- IV. Facilitating Commission of Felony or Flight.
- V. Doing Bodily Harm or Terrorizing.
- VI. First-Degree Kidnapping.
- VII. Second-Degree Kidnapping.
  - A. In General.
  - B. Mitigating Factors in Subsection (b).
- VIII. Charge and Indictment, Generally.
- IX. Instructions.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases below were decided under this section as it stood prior to the 1975 amendment. At that time the statute did not specifically define kidnapping and was construed as incorporating common-law elements of kidnapping. The cases should be read in light of State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978), which held that the 1975 amendment superseded the common law.*

In addition, many of the cases below were decided prior to July 1, 1981, the effective date of the 1979 amendment which created two degrees of kidnapping.

Constitutionality. — This section, on its face, does not violate the due process clause of U.S. Const., Amend. XIV, or the law of land clause of N.C. Const., Art. I, § 19, or the cruel or unusual punishment clause of either Constitution. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section, as herein construed, is not vague. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section applies to all who violate it without exception or classification. Consequently, it does not, upon its face, violate the equal protection clause of U.S. Const., Amend. XIV or the like clause contained in N.C. Const., Art. I, § 19. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section does not interfere with or prohibit any activity protected by U.S. Const., Amend. I or any other federal or State constitutional provision. It is a penal statute completely within the State's police power. The doctrine of overbreadth has no application to it. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

This section is neither unconstitutionally vague nor "overbroad." State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

As to the constitutionality of the sentencing procedure, see State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

This section prima facie violates no provision of the State or federal Constitutions. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

History. — A former statute, C.S., s. 4221, provided that any person who forcibly or fraudulently kidnapped any person should be guilty of a felony, and upon conviction might be punished in the discretion of the court, not exceeding 20 years in the State's prison. As a result of the kidnapping and death in the Lindbergh tragedy, the General Assembly repealed C.S., s. 4221 by the enactment of Public Laws 1933, c. 542, now codified as this section. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

Legislative Intent. — The Supreme Court's long-standing interpretation in State v. Fulcher, 294 NC 503, 243 S.E.2d 338 (1978) of legislative intent in the enactment of this section has become an integral part of the kidnapping statute, and thus remains the appropriate focus for analysis of kidnapping convictions. State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998).

Effect of the 1975 Amendment. — Though this section, as amended in 1975, is broader than common-law kidnapping, in that it eliminates asportation as a necessary element of the crime, it is restrictive in that, by limiting kidnapping to unlawful confinement, restraint or asportation for the purposes enumerated it does not include some of the situations covered by the common-law crime. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

The present statutory definition of the crime of kidnapping, enacted in 1975, must be construed in the light of recent decisions of the Supreme Court decided prior to the rewriting of the statute. When so considered, it is clear that the legislature intended to change the law as therein declared. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This Section Supersedes the Common Law. — This section, as amended in 1975, supersedes the common-law crime of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

Since this section supersedes the common-law crime of kidnapping, common-law kidnapping no longer exists in North Carolina. State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978).

And Changes the Law as Theretofore Declared. — The present statutory definition of the crime of kidnapping enacted in 1975 changed the law as theretofore declared by the Supreme Court. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Consideration of Common Law Kidnapping for Sentencing Purposes. — The trial court properly assessed four points under G.S. 15A-1340.14 for the defendant's prior common law kidnapping offense, as the common law definition of kidnapping is substantially similar to the definition under this section. State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998), cert. denied, 349 N.C. 374, 525 S.E.2d 189 (1998).

This section follows the pattern of the kidnapping provision, § 212.1, of the Model Penal Code. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Term "aggravated kidnapping" is a misnomer and should not be used in connection with this statute. State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982).

While some of the opinions of the Supreme Court refer to the crime defined in subsection (a) as "aggravated kidnapping," this is a misnomer. The proper term for the crime there defined is "kidnapping." State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

First-degree kidnapping differs from second-degree kidnapping in that the former includes the following essential element not present in the latter: the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted. All other essential elements for first- and second-degree kidnapping are identical. Thus, someone properly found guilty of first-degree kidnapping is necessarily guilty of second-degree kidnapping. State v. Jeune, 332 N.C. 424, 420 S.E.2d 406 (1992).

The common-law crime of false imprisonment has not been superseded by this section, as amended in 1975, because there may be an unlawful restraint without the purposes specified in the statute. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

First and Second Degrees Distinguished. — There are two degrees of kidnapping in North Carolina: (1) if the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony; (2) if the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony. State v. Pratt, 152 N.C. App. 694, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

Kidnapping and False Imprisonment Distinguished. — Whether a defendant who confines, restrains, or removes another is guilty of kidnapping or false imprisonment, depends upon whether the act was committed to accomplish one of the purposes enumerated in this section. State v. Lang, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982); State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986).

The trial court properly denied the defendant's request for a jury instruction on the lesser-included offense of false imprisonment where the evidence showed that he held the victim at gunpoint in order to force her to watch him commit suicide or at the very least to force her to watch him point a gun at his head and repeatedly threaten to do so, and thereby terrorize her. State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000).

Crime of false imprisonment is a lesser included offense of the crime of kidnapping. State v. Lang, 58 N.C. App. 117, 293 S.E.2d 255, cert. denied, 306 N.C. 747, 295 S.E.2d 761 (1982); State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986).

As is Felonious Restraint. — Felonious restraint is a lesser included offense of kidnapping. State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. State v. Claypoole, 118 N.C. App. 714, 457 S.E.2d 322 (1995).

Under G.S. 14-39(a)(2), (3) (2001), any person who, unlawfully and without consent, confines, restrains, or removes from one place to another any other person is guilty of kidnapping if such confinement, restraint or removal is for one of several purposes outlined in the statute, including facilitating the commission of any felony and terrorizing the person so confined. State v. Pratt, 152 N.C. App. 694, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

As there could be no kidnapping without there first being a false imprisonment. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

But Forcible Trespass Is Not. — Since forcible trespass requires proof of an element not essential to kidnapping, i.e., entry into a person's premises, it cannot be a lesser included offense of kidnapping. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

The restraint, confinement, and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. For the kidnapping convictions to be upheld, the initial inquiry is whether there was substantial evidence that the defendants restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

When Defendant May Be Convicted of Both Kidnapping and Another Felony. — There is no constitutional barrier to the conviction of a defendant for kidnapping by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under this section as now written. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Under this section it is necessary to prove that the confinement, restraint, or removal is for the purpose of, among other alternatives, "facilitating the commission of any felony," and if the intended felony is actually completed, the defendant can be convicted and sentenced for kidnapping and the intended felony without violating the Double Jeopardy Clause of the U.S. Const., Amend. V. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

Defendant may not be separately punished for the offenses of first-degree rape and first-degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree. State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986).

Where the removal of the victim is an inherent and integral part of the underlying felony, it is insufficient to support a conviction for a separate kidnapping offense. State v. Parker, 81 N.C. App. 443, 344 S.E.2d 330 (1986).

When Defendant May Be Convicted of Both Kidnapping and Another Felony. — Since the State failed to show that the removal of the victims was separate from the robbery, that it increased the danger beyond that inherent in the robbery, that the victims were physically injured, or that they were subjected to restraint beyond that of the threatened use of a firearm, defendant's kidnapping convictions were reversed as being in violation of double jeopardy. State v. Ripley, 172 N.C. App. 453, 617 S.E.2d 106, 2005 N.C. App. LEXIS 1801 (2005), aff'd, 360 N.C. 333, 626 S.E.2d 289 (2006).

Although some restraint is inherent in the crime of forced rape, the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetuated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape. Such asportation is separate and independent of the rape, is removal for the purpose of facilitating the felony of rape, and is, therefore, kidnapping pursuant to this section. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

As both first-degree rape and first-degree sexual offense, of which the jury found defendant guilty, were sufficient to support conviction of first-degree kidnapping, and each carried a mandatory penalty of life imprisonment, defendant was not prejudiced when the trial judge averted the multiple punishment problem by arresting judgment on the rape conviction. State v. Young, 319 N.C. 661, 356 S.E.2d 347 (1987).

Convictions of first-degree kidnapping and first-degree rape could not both stand, where there was evidence of an unindicted sexual offense and of a first-degree sexual offense for which defendant was indicted but not convicted, as well as evidence of the rape for which defendant was both indicted and convicted, but the trial court did not specify in its instructions to the jury in the kidnapping case which of these sexual assaults the jury might use to satisfy the "sexual assault" element of the first-degree kidnapping. State v. Freeman, 319 N.C. 609, 356 S.E.2d 765 (1987).

Defendant may be convicted of kidnapping and of sexual assault where restraint or asportation of victim is separate, complete act, independent of and apart from sexual assault. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Although restraint of the victim is inherent in the crime of rape, the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. McKenzie, 122 N.C. App. 37, 468 S.E.2d 817 (1996).

It was reversible error to impose sentences for first-degree kidnapping and attempted robbery with a dangerous weapon offenses, both of which the jury was instructed could serve as underlying felonies to the charge of felony murder. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005), aff'd in part, vacated in part, review improvidently allowed in part, 361 N.C. 550, 648 S.E.2d 819 (2007).

Same — Illustrative Cases. — In a prosecution for first-degree rape and kidnapping, where the defendant told the prosecutrix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit the case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

As the felonious assault which it was alleged in the indictment was one of the purposes for which defendant removed the victim from one place to another was not an element of the kidnapping offense, since it was not necessary for the State to prove the felonious assault in order to convict the defendant of kidnapping, but only to prove that the purpose of the removal was a felonious assault, the felonious assault was, consequently, a separate and distinct offense and the defendant could be convicted and sentenced on both the assault and the kidnapping charges. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980).

Where the restraint of two victims was for the purpose of facilitating the commission of the crime against nature and for the purpose of facilitating the flight of defendant from the room after the perpetration of the two crimes, the restraint of each woman was separate and apart from, and not an inherent incident of the crime against nature, though closely related thereto in time, and either of such purposes satisfied the statutory definition of kidnapping. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

There was ample evidence of kidnapping in a prosecution for kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily harm when defendant produced a pistol and forced the victim to walk 50 feet or more into the woods, where he committed felonious assault. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

When the State proves the elements of kidnapping and the purpose for which the victim was confined or restrained, conviction of the kidnapping may be sustained. Thus, the crimes of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon are separate and distinct offenses and are punishable as such. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

The principle that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both offenses was not applicable in a prosecution for two counts of kidnapping and for robbery and other felonies for which the victims were kidnapped, since in order to prove kidnapping it was only necessary to prove a purpose of robbery and the other felonies and not the commission of the felonies themselves. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Even though both the prosecution and the trial court treated the "serious injury" arising out of the felonious assault charge and the "sexual assault" arising out of the rape charge as elements of the respective kidnappings in a prosecution for two counts of kidnapping, first-degree rape, two counts of armed robbery, and assault with a deadly weapon with the intent to kill inflicting serious bodily injury, the convictions and sentencing of the defendant for the kidnappings and the assault and rape were not violations of the Double Jeopardy Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

In a prosecution for kidnapping and armed robbery, the restraint and asportation of the victim, consisting of moving her from the store to a hallway in the rear of the building and tying her to a grocery cart, was not necessary to and not a part of the armed robbery, and the elements of the two offenses were not the same. Thus, conviction of both crimes did not violate due process and equal protection standards. State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978), cert. denied, 296 N.C. 739, 254 S.E.2d 181 (1979).

In a prosecution for rape and kidnapping, where the victim was by trick enticed into defendant's automobile and transported about six blocks away, where by force and by threat of the use of a knife, she was raped, and during a period of about 45 minutes the victim was under the complete dominion and control of the defendant, the restraint accompanying the rape was not an inherent, inevitable feature of the kidnapping. Under these circumstances, the kidnapping was a separate, complete act independent of the later committed crime of rape. Thus, the constitutional problem of double jeopardy did not arise and defendant failed to show denial of due process. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

The restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Where a defendant is charged with kidnapping, rape and crime against nature, an essential element of each offense being a restraint, the defendant can be convicted for each offense without violating the constitutional prohibition against double jeopardy where there is also a showing of asportation as an element of kidnapping. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Double jeopardy did not result when defendant was tried and convicted of kidnapping for the purpose of facilitating flight following his participation in an armed robbery and of armed robbery, since the intent of the legislature in establishing the punishment for kidnapping was to impose an indivisible penalty for restraint and removal for specified purposes, no hypothetical part of which penalty represents a punishment for the felony which gave rise to the flight of defendant and his removal of the victim, and the crimes of armed robbery and kidnapping involve vastly different social implications. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980).

Asportation of the victim is not an inherent or inevitable feature of an assault; therefore, removal of a victim from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault, and thus a separate charge for kidnapping was proper. State v. Coffer, 54 N.C. App. 78, 282 S.E.2d 492 (1981).

Where removal of the victims was a separate course of conduct designed to remove the victims from the view of a passerby who might have hindered the commission of the crime, the evidence was sufficient under this section to sustain kidnapping convictions, and the court properly denied defendant's motion to dismiss kidnapping charges. State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518, cert. denied and appeal dismissed, 314 N.C. 670, 337 S.E.2d 583 (1985), cert. denied, 315 N.C. 393, 338 S.E.2d 882 (1986).

Conduct of defendant in forcing his victim to drive down a highway, turn into a motel parking lot and drive around to the back of the motel, a darker and much more deserted area, was more than a mere technical asportation, was not necessary to the accomplishment of the robbery which he subsequently committed, and did, in fact, expose the victim to danger greater than that inherent in the robbery itself, and the trial court did not err in denying motion to dismiss the charge of second-degree kidnapping. State v. Parker, 81 N.C. App. 443, 344 S.E.2d 330 (1986).

Where the placement of a gag over victim's mouth could not have been the proximate cause of her death without the binding of her hands and feet, which prevented the removal of the gag, so that the victim's death would not have occurred without these other ligatures, the restraint of the victim which resulted in her murder was indistinguishable from the restraint used by the State to support the kidnapping charge, and defendant's kidnapping conviction would be vacated. State v. Prevette, 317 N.C. 148, 345 S.E.2d 159 (1986).

Trial judge properly refused to dismiss kidnapping charges where the State's evidence tended to show that defendant removed victim from his truck and dragged her down to river and under bridge where he committed sexual assaults out of the view of passersby on the road, and that the victim sustained multiple bruises, abrasions and cuts from being dragged on her back, as these acts constituted neither a mere technical asportation nor an inherent and integral part of the rape and sex offense committed. State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Where defendant threatened the victim with a knife at the front of the car wash and then dragged her approximately 80 feet to the rear of the car wash, where he sexually assaulted her, the removal of the victim was separate and apart from that which was inherent in the first-degree sexual offense, and therefore, the trial judge did not err in denying defendant's motion to dismiss the kidnapping charge. State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986).

Where defendant's conviction of sexual offense was used to raise kidnapping to first-degree kidnapping, the trial judge erred in sentencing defendant for both crimes. State v. Whittington, 318 N.C. 114, 347 S.E.2d 403 (1986).

Defendants' convictions of both first degree kidnapping and rape against one victim and of first degree kidnapping and both first degree rape and first degree sex offense against the other could not all stand, even though the combination of convictions, because of the manner in which they were consolidated for judgment, resulted in no additional punishment attributable to any of the kidnapping cases, where it could not be said that the jury's verdict of first degree kidnapping was based upon a sexual assault other than the ones forming the basis for the other convictions. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

The holding in State v. Price, 313 N.C. 297, 327 S.E.2d 863, (1985), that no principle of double jeopardy was violated by entry of judgments that the defendant committed both rape in the first degree and kidnapping in the first degree, is overruled. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Where defendant was convicted for two first degree rapes and first degree kidnapping arising out of the same incident, and the jury may have used one of the rapes to elevate the kidnapping from second to first degree, the case would be remanded for resentencing. State v. Johnson, 320 N.C. 746, 360 S.E.2d 676 (1987).

A defendant cannot be convicted of both first degree kidnapping and a sexual assault when the latter was used to prove an element of the kidnapping, and thus where the jury may not have understood that it could only convict for first degree kidnapping by using unindicted sexual assault, rather than the attempted rape of which defendant was convicted, to supply the sexual assault element of the crime of first degree kidnapping, defendant's convictions of both first degree kidnapping and attempted first degree rape could not stand. State v. Fisher, 321 N.C. 19, 361 S.E.2d 551 (1987).

Evidence of restraint and injury separate from evidence used to indict for first-degree murder held sufficient to also convict defendant of first-degree kidnapping. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Defendant could be convicted of both robbery and kidnapping for the purpose of committing a felony where he forced his way into, and took control of, victim's car by threatening her with a pistol, completing the force necessary to commit the robbery and, then, by further restraining her in the car and driving her to an isolated park, he exposed her to greater danger than that inherent in the robbery and, thereby, committed the separate crime of kidnapping. State v. Hill, 139 N.C. App. 471, 534 S.E.2d 606, 2000 N.C. App. LEXIS 990 (2000).

The trial court did not err in finding defendant guilty of both common law robbery and second-degree kidnapping in connection with the robbery of a pizza restaurant, where there was sufficient evidence of restraint of an employee beyond what was necessary for the commission of common law robbery, to wit: defendant placed the employee in a choke hold, hit him in the side three times, wrestled with the employee on the floor, grabbed the employee again around the throat, pointed a gun at his head, and marched the employee to the front of the pizza shop. State v. Muhammad, 146 N.C. App. 292, 552 S.E.2d 236, 2001 N.C. App. LEXIS 862 (2001).

Court Required to Arrest Judgment for First-Degree Kidnapping. — Where defendant was convicted and sentenced for sexual assault and first-degree kidnapping predicated on one sexual assault, Supreme Court required trial court to arrest judgment either on conviction of sexual assault or on conviction of first-degree kidnapping. Defendant could be resentenced for second-degree kidnapping, if judgment on first-degree kidnapping was arrested. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Kidnapping as Felony Supporting Burglary Charge. — There was not a fatal variance between the indictment charging that defendant broke into the victim's residence with an intent to sexually assault the victim, a crime not recognized in North Carolina, and the evidence offered at trial as there was not a requirement that a burglary indictment specify the crime a defendant intended to commit at the time that he broke into a victim's residence, and the indictment properly alleged that defendant intended to commit a felony at the time of the breaking and entering; further, the indictment alleged that defendant intended to kidnap the victim, a crime for which he was convicted. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

First-degree kidnapping is not a lesser included offense of murder. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

First degree kidnapping requires the State to prove facts not required to prove murder, and it addresses a distinct evil, the kidnapping of and failure to release the victim in a safe place or condition; thus, at least one essential element of each crime is not an element of the other. State v. Fernandez, 346 N.C. 1, 484 S.E.2d 350 (1997).

Jury, by finding first-degree kidnapping, necessarily found facts sufficient to convict defendant of second-degree kidnapping, a felony which would have supported defendant's felony murder conviction; even had the jury not been instructed that murder was the equivalent of not being released in a safe place, defendant would have been convicted of felony murder, as either first-degree or second-degree kidnapping would have served as an underlying felony for felony murder. State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004).

Instruction on Parole Ineligibility in Capital Case. — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Applied in State v. Mallory, 266 N.C. 31, 145 S.E.2d 335 (1965); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Robertson, 284 N.C. 549, 202 S.E.2d 157 (1974); State v. Conrad, 293 N.C. 735, 239 S.E.2d 260 (1977); State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438 (1977); State v. Sampson, 34 N.C. App. 305, 237 S.E.2d 883 (1977); State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978); State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981); State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982); State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982); State v. Newman, 308 N.C. 231, 302 S.E.2d 174 (1983); State v. Partridge, 66 N.C. App. 427, 311 S.E.2d 53 (1984); State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984); State v. Woodruff, 70 N.C. App. 561, 321 S.E.2d 1 (1984); State v. Brame, 71 N.C. App. 270, 321 S.E.2d 449 (1984); State v. Wilson, 73 N.C. App. 398, 326 S.E.2d 360 (1985); State v. Mayse, 97 N.C. App. 559, 389 S.E.2d 585 (1990); State v. Joyce, 104 N.C. App. 558, 410 S.E.2d 516 (1991); State v. Bunch, 106 N.C. App. 128, 415 S.E.2d 375 (1992); State v. Pigott, 331 N.C. 199, 415 S.E.2d 555 (1992); State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262 (1992); State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (1994); State v. Stinson, 127 N.C. App. 252, 489 S.E.2d 182 (1997); State v. Ackerman, 144 N.C. App. 452, 551 S.E.2d 139, 2001 N.C. App. LEXIS 540 (2001); State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 2002 N.C. LEXIS 942 (2002); State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004); State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004); State v. Tollison, 190 N.C. App. 552, 660 S.E.2d 647, 2008 N.C. App. LEXIS 1002 (2008).

Cited in State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Sharratt, 29 N.C. App. 199, 223 S.E.2d 906 (1976); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979); State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979); State v. Gunther, 296 N.C. 578, 251 S.E.2d 462 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); Bryant v. Cherry, 687 F.2d 48 (4th Cir. 1982); Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983); State v. Baldwin, 61 N.C. App. 688, 301 S.E.2d 725 (1983); State v. Little, 67 N.C. App. 128, 312 S.E.2d 695 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Field, 75 N.C. App. 647, 331 S.E.2d 221 (1985); State v. Parker, 315 N.C.

249, 337 S.E.2d 497 (1985); State v. Denning, 316 N.C. 523, 342 S.E.2d 855 (1986); State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986); State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987); State v. McNeill, 90 N.C. App. 257, 368 S.E.2d 206 (1988); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); State v. Ellis, 100 N.C. App. 591, 397 S.E.2d 518 (1990); State v. Hooper, 103 N.C. App. 662, 406 S.E.2d 643 (1991); State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Kyle, 333 N.C. 687, 430 S.E.2d 412 (1993); Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489 (1993); State v. Easterling, 119 N.C. App. 22, 457 S.E.2d 913 (1995); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996); State v. Bates, 343 N.C. 564, 473 S.E.2d 269 (1996); State v. Griffin, 136 N.C. App. 531, 525 S.E.2d 793, 2000 N.C. App. LEXIS 108 (2000); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Morris, 147 N.C. App. 247, 555 S.E.2d 353, 2001 N.C. App. LEXIS 1140 (2001); State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004); State v. Petro, 167 N.C. App. 749, 606 S.E.2d 425, 2005 N.C. App. LEXIS 16 (2005); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008); State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008); State v. Garcell, 363 N.C. 10, 678 S.E.2d 618, 2009 N.C. LEXIS 239 (2009).

II. KIDNAPPING, GENERALLY.

Prior Contempt Adjudication And Double Jeopardy. — Defendant's convictions for kidnapping, non-felonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that the defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

Subsection (a) of this section defines the offense of kidnapping. Proof of the elements set forth therein is all that the statute requires for a conviction of kidnapping. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Offense of kidnapping under G.S. 14-39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will. State v. Smith, 162 N.C. App. 46, 589 S.E.2d 739, 2004 N.C. App. LEXIS 60 (2004).

"Kidnapping" Defined. — Subsection (a) of this section defines kidnapping as (1) an unlawful, nonconsensual restraint, confinement or removal from one place to another, (2) for the purpose of committing or facilitating the commission of certain specified acts. On its face, this is all this section requires for a conviction of kidnapping. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

The gist of the offense proscribed by this section is the unlawful, nonconsensual confinement, restraint or removal of victim, for the purposes of committing certain acts specified in the statute. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980).

Kidnapping, as defined by this section, is the confinement, restraint or removal of a person against his will for a felonious purpose. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

The offense of kidnapping is established upon proof of an unlawful, nonconsensual restraint, confinement, or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or the commission of any felony; or (3) terrorizing or doing serious bodily harm to the person. G.S. 14-39(a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree. G.S. 14-39(b). State v. Smith, 160 N.C. App. 107, 584 S.E.2d 830, 2003 N.C. App. LEXIS 1767 (2003).

Unlawful Removal Constitutes Kidnapping. — Where a defendant by force and threat of violence took a person and carried him where he did not consent to go, this constitutes kidnapping under this section. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

Distance of Removal Is Immaterial. — It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied and appeal dismissed, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

The asportation requirement has been relaxed so that any carrying away is sufficient, and the distance the victim is carried is immaterial. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); State v. Dix, 14 N.C. App. 328, 188

S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

200 Feet Not Minor. — Distance of removal need not be substantial, but where defendant forced victim 200 feet in the course of a robbery, asportation was not "minor" or "merely technical in nature." In fact, it was unnecessary to extract more money from victim, and trial court did not err in denying motion to dismiss charge of kidnapping. State v. Little, 133 N.C. App. 601, 515 S.E.2d 752, 1999 N.C. App. LEXIS 616 (1999), cert. denied, appeal dismissed, 351 N.C. 115, 540 S.E.2d 741 (1999).

Removal of the victim only a few feet could be sufficient to constitute kidnapping in a proper case. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

Shift of Location Within Same Structure May Constitute Carrying Away. — Where the shift of location or removal was done within a physical structure, such a removal constituted a carrying away and sufficiently established the offense of kidnapping. State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Where defendants moved victim only as far as her hotel room to get her keys and money, the movement was necessary to complete the robbery and was not sufficient to support convictions for kidnapping. State v. Weaver, 123 N.C. App. 276, 473 S.E.2d 362 (1996).

Each Place of Confinement Not a Separate Offense. — The offense of kidnapping under this section is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will; each place of confinement or each act of asportation does not constitute a separate offense. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

As used in this section, the term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute. Such restraint, however, is not kidnapping unless it is (1) unlawful (i.e., without legal right), (2) without the consent of the person restrained (or of his parent or guardian if he be under 16 years of age), and (3) for one of the purposes specifically enumerated in the statute. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

The term "restrain" connotes restriction by force, threat or fraud with or without confinement. Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance. State v. Brayboy, 105 N.C. App. 370, 413 S.E.2d 590, cert. denied, 332 N.C. 149, 419 S.E.2d 578 (1992).

Restraint Must Be Separate and Apart from That Inherent in Committing Other Felonies. — The word "restrain," as used in this section, connotes a restraint separate and apart from that which is inherent in the commission of the other felony. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. This section was not intended by the legislature to make such restraint, which is an inherent, inevitable feature of such other felony, also kidnapping, so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980); State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518, cert. denied and appeal dismissed, 314 N.C. 670, 337 S.E.2d 583 (1985), cert. denied, 315 N.C. 393, 338 S.E.2d 882 (1986).

The restraint element necessary for the charge of kidnapping is separate and distinct from the elements necessary to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. State v. Carrillo, 115 N.C. App. 674, 446 S.E.2d 379 (1994).

Restraint or removal is inherently an element of some felonies, such as armed robbery and rape, and therefore, the restraint, confinement or removal required of the crime of kidnapping, has to be something more than that restraint inherently necessary for the commission of these other felonies. State v. Raynor, 128 N.C. App. 244, 495 S.E.2d 176 (1998).

State presented substantial evidence of the required kidnapping element that the restraint be a separate complete act independent of and apart from the attempted rape as: (1) defendant straddled the victim on the sofa, hit the victim, tried to pull up the victim's tank top, and had defendant's pants unzipped, at which time defendant had completed the crime of attempted second-degree rape, (2) defendant then pulled the victim from the couch and dragged the victim to the kitchen, and (3) defendant's acts to restrain the victim while they struggled in the kitchen clearly subjected the victim to greater danger and vulnerability than was inherent in the attempted rape that occurred on the couch. State v. Simpson, 187 N.C. App. 424, 653 S.E.2d 249, 2007 N.C. App. LEXIS 2431 (2007).

More Restraint Than Necessary for Robbery. — The evidence showed that more than a mere technical asportation occurred when defendant restrained and moved victim from the front door of his residence to a back bedroom, and when they then restrained and moved victim to the kitchen, the restraint utilized was more than that inherently necessary for the commission of armed robbery. State v. Raynor, 128 N.C. App. 244, 495 S.E.2d 176 (1998).

Evidence sufficiently established additional restraint beyond that necessary for the robbery for the purpose of facilitating flight, as alleged in the kidnapping indictment. State v. McNeil, 155 N.C. App. 540, 574 S.E.2d 145, 2002 N.C. App. LEXIS 1598 (2002), cert. denied, appeal dismissed, 356 N.C. 688, 578 S.E.2d 323 (2003).

As Must Removal of Victim. — To constitute kidnapping, removal must be separate and apart from that which is an inherent, inevitable part of the commission of another felony. State v. Battle, 61 N.C. App. 87, 300 S.E.2d 276, cert. denied, 309 N.C. 462, 307 S.E.2d 367 (1983).

Where removal is separate and apart from the commission of another felony, subsection (a) of this section allows conviction and punishment for both crimes. State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518, cert. denied and appeal dismissed, 314 N.C. 670, 337 S.E.2d 583 (1985), cert. denied, 315 N.C. 393, 338 S.E.2d 882 (1986).

The victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the State's burden of proof in regard to consent. If the victim is shown to be under 16, the State has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the State must prove that the action was taken without his or her own consent. State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. Froneberger, 55 N.C. App. 148, 285 S.E.2d 119 (1981), appeal dismissed, 305 N.C. 397, 290 S.E.2d 367 (1982).

Asportation No Longer Essential. — This section, as amended in 1975, removes asportation as an essential element of the crime of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978). See State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Restraint or removal of the victim for any of the purposes specified in the statute is sufficient to constitute kidnapping. Thus, no asportation is required where there is the requisite restraint. State v. Brayboy, 105 N.C. App. 370, 413 S.E.2d 590, cert. denied, 332 N.C. 149, 419 S.E.2d 578 (1992).

The legislature rejected the decision in State v. Ingland, 278 N.C. 42, 178 S.E.2d 577, (1971), to the effect that there must be both detention and asportation of the victim, the statute plainly stating that confinement, restraint or removal of the victim for any one of the three specified purposes is sufficient to constitute the offense of kidnapping. Thus, no asportation whatever is now required where there is the requisite confinement or restraint. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

Substantiality of Time or Distance Not Essential. — The legislature in 1975 rejected the determinations in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973), and in State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974), to the effect that where the State relies upon asportation of the victim to establish a kidnapping, the asportation must be for a substantial distance, and where the State relies upon "dominion and control," i.e., "confinement" or "restraint," such must continue "for some appreciable period of time." Thus, it was clearly the intent of the legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966); State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Threats and intimidation are equivalent to the use of actual force or violence. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

The crime of kidnapping is frequently committed by threats and intimidation and appeals to fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966); State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert.

denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Proof of Actual Force Held Unnecessary. — Where defendant entered victim's car without her permission and ordered her to drive him around, telling her that if she did as he said, no one would be hurt, and victim thought defendant had a pistol under his jacket, a jury could reasonably infer from such evidence that victim acquiesced to defendant's demands because she feared for her safety; it was not necessary for the State to prove use of actual physical force. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

Threats by actions may be more effective than when made by mere words, and defendant's uninvited entrance into the car in itself constituted a threat under this section. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Defendant's conduct on first entering car and in directing the victim where to drive constituted such a threat as to put an ordinarily prudent person in fear for her life or personal safety so as to secure control of her person against her will, and from that point on there was an ample showing of asportation to constitute the crime of kidnapping. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Kidnapping by Means of Fraud Rather Than Force. — The use of fraud instead of force to effect a kidnapping is a violation of the kidnapping statute. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981).

Where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim, and under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The use of fraud, threats or intimidation is equivalent to the use of force or violence so far as a charge of kidnapping is concerned. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The unlawful taking and carrying away of a human being fraudulently is kidnapping within the meaning of this section. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

Trial court properly denied the defendant's motion to dismiss the kidnapping charge because the State presented substantial evidence that the defendant obtained consent from the victim by falsely telling the victim that he was stranded and needed a ride; from this evidence, the jury could infer that the scene of the shooting was not a place to which the victim would normally have gone willingly absent the defendant's fraudulent representations. State v. Davis, 158 N.C. App. 1, 582 S.E.2d 289, 2003 N.C. App. LEXIS 932 (2003).

Consent of Victim Negates Offense. — The term "kidnap," by itself, continues to have a precise and definite legal meaning under subsection (a) of this section, to wit, the unlawful seizure of a person against his will. In short, common sense dictates that one cannot unlawfully kidnap or unlawfully restrain another with his consent. State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982), overruled on other grounds, 317 N.C. 555, 346 S.E.2d 495 (1986).

State Must Prove One of the Purposes in this Section. — Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

The unlawful confinement, restraint, or removal of a person is kidnapping only when it is done for one of the purposes stated in this statute. State v. Ellis, 90 N.C. App. 655, 369 S.E.2d 642 (1988).

Listed Purposes Not Mutually Exclusive. — The purposes specified in subsection (a) of this section are not mutually exclusive. State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982), overruled on other grounds, 317 N.C. 555, 346 S.E.2d 495 (1986).

Only One Purpose Need Be Proved. — Indictments under the kidnapping statute may allege one or several of the purposes set forth in subsection (a), but the State need prove only one purpose in order to sustain its burden of proof as to that element of the crime. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981); State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986); State v. Surrett, 109 N.C. App. 344, 427 S.E.2d 124 (1993).

State Is Restricted to the Purposes Alleged in the Indictment. — The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

Defendant was entitled to a new trial where the trial court instructed the jury on terrorizing under subdivision (a)(3) of this section, while the indictment alleged that the victim was restrained for the purpose of facilitating the commission of a felony or facilitating the flight of any person following the commission of a felony under subdivision (a)(2). State v. Mitchell, 77 N.C. App. 663, 335 S.E.2d 793 (1985), cert. denied, 315 N.C. 594, 341 S.E.2d 35 (1986).

Jury May Only Convict on Theory of Purpose Alleged. — Where the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Therefore, where the indictment charged that defendant kidnapped one victim for the purpose (1) of committing armed robbery and assault on him, and (2) to facilitate his flight after committing the felonies of armed robbery and murder in his crimes against another victim, and in charging the jury the trial judge did not specify either purpose expressed in the indictment, there was error in the vagueness of the judge's charge, because the jury could have convicted the defendant of kidnapping the first victim to facilitate his flight after the armed robbery, a charge not named in the indictment. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981), cert. denied, 463 U.S. 1213, 103 S. Ct. 3552, 77 L. Ed. 2d 1398, rehearing denied, 463 U.S. 1249, 104 S. Ct. 37, 77 L. Ed. 2d 1456 (1983).

Evidence of More Than One Purpose Where Indictment Charges Only One. — So long as the evidence proves the purpose charged in the indictment, the fact that it also shows that the kidnapping was effectuated for another purpose enumerated in subsection (a) of this section is immaterial and may be disregarded. State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982), overruled on other grounds, 317 N.C. 555, 346 S.E.2d 495 (1986).

Evidence of Purpose Held Sufficient. — When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim; because defendant's misrepresentation was clearly calculated to mislead and did in fact mislead, defendant's actions constituted a false pretense and the "purpose" element of the kidnapping charge was satisfied. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Exposure to Danger Not Involving an Enumerated Purpose Is Not Kidnapping. — Regardless of the danger to which the victims are exposed, unless the purpose of the exposure is either felonious, or otherwise enumerated, and not merely unlawful, the statutory crime of kidnapping has not been committed. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

It is not necessary for the unlawfulness to exist from the beginning of the transaction. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Accomplishment of Purpose Not Essential. — It is not necessary under this statute to show that the kidnapping accomplished its purpose. State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

What Intent Is Required. — This section makes it a crime for a person to confine, restrain or remove a person for any of the eight separate purposes set forth therein; and in order to be guilty of kidnapping the defendant must have formed the intent to do one of these eight purposes at the time he confined, restrained or removed the victim. State v. Moore, 74 N.C. App. 464, 328 S.E.2d 864, modified on other grounds, 315 N.C. 738, 340 S.E.2d 401 (1986).

How Long Intent Must Be Retained. — The offense of kidnapping with intent to rape does not require that defendant retain the intent throughout the offense, but if he, at any time during the kidnapping, has an intent to gratify his passion upon the victim, notwithstanding any resistance on her part, the defendant would be guilty of the offense. State v. Franks, 74 N.C. App. 661, 329 S.E.2d 717, cert. denied, 314 N.C. 333, 333 S.E.2d 493 (1985); State v. Whitaker, 76 N.C. App. 52, 331 S.E.2d 752 (1985), modified on other grounds, 316 N.C. 515, 342 S.E.2d 514 (1986).

Offense of kidnapping with intent to commit rape was complete if defendant at any time during the confinement had the requisite intent; it was immaterial that he changed his mind. State v. Franks, 74 N.C. App. 661, 329 S.E.2d 717, cert. denied, 314 N.C. 333, 333 S.E.2d 493 (1985).

Inferring Intent. — On a charge of kidnapping with the intent to rape, the intent to commit rape may be inferred from the evidence without a showing of an actual physical attempt to have intercourse. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

Aiding and Abetting. — In a prosecution for kidnapping, the defendant could be convicted upon the State's showing that he accompanied the principal during the removal of the victim for the purpose of facilitating the commission of the victim's murder, since the overall circumstances, including the defendant's actual presence throughout the entire criminal episode and the defendant's handing of guns to the actual perpetrators of the murder, warranted the inference that the defendant intended to aid and abet the principal by accompanying him. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

Release of Victim. — Victim released in a "safe place" where she was voluntarily released in a motel parking lot. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

The element of failure to release in a safe place applies to a kidnapping by restraint and confinement, and not just to kidnapping by removal. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Where defendant was indicted for first-degree kidnapping, but the arrest warrant charged him with second-degree kidnapping, the trial court properly denied defendant's attempt to admit evidence of the arrest warrant since it had no relevance on the issue of defendant's guilt or whether the victim was released in a ""safe place," because the allegations of an arrest warrant do not necessarily ""frame" what is relevant to a particular criminal case tried upon an indictment. State v. Corbett, 168 N.C. App. 117, 607 S.E.2d 281, 2005 N.C. App. LEXIS 146 (2005), aff'd, — N.C. —, 624 S.E.2d 625 (2006).

Aggravating Circumstance to Felony Murder. — Trial court did not err in allowing the jury to find as an aggravating circumstance that a murder was committed during a kidnapping where the evidence showed that, after the elderly victim invited defendant into his home, defendant grabbed the victim, choked him until he became unconscious, bound him, covered his face in tape, and left him to die from asphyxiation under a bed before defendant then ransacked the victim's home and left with cash, other personal items, and the victim's car. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Evidence held sufficient to be submitted to the jury on the charge of kidnapping. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956), overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969); State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977); State v. Hoots, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

Where a motorist who invited a hitchhiker to ride with him is compelled by the force and intimidation exerted upon him by the hitchhiker to abandon his own desired course of travel and to drive his car as commanded by the hitchhiker, there is a kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Evidence that after defendant had shot at victim's car several times, he got into the car and slapped her twice, and that then the car pulled down a dirt road, viewed in the light most favorable to the State, permitted a reasonable inference that defendant unlawfully confined the victim in her car. State v. Strickland, 321 N.C. 31, 361 S.E.2d 882 (1987).

Evidence in trial for sexual offenses against three minor teenage boys held sufficient for the jury properly to infer a lack of parental consent to the defendant's alleged confinement, restraint or removal of victim. State v. Gross, 104 N.C. App. 97, 408 S.E.2d 531, cert. denied, 330 N.C. 444, 412 S.E.2d 78 (1991).

There is substantial evidence from which the jury could infer the victim was kidnapped where the defendant called her into a room, locked the door, and physically restrained her. State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245, cert. denied, 332 N.C. 670, 424 S.E.2d 414 (1992).

Where defendant forced victim into his car despite her screams, fighting, and struggling with him, demanded that she lay down and be quiet, where victim's screams were heard by others in the parking lot and she stated that she was "scared to death" and crawled out of the window of defendant's moving vehicle and where defendant attempted to prevent her escape by driving the vehicle at a speed of between fifteen and twenty miles per hour while struggling to hold the victim in the car, this evidence would support a finding that the defendant intended by his actions and commands to put the victim in a state of intense fright or apprehension; the fact that he did not have the opportunity fully to carry out his intentions because of her fortunate and speedy escape was of no avail. State v. Surrett, 109 N.C. App. 344, 427 S.E.2d 124 (1993).

Substantial evidence found that the victim-infant was unlawfully confined, restrained and removed within the meaning of this section. State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (1993).

The removal of a clerk from the part of a convenience store where the money was kept to some other location was sufficient to support the charge of kidnapping. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

Removal of a victim from one location to another prior to murdering her supported a charge of kidnapping. State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994).

Substantial evidence, including the contents of victim's stomach, the motive, the weapon, the fact that defendant looked into who owned defendant's car, parked outside his former girl friend's house, the fact that he had his car painted and cleaned after victim disappeared, Mitochondrial DNA sequencing, and other circumstances, supported the conviction of defendant under G.S. 14-17 and this section. State v. Underwood, 134 N.C. App. 533, 518 S.E.2d 231 (1999), cert. dismissed, 352 N.C. 669, 535 S.E.2d 33 (2000).

Evidence showed the required restraint for kidnapping where an inference could be made that defendant fraudulently induced the victim to return to his apartment by assuring her that he would help her, fraudulently induced her to enter his bedroom, and once there, restrained her, brandished a knife, and threatened either to have sex with her or to kill her. State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551, 2002 N.C. App. LEXIS 288 (2002).

Testimony that the victim's mother did not give the victim permission to go with defendant was sufficient to support his conviction for kidnapping. State v. Quinn, 166 N.C. App. 733, 603 S.E.2d 886, 2004 N.C. App. LEXIS 2025 (2004).

Evidence that defendant, a gang member, (1) on one night met with other gang members to participate in an initiation of gang members, (2) participated in obtaining bullets to support gang missions, (3) asked to be allowed to shoot a victim that was abducted by other gang members, and (4) grumbled when he was not chosen to shoot and kill the victim, was sufficient to show that defendant joined with one or more persons to kidnap, rob, assault with a deadly weapon, and attempt to murder the victim, and was constructively present when the crimes were carried out. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Trial court did not err in denying defendant's motion to dismiss the second-degree kidnapping charges, a violation of G.S. 14-39(a), which arose from two separate incidents in which defendant beat and restrained his girlfriend against her will because the evidence was sufficient to support the trial court's denial of defendant's motion to dismiss the charges of second-degree kidnapping. The record showed that the hospital staff that treated defendant's girlfriend testified that defendant restrained his girlfriend by refusing to allow her to seek medical treatment for a broken arm after the first incident, and after the second incident, a police officer testified that the girlfriend told him that defendant had been holding her against her will for days and would not let her contact her family. State v. McCoy, 174 N.C. App. 105, 620 S.E.2d 863, 2005 N.C. App. LEXIS 2289 (2005).

Sufficient evidence supported defendant's conviction of first degree kidnapping, G.S. 14-39, as there was evidence of a mitochondrial DNA match between defendant's parent and two hairs found in the victim's bedroom. This evidence strongly suggested that the assailant was someone in the same maternal line as defendant's parent, and defendant's two brothers were in custody when the attack on the victim took place. State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Pursuant to G.S. 15-144.1, trial court properly declined to instruct a jury regarding assault on a female. Conduct that defendant relied on as supporting assault charge was unrelated to conduct supporting first degree rape under G.S. 14-27.2; however, that conduct supported G.S. 14-39 kidnapping conviction. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Evidence was sufficient to establish that defendant confined, restrained, or removed a victim from one place to another place independent of the restraint required to undertake a rape, such that denial of a motion to dismiss a G.S.14-39 kidnapping charge was proper: (1) defendant threatened the victim with a gun while she was in his car; (2) when she tried to escape, he grabbed her and pulled her back into the car and sprayed her in the face with mace; (3) he drove her away from her car and children and told her that if she tried to jump out, he had his hand on the rifle's trigger and he would kill her; (4) when she jumped out, he stopped the car and again forced her back into the car at gunpoint; (5) he drove to a secluded, wooded area and, only then, committed the rape; (6) defendant deceived the victim into voluntarily going with him that evening by telling her he had something important to show her; and (7) such deceit, unnecessary for the rape, was sufficient to support a conviction of kidnapping. State v. Thomas, — N.C. App. —, 676 S.E.2d 56, 2009 N.C. App. LEXIS 520 (2009).

Evidence Held Insufficient. — Absent evidence indicating how or why defendant got together with victim, or what occurred between the time they were seen together and the time victim was shot, the State failed to prove beyond a reasonable doubt that defendant restrained, confined or removed victim within the meaning of this section, so as to support a conviction on the charge of kidnapping. State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Evidence in case was not sufficient to show that the defendant unlawfully confined, restrained, or removed the victim from one place to another without his consent; thus, it was error to submit to the jury kidnapping as a possible verdict. State v. Skeels, 346 N.C. 147, 484 S.E.2d 390 (1997).

Where there was no evidence regarding the circumstances under which the defendant entered the victim's truck or under what circumstances the victim drove to the area where he was killed it was error to submit kidnapping to the jury as a possible verdict. State v. Skeels, 346 N.C. 147, 484 S.E.2d 390 (1997).

Substantial evidence did not support defendant's kidnapping conviction under G.S.14-39(a) as defendant raped a victim wholly in a guest bedroom, and there was no evidence of confinement, restraint, or removal, other than that which was inherent to the offense of rape itself; thus, the case was remanded for resentencing since defendant's rape and sex offense charges were consolidated. State v. Simmons, 191 N.C. App. 224, 662 S.E.2d 559, 2008 N.C. App. LEXIS 1188 (2008).

Defendant's kidnapping convictions required reversal, because the evidence showed that any confinement or restraint of the named victims was solely to facilitate the commission of the attempted robbery. State v. Yarborough, — N.C. App. —, 679 S.E.2d 397, 2009 N.C. App. LEXIS 1078 (July 7, 2009).

III. HOLDING VICTIM FOR RANSOM OR AS HOSTAGE.

The term "hostage," as used in subdivision (a)(1) of this section, implies the unlawful taking, restraining or confining of a person with the intent that the person or victim be held as security for the performance or forbearance of some act by a third person. State v. Lee, 33 N.C. App. 162, 234 S.E.2d 482 (1977).

To hold a person as hostage means to hold that person as security for the performance or forbearance of some act by some third person. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

Evidence That Victim Was Held as Hostage Held Sufficient. — Although at the time defendant first removed victim from her employer's parking lot his purpose was to convince her to return to him, the evidence was sufficient to support a finding that subsequently the defendant confined the victim as security for prevention of his arrest by law enforcement authorities and to extract from them a promise that he would not go to jail, which constituted holding victim as a hostage within the meaning of the kidnapping statute. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

IV. FACILITATING COMMISSION OF FELONY OR FLIGHT.

No Conviction When Restraint an Inherent Feature of Other Felony. — Under this section, as construed and applied in State v. Fulcher, 294 NC 503, 243 S.E.2d 338 (1978), a person cannot be convicted of kidnapping when the only evidence of restraint is that which is an inherent, inevitable feature of another felony such as armed robbery. State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998).

Where restraint or asportation is not an inherent feature of some other felony, then the unlawful restraint or asportation of a person against that person's will for the purpose of committing a felony is kidnapping. State v. Alston, 61 N.C. App. 454, 300 S.E.2d 857 (1983), rev'd on other grounds, 310 N.C. 399, 312 S.E.2d 470 (1984).

Kidnapping charges were proper under G.S. 14-39(a) because the restraint of the victims through blindfolding and binding the victims on the floor during an armed robbery was not necessary to effectuate the armed robbery of the victims and the victims were placed in greater danger than that inherent in the offense of robbery with a dangerous weapon. State v. Ly, 189 N.C. App. 422, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (2008).

Proof of Intent to Commit a Felony. — When an indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged. Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury. State v. White, 307 N.C. 42, 296 S.E.2d 267 (1982); State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985); State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986).

As substantial evidence allowed a jury to infer that a defendant's removal of a victim through her house was to aid his attempts to rape her, his kidnapping conviction was affirmed. State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657, 2002 N.C. App. LEXIS 1126 (2002).

Felony Need Not Be Committed Against Kidnapping Victim. — It is not necessary that the felony which was facilitated by the kidnapping must also be committed against the victim of the kidnapping, because the statute clearly requires only that the kidnapping facilitate the commission of any felony. State v. Moore, 77 N.C. App. 553, 335 S.E.2d 535 (1985), aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

Felony Involved Need Not Be Specified in Indictment. — An essential element of kidnapping under subdivision (a)(2) of this section is that the confinement, restraint or removal be for the purpose of facilitating the commission of any felony or facilitating escape following the commission of a felony. The requirements of G.S. 15A-924(a)(5) are met for purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape following "a felony." It is not required that the indictment specify the felony referred to in subdivision (a)(2). State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

No Conviction for Kidnapping to Facilitate an Assault Where the Assault Charge was Unsupported by Evidence. — The defendant's kidnapping conviction based on an indictment charging that the defendant kidnapped the victim "to facilitate the commission of a felony" was overturned where; based on the court's earlier finding that the state's assertion that the defendant committed two assaults was unsupported by evidence, it held the kidnapping conviction based on the alleged second assault plain error. State v. Brooks, 138 N.C. App. 185, 530 S.E.2d 849, 2000 N.C. App. LEXIS 601 (2000).

Language of Indictment Upheld. — An indictment alleging that defendant kidnapped victim "by unlawfully confining, restraining, or removing her from one place to another without her consent for the purpose of committing a felony ..." charges the offense in the language of the statute and is sufficient. All of the elements of the crime of kidnapping are clearly alleged in the indictment. The additional "Rape or Robbery" language in the indictment, following "committing a felony," is mere harmless surplusage and may properly be disregarded in passing upon its validity. State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Lesser Included Offenses. — Defendant was improperly convicted of second-degree kidnapping for the purpose of committing the crime of felonious escape because the State failed to prove the elements of felonious escape; however, the jury's verdict of guilty contained all the elements of the lesser included offense of false imprisonment. State v. Miller, 146 N.C. App. 494, 553 S.E.2d 410, 2001 N.C. App. LEXIS 975 (2001).

Evidence held sufficient to convict defendant of kidnapping for the purpose of facilitating the commission of armed robbery. State v. Torbit, 77 N.C. App. 816, 336 S.E.2d 122 (1985), appeal dismissed, 316 N.C. 201, 341 S.E.2d 573 (1986).

Forced removal of clerk to prescription counter of drug store during attempted armed robbery with intent to steal drugs was a mere technical asportation and insufficient to support conviction of separate offense of kidnapping. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

The evidence supported a reasonable inference that defendant removed his victim for the purpose of facilitating an attempt to rape her, where he grabbed her by the throat, ordered her to drive to a secluded, deserted parking lot beside a bus and turn off her taxi's lights, commanded her to pull her pants down to her knees and inquired about her underclothing, and stated his intent to commit at least one manner of sexual attack on her, not necessarily to the exclusion of any other. The jury could have reasonably inferred that, but for the victim's ingenuity and courage, she would have been subjected to attempted forcible sexual intercourse. State v. Whitaker, 316 N.C. 515, 342 S.E.2d 514 (1986).

Evidence held sufficient to show that defendant abducted victim to facilitate attempted robbery of store with a dangerous weapon where it tended to show that while still attempting to complete the robbery he abducted and threatened her in an effort to coerce night manager into turning the store's money over to him. State v. Harlee, 85 N.C. App. 159, 354 S.E.2d 348, cert. denied, 320 N.C. 173, 358 S.E.2d 60 (1987).

Where one of the robbers approached victim, pointed a gun at him, and victim did not move and was not injured the act of threatening with a gun was an inherent inevitable feature of the robbery and was insufficient to support a conviction for kidnapping. State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998).

Where the evidence showed that the victim was transported in her car to the location of the murder, that defendant took the victim's keys, and that he then drove back to and attempted to rob the store amply supports submission of felony murder with kidnapping as the underlying felony. State v. Richardson, 346 N.C. 520, 488 S.E.2d 148 (1997), cert. denied, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 652 (1998).

Evidence was sufficient to support a kidnapping conviction where the kidnapping was based on evidence of the defendant's ruse of luring the victim away from his home to the murder site under the pretense of earning money. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Evidence indicated that defendant's assault on a victim was complete and that defendant then removed the victim to a different location to facilitate defendant's flight from the assault scene. State v. Scott, 161 N.C. App. 104, 587 S.E.2d 485, 2003 N.C. App. LEXIS 1999 (2003), cert. denied, 358 N.C. 158, 593 S.E.2d 398 (2004).

Evidence that defendant first robbed a victim, then forcibly restrained him and moved him about an apartment at gunpoint for use as an interpreter to facilitate the robbery of the apartment's Spanish-speaking occupants, was sufficient to support defendant's conviction under G.S. 14-39(a) because defendant's actions exposed the victim to greater danger than that inherent in the armed robbery of the victim itself. State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348, 2003 N.C. App. LEXIS 1667 (2003), notice of appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 855 (2003).

Defendants' convictions in a joint trial for one count of first degree burglary and five counts of first degree kidnapping were affirmed because defendants and three other men entered a residence and tied up the five people that they found in the residence, hit some of the people that they tied up, took money from one of the people, and unplugged and moved a stereo system that they planned to take with them before police officers arrived upon the scene and arrested defendants. Furthermore, the trial court did not abuse its discretion in denying a motion to sever defendants' trials because of defendants' collective criminal behavior in the commission of the crimes. State v. Escoto, 162

N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Evidence that defendant kidnapped the victim to facilitate the armed robbery, which could not have occurred without the kidnapping, was sufficient to support the denial of defendant's motion to dismiss the kidnapping charge. State v. Bagley, — N.C. App. —, 644 S.E.2d 615, 2007 N.C. App. LEXIS 1162 (2007).

Where defendant restrained a victim and prevented the victim from leaving her home by holding onto her shirt and pulling her back from the door before defendant subsequently committed a robbery of the same victim with a dangerous weapon, a separate conviction of defendant for kidnapping, in violation of G.S. 14-39(a)(2), was proper and not violative of U.S. Const., Amend. XIV and N.C. Const., Art. I, § 19; the restraint and removal of the victim was a distinct criminal transaction that facilitated the accompanying felony offense. State v. Boyce, 361 N.C. 670, 651 S.E.2d 879, 2007 N.C. LEXIS 1104 (2007).

V. DOING BODILY HARM OR TERRORIZING.

The serious injury element of first-degree kidnapping is not limited to a fatal injury. State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988).

Assault as Means and Not Purpose of Kidnapping. — Where there was no evidence of intent to do bodily harm other than the harm that actually was inflicted when defendant struck victim with rifle, and such assault was the means rather than the purpose of the victim's removal, it was error for the trial judge to instruct the jury that it could consider the infliction of serious bodily harm as a purpose for the confinement or removal of the victim. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

Evidence Held Sufficient on Theory of Terrorizing Victim. — Evidence that the defendant held the victim at gunpoint for almost three hours after inflicting a serious head injury upon her, during which time he threatened to shoot himself in her presence and in the presence of their three-year-old son, tried to get her to shoot him, and made threats against her life if she tried to take the children away from him, would support a finding that defendant intended by these actions and threats to put victim in a state of intense fright or apprehension so that she would agree to stay with him, and that he removed her to trailer and confined her there for that purpose. Thus the trial judge's submission of the kidnapping charge to the jury on the theory that a purpose for the confinement or removal was to terrorize the victim was proper. State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

Stabbing with Scissors. — The court properly instructed that the jury could find defendant guilty of first degree kidnapping if, inter alia, the State proved beyond a reasonable doubt that defendant inflicted multiple stabbing and cutting wounds with scissors. State v. Johnson, 320 N.C. 746, 360 S.E.2d 676 (1987).

Kidnapping in Conjunction with Murder. — Trial court did not err in submitting the underlying felony of kidnapping to the jury where defendant abused girlfriend and her child on automobile trip prior to killing the child. State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), cert. denied, 517 U.S. 1197, 116 S. Ct. 1694, 134 L. Ed. 2d 794 (1996).

Evidence Held Sufficient and Jury Unanimity Not Required. — State presented sufficient evidence to survive G.S. 15-173 motion to dismiss kidnapping charges in capital murder case where a defendant and codefendant confined, restrained, or removed the victim for the purpose of doing serious bodily harm to or terrorizing the victim, resulting in serious injury to the victim including putting the victim in the victim's car trunk and then burning the car; the jury was not required to unanimously find any one of the "either/or" kidnapping predicates, as long as there was evidence for them to find at least one of the predicates — "unanimity" was not required. State v. Bell, 359 N.C. 1, 603 S.E.2d 93, 2004 N.C. LEXIS 1126 (2004).

VI. FIRST-DEGREE KIDNAPPING.

Subsections (a) and (b) Must Be Read Together to Determine Elements of First-Degree Kidnapping. — By amending subsection (b) of this section, the legislature manifested its intent that there would be two degrees of kidnapping. The language of subsection (a) creates and defines the offense of kidnapping. The language of subsection (b) addresses the degree of the crime. The two subsections must be read together to determine the elements of first-degree kidnapping. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

The language of subsection (b) of this section states essential elements of the offense of kidnapping in the first degree and does not relate to matters in mitigation of punishment. To properly convict a defendant of kidnapping in the first degree, the State must allege and prove the applicable elements of both subsections (a) and (b) of this section. State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

Illustrative Case. — Trial court's refusal to dismiss the charges of first-degree kidnapping or to lower the charges to second-degree kidnapping was proper where: (1) defendant ordered two victims into the woods at gunpoint, where he bound their hands and wrapped their faces with duct tape; (2) defendant repeatedly threatened to kill the men if they did not comply with his demands; and (3) defendant left the victims bound and gagged in the woods at nighttime. State v. Pratt, 152 N.C. App. 694, 568 S.E.2d 276, 2002 N.C. App. LEXIS 970 (2002).

Failure to Release Victims in a Safe Place. — First-degree kidnapping charges under G.S. 14-39(b) were proper because defendants in robbing the victims committed no affirmative or wilful act to release the victims in a safe place, but instead departed the victims' home leaving the victims bound, blindfolded, and without access to a telephone. State v. Ly, 189 N.C. App. 422, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (2008).

Failure to Leave Child in a Safe Place. — Defendant's motion to dismiss the first-degree kidnapping charge was properly denied; there was sufficient evidence to find that defendant did not leave the child in a safe place where defendant left the child in the middle of the night in an isolated, rural, wooded area with which the child was unfamiliar. State v. Sakobie, 157 N.C. App. 275, 579 S.E.2d 125, 2003 N.C. App. LEXIS 645 (2003).

What Must Be Alleged in Indictment for First-Degree Kidnapping. — In order to properly indict a defendant for first-degree kidnapping, it is necessary for the State to allege both the essential elements of kidnapping as provided in subsection (a) of this section and at least one of the elements of first-degree kidnapping listed in subsection (b) of this section. State v. Bell, 311 N.C. 131, 316 S.E.2d 611 (1984).

In order for the State to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of both subsection (a) and subsection (b). State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983); State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985); State v. Moore, 316 N.C. 328, 341 S.E.2d 733 (1986).

This section, as amended in 1979, expressed the General Assembly's intent for an indictment for first-degree kidnapping to allege the applicable elements of both subsections (a) and (b). State v. McCullough, 79 N.C. App. 541, 340 S.E.2d 132, cert. denied, 316 N.C. 556, 344 S.E.2d 13 (1986).

Factual Basis Must Be Alleged. — Unlike the short-form indictments authorized for homicide and rape, an indictment charging first-degree kidnapping must include information regarding the factual basis under which the State intends to proceed, and the State is limited to that factual basis at trial. State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984).

Evidence of First-Degree Kidnapping Was Separate From that Used to Show Aggravation Factor. — Same item of evidence was not used to prove both an element of the offense and an aggravating factor for purposes of sentencing defendant for first-degree kidnapping, resulting in serious injury where: (1) defendant pushed the victim off of the porch and shot him; (2) the victim fell to the ground but was unable to get up because he had been shot; (3) the victim was paralyzed as a result of the shooting; (4) the evidence that the victim had been shot was sufficient to prove the serious injury element of first-degree kidnapping; and (5) the evidence that the victim was paralyzed as a result of the shooting was the additional evidence that supported the finding of the aggravating factor. State v. Jones, 158 N.C. App. 498, 581 S.E.2d 103, 2003 N.C. App. LEXIS 1178 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003), cert. denied, — U.S. —, 124 S. Ct. 30, 156 L. Ed. 2d 692 (2003).

Reduction of Offense Where Elements of Subsection (b) Not Set Out or Submitted. — Where indictment sufficiently alleged the elements set forth in subsection (a) of this section, which are necessary to sustain a conviction for second-degree kidnapping, but did not allege that the victim was not released in a safe place, seriously injured or sexually assaulted, and the evidence was not only sufficient to convict for the lesser included offense, but the higher offense as well, the conviction for first-degree kidnapping would be vacated and the case remanded for an entry of a verdict for second-degree kidnapping, upon which defendant would be resentenced. State v. McCullough, 79 N.C. App. 541, 340 S.E.2d 132, cert. denied, 316 N.C. 556, 344 S.E.2d 13 (1986).

Indictment which did not allege in particular that victim was sexually assaulted, seriously injured, or not released in a safe place was insufficient to charge kidnapping in the first degree. State v. Moore, 315 N.C. 595, 341 S.E.2d 35 (1986), holding however, that it was a valid second-degree kidnapping indictment.

Where the trial court failed to submit the essential element of kidnapping in the first degree, but the court essentially submitted to the jury the offense of kidnapping in the second degree, the jury's verdict of kidnapping in the first degree would be considered a verdict of guilty of kidnapping in the second degree. State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984).

When Conviction on First-Degree Kidnapping as Well as Sexual Offense Is Not Permissible. — Where, in finding defendant guilty of first-degree kidnapping, the jury must have relied on the crimes of rape or sexual offense of which he was also convicted to satisfy the sexual assault element, defendant was unconstitutionally subjected to double punishment under statutes proscribing the same conduct. State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986).

Defendants' convictions for both first-degree kidnapping and rape violated prohibition against double jeopardy where rape of one victim was the only sexual assault which could have formed the "sexual assault" element of first-degree kidnapping convictions involving her and where defendants were indicted for and convicted of only one first-degree rape and first-degree sex offense against another victim. State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986), overruled in part, State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997).

Defendant could not be convicted and sentenced for first-degree kidnapping as well as for first-degree rape and first-degree sexual offense, where he was convicted of first-degree kidnapping on the basis that he had sexually assaulted the victim during the kidnapping. State v. Mason, 315 N.C. 724, 340 S.E.2d 430 (1986), remanding for a new sentencing hearing so the trial court could arrest judgment on the first degree kidnapping conviction and resentence for second degree kidnapping, or arrest judgment on one of the sexual assault convictions.

The legislature did not intend a defendant to be convicted and punished for both first-degree kidnapping and the underlying sexual assault. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

Where there was only one sexual assault, the second-degree rape of the victim, which could have formed the "sexual assault" element of the first-degree kidnapping conviction, and since the rape was used to raise the kidnapping to first-degree, the defendant was convicted more than once for the same offense in violation of the prohibition against double jeopardy. Therefore, the case would be remanded to the trial court for a new sentencing hearing, to either arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or arrest judgment on the second-degree rape conviction. State v. Walker, 84 N.C. App. 540, 353 S.E.2d 245 (1987).

A defendant cannot be separately convicted for both first degree kidnapping and the underlying sexual assault under subsection (b) of this section without violating both the U.S. Constitution and N.C. Const. Art. 1, § 19. State v. White, 127 N.C. App. 565, 492 S.E.2d 48 (1997).

Restraint Must be Separate and Apart From that Inherent in Committing Other Felonies. — Under this section "restraint" connotes restraint separate and apart from that inherent in the commission of the other felony, and the key question is whether the victim is exposed to greater danger than that inherent in the other felony itself or subjected to the kind of danger this section was designed to prevent. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

The evidence showed restraint of the victim separate and apart from the restraint inherent in commission of armed robbery, where the robbery/murder victim was found lying bound and gagged on the floor, which the elements of armed robbery did not require. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

Defendant's kidnapping conviction was vacated because there was insufficient evidence of confinement, restraint, or removal of the victim beyond that which was inherent to the additional crimes of armed robbery and rape. The victim's testimony was that defendant grabbed the victim by her arm, pushed her back into her kitchen, pulled out a knife and demanded money, pushed the victim through a hall and into a den where he raped her, and left when the victim gave him her money. State v. Cartwright, 177 N.C. App. 531, 629 S.E.2d 318, 2006 N.C. App. LEXIS 1076 (2006), review denied, 360 N.C. 578, 635 S.E.2d 902 (2006).

In defendant's prosecution for first-degree kidnapping under G.S. 14-39(a), defendant was not entitled to have the jury instructed on second-degree kidnapping because the evidence showed three robbers, including defendant, bound the victims' hands with duct tape and left the victims bound in the victims' hotel room after the robbers fled, so defendant did not release the victims in a safe place unharmed pusuant to G.S. 14-39(b), and sufficient evidence showed the robbers restrained the victims for the purpose of committing felony robbery with a dangerous weapon, so an instruction on first-degree kidnapping was supported but an instruction on second-degree kidnapping was not. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Defendant's act of pinning the victim down on the bed by pushing defendant's knee into the victim's chest, defendant's grabbing of the victim's hair, and defendant's preventing the victim from leaving the motel room were separate and independent acts from his assaulting her by means of strangulation, and thus were sufficient to support the charge of first-degree kidnapping. State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637, 2007 N.C. App. LEXIS 834 (2007).

Sentence Violated Double Jeopardy. — Defendant was improperly convicted of first degree kidnapping and first degree rape where the first degree kidnapping conviction arose from the same sexual assault which was the basis of the first degree rape conviction. State v.

Wiggins, 136 N.C. App. 735, 526 S.E.2d 207, 2000 N.C. App. LEXIS 149 (2000).

When Conviction of First-Degree Kidnapping as Well as Sexual Offense Is Permitted. — Where verdict explicitly showed that what raised the kidnapping charge to first-degree was not the sexual assault, but that defendant did not release the victim in a safe place, defendant could be convicted of both first-degree kidnapping and sexual assault. State v. Chambers, 92 N.C. App. 230, 374 S.E.2d 158 (1988), cert. denied and appeal dismissed, 324 N.C. 338, 378 S.E.2d 800 (1989).

The evidence showed that the rape-murder victim was unlawfully moved from one place to another without her consent for the purpose of committing first-degree rape, and thus, supported the first-degree kidnapping conviction, where a door in the victim's apartment indicated forced entry, her car had not been moved and her clothing was inappropriate, and the defendant's semen was found in her vagina. State v. Trull, 349 N.C. 428, 509 S.E.2d 178, 1998 N.C. App. LEXIS 852 (1998), cert. denied, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999).

State Has Burden to Show Factors Which Would Increase Punishment. — The State has the burden of proof concerning those factors in this section which would subject the defendant to increased punishment. Where the State alleges in the bill of indictment the additional factor that will support the increased punishment, the State has accepted the burden of proof as to that factor. State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 578, 251 S.E.2d 462 (1979).

In order for the State to subject a defendant to a punishment of greater than 25 years (now punishment as a Class D felon) upon conviction of kidnapping, the State must allege and prove beyond a reasonable doubt that in the course of the kidnapping the defendant either sexually assaulted the victim, or seriously injured the victim, or released the victim in an unsafe place. State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 578, 251 S.E.2d 462 (1979).

Evidence Insufficient to Support Sentence. — While defendant assumed a leadership position in committing the offenses of kidnapping and rape, there was insufficient evidence that defendant acted with more than one other person or that defendant was in a position of trust and confidence with the victim; thus, the trial court's imposition of a sentence in excess of the presumptive range was erroneous and an abuse of discretion. State v. Rogers, 157 N.C. App. 127, 577 S.E.2d 666 (2003).

Resentencing Warranted. — Because the trial court erred in sentencing defendant for both first-degree kidnapping and first-degree rape, as the same sexual assault served as the basis for both convictions, the matter was remanded for resentencing. On resentencing, the trial court could either: (1) arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or (2) arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction. State v. Daniels, 189 N.C. App. 705, 659 S.E.2d 22, 2008 N.C. App. LEXIS 711 (2008).

Evidence Sufficient to Withstand Motion to Dismiss. — Motion to dismiss the kidnapping charges was properly denied where the state's evidence was sufficient to allow the jury to consider whether the victims had been released to a safe place and to allow the jury to conclude that defendant committed the acts of confinement, removal, or restraint with respect to each victim, separate and independent of defendant's commission of burglary and armed robbery. State v. Anderson, 181 N.C. App. 655, 640 S.E.2d 797, 2007 N.C. App. LEXIS 410 (2007).

Defendant was properly convicted of first-degree kidnapping under G.S. 14-39(b), apart from the armed robbery defendant also committed, because when defendant and defendant's co-defendants bound the victims, the victims were placed in greater danger than the restraint and removal inherent in armed robbery, and there was no affirmative or wilful action on the part of defendants to "release" the victims. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Evidence Sufficient to Support Conviction. — There was strong evidence that defendant committed two counts of first degree kidnapping where according to defendant, another individual told two men to get out of the car, they were taken into the woods out of sight of the road and that an individual told them to take off their clothes and they were found only partially clothed and at that time another individual shot both men to death. State v. Villatoro, — N.C. App. —, 666 S.E.2d 838, 2008 N.C. App. LEXIS 1737 (2008).

No Double Jeopardy in Case Involving Convictions of Kidnapping and Assault with a Deadly Weapon Inflicting Serious Injury. — Where defendant dragged his wife by the hair into the house and then beat her with his gun, defendant's convictions of first-degree kidnapping in violation of G.S. 14-39(a) and assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b) did not violate double jeopardy under N.C. Const. art. I, § 19; the restraint and removal of the wife, which was the act of dragging her into the house, were separate from the commission of the assault, which was the act of beating the wife with the gun once the kidnapping had been completed. State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

VII. SECOND-DEGREE KIDNAPPING.

A. In General.

Release in Safe Place by Defendant Must Be Voluntary. — While it is true that subsection (b) of this section does not expressly state that defendant must voluntarily release the victim in a safe place, a requirement of "voluntariness" is inherent in the statute. The language "in a safe place by the defendant" implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety. State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Release Held Not "Voluntary" Nor in a "Safe Place." — Releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not "voluntary" and sending a victim out into the focal point of the officers' weapons is not a "safe place." State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992).

The crime of second-degree kidnapping was complete, irrespective of the fact that defendant went on to commit the crime of first degree rape, where, defendant forced the victim into the store restroom, tied her hands with cable, and thus procured her submission and restrained her within the meaning of this section with the purpose of committing rape. State v. Hill, 116 N.C. App. 573, 449 S.E.2d 573, cert. denied, 338 N.C. 670, 453 S.E.2d 183 (1994).

It was plain error to instruct the jury on kidnapping under G.S. 14-39(b) since: (1) if any burglary occurred, it was completed before the restraint, (2) the burglary was complete as soon as defendant kicked down the front door and entered the victim's residence with the intent to murder, (3) the kidnapping was not complete until defendant and co-defendants unlawfully restrained the victims by ordering them at gunpoint to lie on the ground, and (4) the felony that was the only alleged purpose for the kidnapping occurred before, not after, the kidnapping; however, evidence showing that the victims were held at gunpoint in the kitchen was sufficient to find that the victims were both "restrained" and "confined" for purposes of kidnapping. State v. Jordan, 186 N.C. App. 576, 651 S.E.2d 917, 2007 N.C. App. LEXIS 2270 (2007).

The evidence was sufficient to prove specific intent as required by this section where the defendant, while brandishing a gun, confined his wife in her apartment against her will for close to twenty hours and intermittently threatened to kill himself. State v. Baldwin, 141 N.C. App. 596, 540 S.E.2d 815, 2000 N.C. App. LEXIS 1401 (2000).

The evidence was sufficient to show that the defendant acted with the purpose of terrorizing the victim where he called her twice, entered her home uninvited, punched her repeatedly and pointed a gun in her face, followed her when she fled to a neighbor's house, made the neighbor lie on the floor while he pushed a table against her, choked her, and dragged her outside. State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474, 2000 N.C. App. LEXIS 1402 (2000), cert. dismissed, 353 N.C. 731, 551 S.E.2d 112 (2001).

Trial court did not err in denying defendant's motion to dismiss the charge of second-degree kidnapping as the evidence that defendant grabbed the victim on the street at night, attempted to drag the victim to some bushes, wrestled with and sexually molested the victim, fled from the scene when the police were called by a woman who heard the victim screaming, and that the victim was emotionally upset and distraught when the police arrived and when she saw defendant at a showup identification about 30 minutes later was sufficient for the jury to conclude that defendant acted with the purpose of terrorizing the victim. State v. Harrison, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), aff'd, — N.C. —, 627 S.E.2d 461 (2006).

Sufficient Evidence of Restraint. — All of the elements for second-degree kidnapping were met. State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993).

Where the evidence showed that, after shooting victim, a pawnshop clerk, defendant pointed his gun at victim's girl-friend and ordered her to get down on the floor and crawl towards back room, conviction of second-degree kidnapping for the purpose of terrorizing would be upheld. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Where evidence was sufficient to establish that the blows used for restraint were separate and apart from the blows causing death, trial court did not err in denying motion to dismiss second-degree kidnapping charge. State v. Stroud, 345 N.C. 106, 478 S.E.2d 476 (1996), cert. denied, 522 U.S. 826, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997).

There was sufficient evidence of victim's "restraint" during an armed robbery to warrant a second degree kidnapping conviction, where the victim was physically forced into the living room from a bedroom to prevent him from hindering the defendant and his accomplice from robbing the other victims. State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

Trial court did not err in submitting second-degree kidnapping charge to the jury where there was sufficient evidence of an independent act; the evidence permitted a reasonable inference that defendant fraudulently coerced victim into remaining with him in car so that he could drive to a secluded place (the cemetery), get high on marijuana, and then sexually assault her. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

Trial court did not err in denying defendant's motion to dismiss his second-degree kidnapping charge and there was sufficient evidence that defendant restrained the victim for the purpose of facilitating a felony where there was sufficient evidence from which the jury could find that defendant intended to rape the victim; further, the evidence of restraint forming the basis of the kidnapping charge was independent of the restraint inherent in the attempted rape charge as defendant pushed the victim down the hallway of her residence, away from her sister's bedroom, into her bedroom and pinned her on her bed, which constituted evidence that defendant took the victim to a more secluded area to prevent others from witnessing or hindering the rape. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

After threatening a victim with a knife and blinding her by taping her eyes shut, defendant penetrated the victim vaginally from the front, then withdrawing, turning her on her side and re-penetrating her vaginally; here, there was sufficient evidence to show that defendant committed two separate acts of first degree rape such that defendant's motion to dismiss the second count of first degree rape and defendant's motion to dismiss the second degree kidnapping charge were properly denied. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Evidence that defendant restrained three young children under the age of 16 in an apartment bedroom while defendant and an accomplice searched for drugs and money during a robbery sufficiently supported defendant's conviction for second-degree kidnapping in violation of G.S. 14-39. As a result, and because the jury was properly instructed regarding the charge, the trial court did not have grounds to dismiss the charge. State v. Sapp, — N.C. App. —, 661 S.E.2d 304, 2008 N.C. App. LEXIS 1098 (2008).

Evidence Sufficient to Support Conviction. — Trial court properly denied defendant's motion to dismiss and properly convicted defendant of second-degree kidnapping; testimony from the victim and other witnesses showed that defendant grabbed the victim while he was seated inside his car, threw the victim to the ground, knocked the victim onto the hood of his car, and that the victim could not flee from defendant because defendant continued to hold the victim while assaulting him, therefore, there was sufficient evidence that defendant restrained and terrorized the victim as required by the kidnapping statute. State v. Washington, 157 N.C. App. 534, 579 S.E.2d 463, 2003 N.C. App. LEXIS 728 (2003).

Evidence that defendant restrained the victim when defendant stood by the door of the victim's apartment after the victim asked defendant to leave, thereby confining the victim inside, was sufficient to support a second-degree kidnapping charge and withstand defendant's motion to dismiss. State v. Johnson, — N.C. App. —, 646 S.E.2d 123, 2007 N.C. App. LEXIS 1169 (2007).

Insufficient Evidence of Restraint. — There was insufficient "restraint" of the victims during a robbery to warrant convictions for second degree kidnapping, where the victims were held at gunpoint during the robbery, but were not moved or injured in any way. State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

Evidence Insufficient to Sustain Removal Requirement. — Conviction for second-degree kidnapping was vacated in case where removal to victim's bedroom was an inherent part of armed robbery. State v. Ross, 133 N.C. App. 310, 515 S.E.2d 252 (1999).

Trial court erred in denying defendant's motion to dismiss a second- degree kidnapping charge under G.S. 14-39(a)(2) where defendant's act of pushing a convenience store clerk toward the register during a robbery did not expose her to a greater danger than inherent in an armed robbery, and thus was insufficient to support the charge. State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610, 2006 N.C. App. LEXIS 50 (2006).

Evidence was not sufficient to sustain defendant's convictions for 10 counts of second degree kidnapping because the State's evidence of kidnapping established only the elements of the crime of robbery with a dangerous weapon with the lone added component of the victims' being required to lie down on the floor and that lone act was a mere technical asportation. State v. Taylor, 191 N.C. App. 561, 664 S.E.2d 375, 2008 N.C. App. LEXIS 1476 (2008).

Where the evidence showed that after a child had finished urinating, defendant entered the restroom stall he occupied, closed the door, and molested the child, as defendant effectively restricted the child's ability to leave the stall and removed him from the view of others in the restroom who might hinder the commission of the offense, the evidence was sufficient to allow a jury to find that defendant confined the child within the stall for the purpose of facilitating defendant's taking indecent liberties with him, in violation of G.S. 14-39. State v. Shue, 163 N.C. App. 58, 592 S.E.2d 233, 2004 N.C. App. LEXIS 264 (2004), cert. denied, 358 N.C. 380, 597 S.E.2d 773

(2004), cert. dismissed, notice of appeal dismissed, — N.C. —, 623 S.E.2d 38 (2005).

No double jeopardy implications arose from convictions for second degree kidnapping, first degree burglary, and felonious larceny because the trial court arrested judgment on the common-law robbery charge, which eliminated any possibility of the defendant being punished twice for the restraint involved in the common-law robbery and second degree kidnapping. Moreover, the only force inherent in burglary or in larceny pursuant to a breaking and entering was forcible entry into the property, which was achieved when the intruders forced the door open and not by pushing the victim to the floor of the victim's apartment and holding the victim there. State v. Cousar, — N.C. App. —, 660 S.E.2d 902, 2008 N.C. App. LEXIS 1076 (June 3, 2008).

Evidence Insufficient to Show Removal and Restrain Were Not Inherent Part of Robbery. — Defendant's two convictions for second degree kidnapping were reversed, because the removal and restraint of the victims was an inherent part of the robbery and did not expose the victims to a greater danger than the robbery itself; while the victims were ordered to bathroom, neither were bound or physically harmed and they were only in bathroom for 10 to 15 minutes while defendant and the others completed the robbery. State v. Payton, — N.C. App. —, 679 S.E.2d 502, 2009 N.C. App. LEXIS 1176 (July 21, 2009).

B. Mitigating Factors in Subsection (b).

***Editor's Note.** — All of the following cases concerning sentencing under subsection (b) were decided prior to July 1, 1981, the effective date of the 1979 amendment to this section, which rewrote subsection (b) so as to create two degrees of the offense of kidnapping, and which substituted felony classifications for each degree of kidnapping for former provisions concerning minimum and maximum sentences.*

Purpose of Subsection (b). — Subsection (b) of this section seeks to reduce the possibility of harm to a victim who is in an already dangerous situation. In other words, it is intended to offer a kidnapper the inducement of a lesser sentence if he refrains from injuring or permitting injury to his victim. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

It is reasonable to assume that the General Assembly had a purpose similar to that of the Model Penal Code, which was to maximize the kidnapper's incentive to return the victim alive, in providing reduced punishment under subsection (b) of this section when the victim has been released in a safe place and has not been sexually assaulted or seriously injured. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Nature of Mitigating Factors. — The mitigating factors in subsection (b) of this section are not the antithesis of any essential element of the crime of kidnapping. Proof of these factors does not negate any element of the crime of kidnapping which the State must prove. The mitigating factors are, in reality, pleas in avoidance or mitigation of punishment and not pleas in negation. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

No Jury Determination Required. — Since the mitigating factors to be found under subsection (b) of this section relate solely to the severity of the sentence and not to any element of the offense itself, a defendant is not entitled to a jury determination under either the federal or State Constitution. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Determination Made by Judge. — The judge may make the determination with regard to the existence of the factors in subsection (b) of this section relating to sentencing from evidence adduced at the trial of the kidnapping case itself or at the sentencing hearing provided for in G.S. 15A-1334 following the trial, or at both proceedings. If at either or both proceedings evidence of the existence of the mitigating factors has been presented, the judge must consider this and all other evidence bearing on the question. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Since the mitigating factors in subsection (b) of this section are not elements of any substantive criminal offense, but bear solely on the question of punishment, having the judge determine these matters is not violative of N.C. Const., Art. I, § 24. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Normally a jury need only determine whether a defendant has committed the substantive offense of kidnapping as defined in subsection (a) of this section. The factors set forth in subsection (b) of this section relate only to sentencing; therefore, their existence or nonexistence should properly be determined by the trial judge. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980); State v. Boone, 302 N.C. 561, 276 S.E.2d 354 (1981).

No Findings Required. — If no evidence either at trial or at the sentencing hearing is adduced tending to show the existence of the mitigating factors in subsection (b) of this section, then the judge, without making findings, may proceed to impose a sentence. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Same — Where Separate Criminal Charges Are Tried Jointly with Kidnapping. — When the question of the existence of the mitigating factors in subsection (b) of this section has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty, there is no need for the judge to make separate findings. The nonexistence of mitigating factors will already have been determined beyond a reasonable doubt. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

The trial court properly sentenced defendant to life imprisonment for kidnapping without making findings of fact concerning the mitigating circumstances as to whether the victim was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, where charges of kidnapping and assault with intent to commit rape were submitted to the jury, the jury found defendant guilty of both charges, and the nonexistence of the mitigating factors of subsection (b) of this section was thus already established beyond a reasonable doubt. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

The State may stipulate to the presence of all the mitigating factors in subsection (b) of this section and thereby avoid determination of the question. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Evidence permitted jury reasonably to infer that victim was not "released by the defendant in a safe place" within the meaning and intent of that phrase as used in subsection (b) of this section when the defendant at approximately 5:00 on a mid-January morning released the victim at an intersection located nine-tenths of a mile from a shopping mall. State v. Sutcliff, 322 N.C. 85, 366 S.E.2d 476 (1988).

VIII. CHARGE AND INDICTMENT, GENERALLY.

Prosecutorial Discretion in Choice of Crime. — When kidnapping, by definition, overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the naked and arbitrary power to choose the crime for which he will prosecute. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Allowing Amendment of Indictment Erroneous. — Allowing the state to change the alleged purposes of the "confinement, restraint or removal" in an indictment charging defendant with kidnapping was erroneous because the amendment was a substantial alteration that unfairly prejudiced defendant; among other things, the inclusion of the allegation that the victim "was seriously injured" was intended to elevate crime to first degree. State v. Morris, 185 N.C. App. 481, 648 S.E.2d 909, 2007 N.C. App. LEXIS 1802 (2007).

State Held Not Required to Elect Between Charges. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles, where he was robbed, there was sufficient asportation and evidence to support both kidnapping and armed robbery, and the State was not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (1974).

Consolidation of Charges. — Where kidnapping and assault charges arose out of the same transaction, and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible under G.S. 15-152 (now G.S. 15A-926(a)). State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Charge May Be Confined to "Kidnapping by Unlawful Restraint". — Since "confinement" and "restraint" are practically synonymous, and there must be restraint if there is confinement, and since unlawful removal from one place to another must involve unlawful restraint, in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

Indictment Using Common-Law Definition No Longer Sufficient. — An indictment which would have been sufficient under this section prior to the 1975 amendment because the term "kidnap" was given the common-law definition did not allege the elements required under this section, which statutorily defines kidnapping and supersedes the common-law definition of kidnapping. The indictment could not be considered sufficient even to charge common-law kidnapping as a lesser included offense. State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978).

In a kidnapping case, the indictment must allege the specific purposes on which the State intends to rely; the State is furthermore restricted to proving those purposes alleged in the indictment. State v. McClain, 86 N.C. App. 219, 356 S.E.2d 826 (1987).

As to indictments held sufficient prior to the 1975 amendment, see State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

State Must Allege Transportation. — The legislature's proclamation in G.S. 14-43.3 that felonious restraint is a lesser included offense of kidnapping does not relieve the State of its duty to allege in the kidnapping indictment that the defendant transported the victim by motor vehicle or other conveyance. State v.

Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

Where indictment charged that defendant committed kidnapping only by unlawfully removing the victim "from one place to another," trial judge's instruction that defendant could be convicted if he simply unlawfully restrained the victim was error. State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986).

Where indictment for kidnapping specified armed robbery as the underlying felony, defendant could be convicted of kidnapping based on the underlying felony of common-law robbery. State v. Parker, 81 N.C. App. 443, 344 S.E.2d 330 (1986).

Where the elements of restraint and removal of victims were not an inherent part of robbery conviction, defendant's motion to dismiss first and second degree kidnapping charges was properly denied. State v. Warren, 122 N.C. App. 738, 471 S.E.2d 667 (1996).

Where trial judge submitted case to the jury on alternative theories, one of which was determined to be erroneous and the other properly submitted, and the appellate court could not discern from the record the theory upon which the jury relied, the court would remand for a new trial on the charge of second-degree kidnapping. State v. Getward, 89 N.C. App. 26, 365 S.E.2d 209 (1988).

Confining, Restraining And/Or Removing. — The trial court's use of the disjunctive "or" in the jury instruction on kidnapping was not error although the indictment used the conjunctive "and" to describe the State's allegations because substantial evidence supported any of the three methods set out in the indictment: confining, restraining and/or removing where the evidence showed that the defendant bound the victim's hands behind her back with wire ties, dragged her approximately 15 feet and forced her into a storage closet where he left her while he returned to the front office to empty the cash register, then returned and bound the her ankles with wire ties before raping her twice. State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000).

Instructing Jury on a Theory Unsupported by the Indictment. — Where kidnapping indictments alleged that defendant's purpose was to facilitate "the commission of a felony, to wit: escape," and his trial was on that theory, but the court charged the jury that they could find defendant guilty of second-degree kidnapping if they found that his purpose was to use the person named "as a shield," this error by the court permitted the jury to convict defendant upon a theory not supported by the bill of indictment, and though defendant failed to object to it the error was nevertheless reviewable under the "plain error" rule. State v. Ellis, 90 N.C. App. 655, 369 S.E.2d 642 (1988).

Where the trial court instructed the jury on serious bodily injury under subsection (b) of this section, while the indictment alleged as the basis for first-degree kidnapping that the victim was not released in a safe place, this variance between the instruction and the indictment constituted plain error entitling defendant to a new trial. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Where the indictment charged the defendant with kidnapping for "removing" the victims, but the trial court informed the jury that the defendant committed kidnapping if he "confined, restrained or removed" the victims, the appellate court would vacate defendant's first degree kidnapping convictions and remand for a new trial. State v. Dominie, 134 N.C. App. 445, 518 S.E.2d 32 (1999).

Instructing the jury that it could convict defendant if it found he kidnapped victim for the purpose of committing the felonies of second-degree sex offense or crime against nature, theories different from that found in the indictment, which alleged that he kidnapped her for the purpose of committing felony rape, was not plain error where the jury convicted him of committing or attempting to commit all three. State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614, 2000 N.C. App. LEXIS 1116 (2000).

Indictment Alleging Only Second-Degree Kidnapping. — Indictment for first-degree kidnapping which failed to allege that victim was not released in a safe place or was seriously injured or sexually assaulted alleged only the crime of second-degree kidnapping, and if defendant was not entitled to a new trial because the court erred in charging the jury, his conviction would be treated as being for that lesser offense. State v. Ellis, 90 N.C. App. 655, 369 S.E.2d 642 (1988).

Defendant was entitled to reversal of convictions for first degree kidnapping and entry of convictions for second degree kidnapping because the indictment only alleged that defendant did something "for the purpose of doing other serious bodily harm" and failed to allege actual serious injury. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

Evidence Was Sufficient to Deny Motion to Dismiss. — Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at knifepoint from the front of her home to a bedroom and then sexually assaulted her constituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

IX. INSTRUCTIONS.

Instructions which merely list but do not define and explain the elements of kidnapping to the jury are not sufficient. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

Court Not Required to Instruct that Acts of Confinement Be Separate from Other Felony Charged. — Trial court did not err in refusing to instruct that in order for defendant's acts of confinement to constitute kidnapping, they must have been separate, complete and independent of the robbery since evidence was sufficient to support trial court's instruction as given where defendant forced five employees to back of store and into freezer, retrieved one employee and forced him from freezer and into office where he was forced to open safe, guided that employee back to freezer, and informed all five employees that they would be shot if they left freezer. State v. Clinding, 92 N.C. App. 555, 374 S.E.2d 891 (1989).

Charge on Elements of First and Second-Degree Kidnapping Held Correct. — By stating, "If you do not find the defendant guilty of first-degree kidnapping, you must determine whether he is guilty of second-degree kidnapping. Second-degree kidnapping differs from first-degree kidnapping only in that it is unnecessary for the State to prove that the person had been sexually assaulted," trial court correctly charged jury on elements of first and second-degree kidnapping. State v. Coats, 100 N.C. App. 455, 397 S.E.2d 512 (1990), cert. denied, 328 N.C. 573, 403 S.E.2d 515 (1991).

Instructions on Elements of Kidnapping Held Improper. — Where the trial judge instructed the jury that kidnapping was the taking and carrying away without lawful authority of a human being by force, threat of force, or fraud, the trial judge failed to properly instruct the jury on the elements of kidnapping. State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

An instruction permitting the jury to find either defendant guilty of kidnapping if they found from the evidence that he confined, restrained or removed from one place to another either of the victims for the purpose of obtaining information, even though such a purpose is not one of the proscribed purposes set out in subsection (a) of this section, was error and entitled the defendants to a new trial. State v. Hoots, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

Instruction on Elements of Kidnapping Held Not Prejudicial. — Defendant was not prejudiced by a portion of the charge in which the court stated that two of the essential elements of kidnapping a person under the age of 16 were that the victim did not consent and that the victim had not reached his sixteenth birthday, where the court in other portions of the charge instructed the jury that before it could find defendant guilty of kidnapping the State must prove beyond a reasonable doubt, among other things, that he had not reached his sixteenth birthday; and that his parents did not consent to his confinement or restraint. State v. McGuire, 49 N.C. App. 70, 270 S.E.2d 526, appeal dismissed, 301 N.C. 529, 273 S.E.2d 457 (1980).

Instruction Requiring Substantiality in Terms of Distance and Time is Error. — The Court of Appeals erred in its holding that "substantiality" in terms of distance or time is an essential of kidnapping and in its pronouncements that the trial judge must instruct the jury that "confinement" or "restraint," as used in this statute, means confinement or restraint "for a substantial period" and that "removal," as used in this statute, requires a movement "for a substantial distance." State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The failure of the trial court to instruct that kidnapping by unlawful confinement means confinement for a substantial period and not merely incidental to the commission of another crime; that kidnapping by unlawful restraint means restraint for a substantial period of time and not merely incidental to the commission of another crime; or that kidnapping by unlawfully moving one from one place to another means movement for a substantial distance and not merely incidental to the commission of another crime was not error in light of State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978). State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A charge to the jury that in order to constitute kidnapping under subsection (a) any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance would be improper. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Instruction on "Distance Carried Away" Held Not Reversible Error. — In prosecution for kidnapping, where the distance the victim was carried is immaterial, the court's instructing the jury that "any carrying away is sufficient, members of the jury, that is the distance he is carried is immaterial," though disapproved, did not constitute reversible error. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

Charge on Unlawful Restraint Sufficient. — Any unlawful asportation involves unlawful restraint, and any unlawful confinement must involve unlawful restraint. Therefore, if a case were to involve asportation or confinement, it would not be necessary to charge on either. A charge on unlawful restraint would be sufficient. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

Instruction on Kidnapping by Fraud. — If it be conceded arguendo that the evidence was sufficient to require a charge on kidnapping by fraud as well as kidnapping by force, it is not perceived how a failure to charge on the fraudulent aspect of the matter was prejudicial to defendant, since kidnapping effected by fraud is still kidnapping, and failure to so charge would have been advantageous to defendant. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Instruction Defining Terror. — In a prosecution for kidnapping, the trial judge was correct in defining terror, for purposes of this section, as involving more than ordinary fear. State v. Jones, 36 N.C. App. 447, 244 S.E.2d 709 (1978).

Instructions as to Lesser Included Offenses. — Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72; 414 U.S. 869, 94 S. Ct. 182, 38 L. Ed. 2d 116 (1973).

The trial court did not err in failing to instruct on the lesser-included offense of false imprisonment, where the evidence shows that defendant, who was charged with kidnapping the victim for the purpose of facilitating the commission of a felony, confined, restrained, or removed the victim in order to commit a robbery and there was no evidence indicating that defendant acted for any other purpose. State v. Lancaster, 137 N.C. App. 37, 527 S.E.2d 61, 2000 N.C. App. LEXIS 266 (2000).

In a prosecution for first degree kidnapping, the defendants were not entitled to have the jury instructed with regard to second degree kidnapping as a lesser included offense, since there was no evidence that the defendants consciously and willfully left the victims in a safe place, where the victims were left in a house and in the back yard of the house when the defendants shot one victim and chased another as she escaped. State v. Parker, 143 N.C. App. 680, 550 S.E.2d 174, 2001 N.C. App. LEXIS 322 (2001).

There was no error in the trial court's failure to submit the charge of second-degree kidnapping to the jury because there was no affirmative or willful action on the part of defendants to release the victims, as alleged by defendants State v. Love, 177 N.C. App. 614, 630 S.E.2d 234, 2006 N.C. App. LEXIS 1189 (2006).

Instruction on False Imprisonment as Lesser Offense. — In appropriate cases the trial judge should instruct the jury on false imprisonment as a lesser offense of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

It is not error to fail to instruct on false imprisonment if there is no evidence tending to show that the victim was kidnapped for some purpose other than rape, or for no purpose. State v. Franks, 74 N.C. App. 661, 329 S.E.2d 717, cert. denied, 314 N.C. 333, 333 S.E.2d 493 (1985).

Where the evidence indicated that defendant confined, restrained, and removed the victim in order to terrorize and sexually assault her and there was no evidence indicating that defendant acted for any other purpose, the trial court did not err in failing to instruct on the lesser-included offense of false imprisonment. State v. Claypoole, 118 N.C. App. 714, 457 S.E.2d 322 (1995).

Trial court did not err in failing to instruct on the lesser-included offense of false imprisonment, where the evidence showed that defendant restrained the victim for the purpose of terrorizing her; among other things, the evidence showed that defendant approached the victim with a rifle, grabbed her hair, and forced her into his vehicle, where he placed her in headlock, choked her, and caused her to hit her head against the side of the vehicle. State v. Jacobs, 172 N.C. App. 220, 616 S.E.2d 306, 2005 N.C. App. LEXIS 1586 (2005).

Defendant's conviction for second-degree kidnapping was affirmed because the trial court did not err in denying defendant's request to instruct the jury regarding the lesser-included offense of false imprisonment, as defendant had the specific intent to terrorize his victim, a woman whom defendant grabbed on the street, attempted to drag toward some bushes, and wrestled with and sexually molested before defendant fled. State v. Harrison, 169 N.C. App. 257, 610 S.E.2d 407, 2005 N.C. App. LEXIS 608 (2005), aff'd, — N.C. —, 627 S.E.2d 461 (2006).

In an action charging defendant with, inter alia, second degree kidnapping, defendant was not entitled to a jury charge on the lesser-included offense of false imprisonment because defendant failed to object to the exclusion of such an instruction and defendant failed to show that the jury probably would have convicted defendant of false imprisonment rather than kidnapping if the judge had given an instruction on false imprisonment. State v. Rodriguez, — N.C. App. —, 664 S.E.2d 654, 2008 N.C. App. LEXIS 1542 (2008).

Defendant was entitled to a new trial kidnapping charge, because the jury should have been instructed on lesser included offenses of false imprisonment where the jury could have found that defendant formed the intent to rob the victim only after restraint ended and the victim got out of the car. State v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

Failure to Instruct on False Imprisonment Not Plain Error. — Where the State's evidence unerringly pointed to a purpose to terrorize the victim in defendant's act of grabbing the victim at gunpoint and telling her that he was going to kill her, and the jury clearly rejected defendant's testimony that the whole incident was a misunderstanding, there was no evidence supporting the lesser included offense of false imprisonment, and the trial court did not commit plain error in failing to instruct the jury thereon. State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990).

It was not plain error for the trial court to fail to instruct the jury on the lesser-included offense of false imprisonment in the second-degree kidnapping charge where defendant's overly sexual actions were inconsistent with his allegation that he restrained the victim for purposes of using the telephone or restroom, or for purposes of horseplay. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Instructions on Theories Not Charged or Substantiated Held Improper. — Where theories of the crime neither supported by the evidence nor charged in the bill of indictment were included in the trial court's instructions to the jury in a prosecution for kidnapping, the defendant was entitled to a new trial. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977); State v. Mitchell, 77 N.C. App. 663, 335 S.E.2d 793 (1985), cert. denied, 315 N.C. 594, 341 S.E.2d 35 (1986).

In a prosecution for kidnapping upon an indictment charging defendant with unlawfully removing the victim from one place to another for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of defendant following the commission of a felony, the trial judge improperly instructed the jury on possible theories of conviction not charged in the indictment when he instructed that defendant would be guilty of kidnapping if the jury found that defendant's confinement or constraint of the victim was for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle. State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980).

Where the judge's instructions permitted the jury to predicate guilt on theories of the crime which were not charged in the bill of indictment and which were, in one instance, not supported by the evidence at trial, there was "plain error" in the jury instructions, and defendant was therefore entitled to receive a new trial on first-degree kidnapping charge. State v. Brown, 312 N.C. 237, 321 S.E.2d 856 (1984).

Instruction to the jury which charged a theory not supported by the indictment was erroneous. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986).

Unsupported Instructions Constitute Error. — It is error, generally prejudicial, for the court to instruct upon those purposes set forth in this section which are not supported by the evidence. State v. Moore, 74 N.C. App. 464, 328 S.E.2d 864, modified on other grounds, 315 N.C. 738, 340 S.E.2d 401 (1986).

Where although there was no evidence in the record to support a finding that at the time defendant originally confined, restrained and removed the victim he did so for the purpose of holding her as a hostage within the meaning of North Carolina law, the court nevertheless instructed the jury as to what was necessary for a conviction under the hostage theory, defendant was entitled to a new trial. State v. Moore, 74 N.C. App. 464, 328 S.E.2d 864, modified on other grounds, 315 N.C. 738, 340 S.E.2d 401 (1986).

Court vacated defendant's second-degree kidnapping conviction; the trial court erred in instructing the jury that it could find defendant guilty if he unlawfully confined, restrained, or removed the victim when the indictment alleged only unlawful removal. State v. Smith, 162 N.C. App. 46, 589 S.E.2d 739, 2004 N.C. App. LEXIS 60 (2004).

Failure to Instruct on Specific Intent Held Error. — The trial court's aiding and abetting instructions were erroneous in failing to require that the jury find the defendant possessed the specific criminal intent for commission of first degree burglary and second degree kidnapping. The trial court's use of the phrases "knowingly encouraged and[/or] aided" did not "adequately convey" the requisite specific intent concept as expressly requested by defendant in writing. State v. Lucas, 138 N.C. App. 226, 530 S.E.2d 602, 2000 N.C. App. LEXIS 596 (2000).

Refusal to Instruct on Unproved Purposes. — When a trial judge determines that the State has failed to prove one or more of the purposes of kidnapping alleged in the indictment, he may properly refuse to instruct on that purpose or those purposes. State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Instruction Held Proper. — Because the testimony was sufficient to show that a kidnapping victim was involuntarily released into the focal point of an officer's weapon, the trial court did not invade the province of the jury by instructing the jury under Heatwole that, should it find the release occurred under those circumstances, the release was not in a ""safe place." State v. Corbett, 168 N.C. App. 117, 607 S.E.2d 281, 2005 N.C. App. LEXIS 146 (2005), aff'd, — N.C. —, 624 S.E.2d 625 (2006).

Trial court did not commit plain error under

N.C. R. App. P. 10(c)(4) when the indictment charged that defendant "confined, restrained and removed" the victim and the jury was instructed that to convict of kidnapping based on a finding that defendant "restrained or removed" the victim because the indictment alleging all three theories was sufficient and put defendant on notice that the state intended to show that defendant committed kidnapping in any one of the three theories; the jury instruction correctly allowed any one of the three theories to serve as the basis for a finding of kidnapping. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

In defendant's prosecution for first-degree kidnapping under G.S. 14-39(a), the jury was properly instructed that the term "release," for purposes of finding if a victim was not released by defendant in a safe place, meant that the victim was free from all restraint, because that comported with the plain and ordinary meaning of the word. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Trial court properly instructed the jury on the charges against defendant of second-degree kidnapping in violation of G.S. 14-39. Contrary to defendant's contention, G.S. 14-39 did not require for a conviction that a person know that a victim was under the age of 16 and, thus, the trial court did not err in not defining the term "unlawfully" when it instructed the jury on that offense regarding defendant transporting to girls under the age of 16 to defendant's house. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

§ 14-40. Enticing minors out of the State for the purpose of employment.

If any person shall employ and carry beyond the limits of this State any minor, or shall induce any minor to go beyond the limits of this State, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a Class 2 misdemeanor. The fact of the employment and going out of the State of the minor, or of the going out of the State by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the State is a minor. (1891, c. 45; Rev., s. 3630; C.S., s. 4222; 1969, c. 1224, s. 4; 1993, c. 539, s. 21; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Count Joined with One Under § 14-41. — An indictment for abduction, containing two counts, one under this section and the second under G.S. 14-41, cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

§ 14-41. Abduction of children.

(a) Any person who, without legal justification or defense, abducts or induces any minor child who is at least four years younger than the person to leave any person, agency, or institution lawfully entitled to the child's custody, placement, or care shall be guilty of a Class F felony.

(b) The provisions of this section shall not apply to any public officer or employee in the performance of his or her duty. (1879, c. 81; Code, s. 973; Rev., s. 3358; C.S., s. 4223; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1144; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 745, s. 1.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

This section is broad and comprehensive in its terms, and embraces all means by which the child may be abducted. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890).

The proviso in § 14-42 must be read in harmony with this section. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Definition. — Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890); State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

Intent Not Required. — There is nothing in this section which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890); State v. Nobles, 99 N.C. App. 473, 393 S.E.2d 328 (1990), aff'd, 329 N.C. 239, 404 S.E.2d 668 (1991).

Force Not Required. — In a prosecution under this section it is not necessary for the State to show that the child was carried away by force. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

When considering the age of a kidnapping victim as an aggravating factor in sentencing a person convicted under this section, it is not necessary to show that the abduction was caused by the child's vulnerability. It is not the cause of the taking which supports the aggravating factor. Whatever the motive, if the victim is more vulnerable because of age, this aggravates the crime. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Vulnerability in Hospital. — That a child victim of kidnapping was more vulnerable because he was in a hospital at the time of his abduction was a proper aggravating factor. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

The increased vulnerability of a victim (an infant abducted from a hospital shortly after birth) because of his being in a hospital was a proper nonstatutory aggravating factor. A person should be able to enter a hospital without feeling he has to be on guard against wrongdoers. It was particularly egregious that the defendant disguised herself as a nurse and used this disguise to abduct the baby. The mother of the child had a right to rely on a person dressed as a nurse. This made the victim more vulnerable than he ordinarily would have been and makes it a worse crime than if it had occurred under other circumstances. It is not only that the victim was away from the safety of his home that made this a properly found aggravating factor. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Father's Consent a Good Defense. — If the carrying away was with the father's consent, that fact is a defense the burden of which is upon the defendant. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

Where the only inference reasonably deducible from the evidence in a prosecution under this section was that the defendant was acting with the consent of the child's father, the trial court erred in denying the defendant's motion for judgment as of nonsuit. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Father Not Guilty in Absence of Order in Favor of Mother. — In the absence of a custody order in favor of the mother, the father of the child taken cannot be guilty of the crime of child abduction. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

The indictment need not state the means by which the abduction was accomplished, nor that it was done without the consent and against the will of her father, State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906), nor that the defendant was not a nearer relation to the child than the person from whose custody the child was abducted. State v. George, 93 N.C. 567 (1885).

Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

Social Worker Became Agent of State. — In case involving crimes against child victim, where social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, the social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

No Requirement of Charge on Guilty Knowledge. — Where a kidnapping defendant conceded that she did not present any evidence to support a mistake of fact defense but said "the inference that she committed the prohibited act without criminal intent plainly was raised by the evidence," this was not enough evidence to require a charge on guilty knowledge. If the defendant did not know that her conduct was criminal she still may be found guilty if she knew she was doing all the acts that constituted the elements of the crime. State v. Nobles, 329 N.C. 239, 404 S.E.2d 668 (1991).

Use of Wrong Expression in Charge to Jury. — The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." State v. Truelove, 224 N.C. 147, 29 S.E.2d 460 (1944).

Cited in State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

OPINIONS OF ATTORNEY GENERAL

Removal of Child from State by Parent in Absence of Custody Order. — See opinion of Attorney General to Honorable Roy R. Holdford, Jr., Solicitor, Second Solicitorial District, 40 N.C.A.G. 143 (1970).

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

§ 14-42: Repealed by Session Laws 1993, c. 539, s. 1358.2.

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-43: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 29(2).

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-43.1. Unlawful arrest by officers from other states.

A law-enforcement officer of a state other than North Carolina who, knowing that he is in the State of North Carolina and purporting to act by authority of his office, arrests a person in the State of North Carolina, other than as is permitted by G.S. 15A-403, is guilty of a Class 2 misdemeanor. (1973, c. 1286, s. 10; 1993, c. 539, s. 22; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-43.2: Repealed by Session Laws 2006-247, s. 20(a), effective December 1, 2006, and applicable to offenses committed on or after that date.

Cross References. — For current provisions regarding involuntary servitude, see G.S. 14-43.12.

Editor's Note. — Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22 provides, in part: 'Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-43.3. Felonious restraint.

A person commits the offense of felonious restraint if he unlawfully restrains another person without that person's consent, or the consent of the person's parent or legal custodian if the person is less than 16 years old, and moves the person from the place of the initial restraint by transporting him in a motor vehicle or other conveyance. Violation of this section is a Class F felony. Felonious restraint is considered a lesser included offense of kidnapping. (1985, c. 545, s. 1; 1993, c. 539, s. 1147; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Relationship to Kidnapping. — Felonious restraint is a lesser included offense of kidnapping. State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

Duty of State to Allege Transportation. — The legislature's proclamation in this section that felonious restraint is a lesser included offense of kidnapping does not relieve the State of its duty to allege in the kidnapping indictment that the defendant transported the victim by motor vehicle or other conveyance. State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (1998).

Cited in Lineberger v. N.C. Dep't of Corr., 189 N.C. App. 1, 657 S.E.2d 673, 2008 N.C. App. LEXIS 432 (2008).

§§ 14-43.4 through 14-43.9: Reserved for future codification purposes.

ARTICLE 10A.

Human Trafficking.

§ 14-43.10. Definitions.

(a) Definitions. — The following definitions apply in this Article:

(1) Coercion. — The term includes all of the following:

a. Causing or threatening to cause bodily harm to any person, physically restraining or confining any person, or threatening to physically restrain or confine any person.

b. Exposing or threatening to expose any fact or information that if revealed would tend to subject a person to criminal or immigration proceedings, hatred, contempt, or ridicule.

c. Destroying, concealing, removing, confiscating, or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of any person.

d. Providing a controlled substance, as defined by G.S. 90-87, to a person.

(2) Deception. — The term includes all of the following:

a. Creating or confirming another's impression of an existing fact or past event that is false and which the accused knows or believes to be false.

b. Maintaining the status or condition of a person arising from a pledge by that person of his or her personal services as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined, or preventing a person from acquiring information pertinent to the disposition of such debt.

c. Promising benefits or the performance of services that the accused does not intend to deliver or perform or knows will not be delivered or performed.

(3) Involuntary servitude. — The term includes the following:

a. The performance of labor, whether or not for compensation, or whether or not for the satisfaction of a debt; and

b. By deception, coercion, or intimidation using violence or the threat of violence or by any other means of coercion or intimidation.

(4) Minor. — A person who is less than 18 years of age.
(5) Sexual servitude. — The term includes the following:
  a. Any sexual activity as defined in G.S. 14-190.13 for which anything of value is directly or indirectly given, promised to, or received by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years; or
  b. Any sexual activity as defined in G.S. 14-190.13 that is performed or provided by any person, which conduct is induced or obtained by coercion or deception or which conduct is induced or obtained from a person under the age of 18 years. (2006-247, s. 20(b).)

Editor's Note. — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.4. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 1(a) provides: "This act shall be known as 'An Act to Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, makes this article effective December 1, 2006, and applicable to offenses committed on or after that date, and provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-43.11. Human trafficking.

(a) A person commits the offense of human trafficking when that person knowingly recruits, entices, harbors, transports, provides, or obtains by any means another person with the intent that the other person be held in involuntary servitude or sexual servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section.

(d) A person who is not a legal resident of North Carolina, and would consequently be ineligible for State public benefits or services, shall be eligible for the public benefits and services of any State agency if the person is otherwise eligible for the public benefit and is a victim of an offense charged under this section. Eligibility for public benefits and services shall terminate at such time as the victim's eligibility to remain in the United States is terminated under federal law. (2006-247, s. 20(b); 2007-547, s. 1.)

Editor's Note. — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.5. It was recodified as this section at the direction of the Revisor of Statutes.

Subsection (d), as added by Session Laws 2007-547, s. 1, effective December 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2007-547, s. 11, provides: "The North Carolina Justice Academy shall establish protocols suitable for the training of State and local law enforcement officers. The protocols shall be made available to all State and local law enforcement agencies so that the agencies may conduct training on:

"(1) The phenomenon of human trafficking and State and federal laws on human trafficking.

"(2) How to recognize and identify victims of one or more of the practices set forth in G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13.

"(3) Methods for protecting trafficking victims and possible trafficking victims, and advising them of their rights.

"(4) Procedures and techniques for handling specialized needs of victims who may face cultural, language, and other barriers that impede ability to request and obtain available services.

"Nothing in this section shall be construed to require the North Carolina Justice Academy to conduct training of State or local law enforcement officers."

§ 14-43.12. Involuntary servitude.

(a) A person commits the offense of involuntary servitude when that person knowingly and willfully holds another in involuntary servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section.

(d) Nothing in this section shall be construed to affect the laws governing the relationship between an unemancipated minor and his or her parents or legal guardian.

(e) If any person reports a violation of this section, which violation arises out of any contract for labor, to any party to the contract, the party shall immediately report the violation to the sheriff of the county in which the violation is alleged to have occurred for appropriate action. A person violating this subsection shall be guilty of a Class 1 misdemeanor. (1983, ch. 746, s. 1; 1993, c. 539, ss. 23, 1146; 1994, Ex. Sess., c. 24, s. 14(c); 2006-247, s. 20(b).)

Editor's Note. — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.6. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2007-547, s. 11, provides: "The North Carolina Justice Academy shall establish protocols suitable for the training of State and local law enforcement officers. The protocols shall be made available to all State and local law enforcement agencies so that the agencies may conduct training on:

"(1) The phenomenon of human trafficking and State and federal laws on human trafficking.

"(2) How to recognize and identify victims of one or more of the practices set forth in G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13.

"(3) Methods for protecting trafficking victims and possible trafficking victims, and advising them of their rights.

"(4) Procedures and techniques for handling specialized needs of victims who may face cultural, language, and other barriers that impede ability to request and obtain available services.

"Nothing in this section shall be construed to require the North Carolina Justice Academy to conduct training of State or local law enforcement officers."

§ 14-43.13. Sexual servitude.

(a) A person commits the offense of sexual servitude when that person knowingly subjects or maintains another in sexual servitude.

(b) A person who violates this section is guilty of a Class F felony if the victim of the offense is an adult. A person who violates this section is guilty of a Class C felony if the victim of the offense is a minor.

(c) Each violation of this section constitutes a separate offense and shall not merge with any other offense. Evidence of failure to deliver benefits or perform services standing alone shall not be sufficient to authorize a conviction under this section. (2006-247, s. 20(b).)

Editor's Note. — Session Laws 2006-247, s. 20(b), enacted this section as G.S. 14-43.7. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2007-547, s. 11, provides: "The North Carolina Justice Academy shall establish protocols suitable for the training of State and local law enforcement officers. The protocols shall be made available to all State and local law enforcement agencies so that the agencies may conduct training on:

"(1) The phenomenon of human trafficking and State and federal laws on human trafficking.

"(2) How to recognize and identify victims of one or more of the practices set forth in G.S. 14-43.11, G.S. 14-43.12, or G.S. 14-43.13.

"(3) Methods for protecting trafficking victims and possible trafficking victims, and advising them of their rights.

"(4) Procedures and techniques for handling specialized needs of victims who may face cultural, language, and other barriers that impede ability to request and obtain available services.

"Nothing in this section shall be construed to require the North Carolina Justice Academy to conduct training of State or local law enforcement officers."

ARTICLE 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon. (1881, c. 351, s. 1; Code, s. 975; Rev., s. 3618; C.S., s. 4226; 1967, c. 367, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — As to instances when abortion not unlawful, see G.S. 14-45.1. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article on federal constitutional limitations on the enforcement and administration of state abortion statutes, see 46 N.C.L. Rev. 730 (1968).

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For note, "State v. Beale and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform," see 68 N.C. L. Rev. 1144 (1990).

For note entitled, "The Pregnant Silence: Rust v. Sullivan, Abortion Rights, and Publicly Funded Speech," see 70 N.C.L. Rev. 1623 (1992).

For article, "Person or Thing — In Search of the Legal Status of a Fetus: A Survey of North Carolina Law," see 17 Campbell L. Rev. 169 (1995).

For article, "The Prospect of Enacting An Unborn Victims of Violence Act in North Carolina," see 28 N.C. Cent. L.J. 127 (2006).

CASE NOTES

Constitutional Power of State. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 35 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201.

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being primarily for the protection of the woman. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Section relates to destruction of child. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949). But see, State v. Slagle, 83 N.C. 630 (1880).

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within 30 days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947).

Elements of Offense — Intent. — The essential ingredient of the offense is the intent and not the noxious nature of the drug used. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901); State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901). For the offense is committed by administering any substance with intent to procure an abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Same — Abortion or Procuring Abortion. — It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942).

Same — Procurement or Use of Drug Not Essential. — For a conviction under this section it is no essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Under this section it is not necessary to charge or prove that the accused procured the drug. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901).

Woman Not an Accomplice. — The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Admissibility of Evidence — Belief of Woman as to Her Pregnancy Relevant. — In a prosecution for abortion, belief of victim on the day of alleged operation that she was pregnant is a relevant circumstance, properly proved by her own testimony. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Same — Statement of Woman as to Payment of Doctor's Fee Admissible. — The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and G.S. 14-45, that the defendant had paid the physician one half of the $200.00 fee he had charged for such services, uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence, whether they were understood by him, whether he denied them or remained silent. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Same — Admission of evidence that woman took an anesthetic was not prejudicial. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Same — Evidence of Disease Facilitating Abortion Properly Excluded. — Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Same — Statement Made Four Months Prior to Abortion Inadmissible. — Upon the trial of a physician for procuring an abortion, testimony of the conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. State v. Brown, 202 N.C. 221, 162 S.E. 216 (1932).

Same — Prejudicial Evidence. — In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions was held incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950).

Sufficiency of Evidence. — Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine or substance with intent to destroy the child is sufficient for a conviction under this section. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Joinder of Offenses. — Where the defendant is tried under this section and G.S. 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered, and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby.

State v. Dilliard, 223 N.C. 446, 27 S.E.2d 85 (1943).

Variance. — On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should be allowed. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949).

Cited in State v. Geurukus, 195 N.C. 642, 143 S.E. 208 (1928); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975); State v. Beale, 324 N.C. 87, 376 S.E.2d 1 (1989).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be punished as a Class I felon. (1881, c. 351, s. 2; Code, s. 976; Rev., s. 3619; C.S., s. 4227; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — As to instances when abortion not unlawful, see G.S. 14-45.1. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

CASE NOTES

In General. — This section relates to miscarriage of, or to injury to, or destruction of the woman. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Constitutional Power of State. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 35 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201.

The purpose of this section is the protection of "any pregnant woman." State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

This section is designed primarily for the protection of the woman. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

This section and § 14-44 create separate offenses, section 14-44 being designed to protect the life of a child in ventre sa mere, and this section being primarily for the protection of the woman. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Properties of Drug Irrelevant If Intent Shown. — This section proscribes the administering of any drug with the intent to produce a miscarriage. It is the intent which is made requisite within the statute, and not the properties of the administered drug, which makes the violation of this statute a felony. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

An actual miscarriage is not a necessary element to prove violation of this section. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

But proof of pregnancy is essential. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

This section does not require that the woman be quick with child and for that reason provides for a lesser punishment than G.S. 14-44. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

A woman may be pregnant within the meaning of this section though the fetus has not quickened. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

But see G.S. 14-45.1 permitting abortion during first 20 weeks of pregnancy.

When Death Results from Abortion, It Is Culpable Homicide. — When death results from an abortion or attempted abortion of a pregnant woman, when not necessary to save the life of the woman or that of the unborn child or to protect the health of the woman, it is a culpable homicide, even though done at the woman's request. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

Evidence of Previous Abortions. — Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

Expert Medical Testimony. — In a prosecution for abortion, testimony of a medical expert that a certain described treatment of a pregnant woman might cause an abortion is competent. State v. Brooks, 267 N.C. 427, 148 S.E.2d 263 (1966).

It was not error for the trial court to exclude testimony to the effect that pills, taken as directed, would not cause an abortion and would have no effect upon the prosecuting witness, where there was no evidence in the record that defendant was aware the drug was ineffective as a means to induce a miscarriage, and that defendant thereby lacked the intent required in this section. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Evidence Sufficient. — In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. State v. Manning, 225 N.C. 41, 33 S.E.2d 239 (1945); State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

Applied in State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

Cited in State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950); State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

§ 14-45.1. When abortion not unlawful.

(a) Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful, during the first 20 weeks of a woman's pregnancy, to advise, procure, or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions.

(b) Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful, after the twentieth week of a woman's pregnancy, to advise, procure or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital licensed by the Department of Health and Human Services, if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman.

(c) The Department of Health and Human Services shall prescribe and collect on an annual basis, from hospitals or clinics where abortions are performed, such representative samplings of statistical summary reports concerning the medical and demographic characteristics of the abortions provided for in this section as it shall deem to be in the public interest. Hospitals or clinics where abortions are performed shall be responsible for providing these statistical summary reports to the Department of Health and Human Services. The reports shall be for statistical purposes only and the confidentiality of the patient relationship shall be protected.

(d) The requirements of G.S. 130-43 are not applicable to abortions performed pursuant to this section.

(e) Nothing in this section shall require a physician licensed to practice medicine in North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion. The refusal of such physician to perform or participate in these medical procedures shall not be a basis for damages for such refusal, or for any disciplinary or any other recriminatory action against such physician.

(f) Nothing in this section shall require a hospital or other health care institution to perform an abortion or to provide abortion services. (1967, c. 367, s. 2; 1971, c. 383, ss. 1, 11/2; 1973, c. 139; c. 476, s. 128; c. 711; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1967, c. 367, s. 2, designated the above section as G.S. 14-46. Since there was already a G.S. 14-46 in the General Statutes, the section added by the 1967 act has been designated G.S. 14-45.1 herein.

Pursuant to Session Laws 1973, c. 476, ss. 128 and 152, "Department of Human Resources" has been substituted for "North Carolina Medical Care Commission" in subsections (a) and (b) and for "State Board of Health" in subsection (c) of the section as rewritten by Session Laws 1973, c. 711.

Section 130-43, referred to in this section, was repealed by Session Laws 1983, c. 891, s. 1. As to fetal death registration, see now G.S. 130A-114.

Legal Periodicals. — For comment on this section, see 46 N.C.L. Rev. 585 (1968).

For comment on a constitutional right to abortion, see 49 N.C.L. Rev. 487 (1971).

For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

For article, "Legal Implications of Human in Vitro Fertilization for the Practicing Physician in North Carolina," see 6 Campbell L. Rev. 5 (1984).

For article, "Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium," see 12 Campbell L. Rev. 181 (1990).

For article, "The Potential for Enacting Parental Consent Legislation in North Carolina: Moving Beyond the Clash of Absolutes" see 26 Wake Forest L. Rev. 433 (1991).

For a note on minors' rights vis-a-vis abortion, see 1999 Duke L.J. 297.

For article discussing the rise and decline of North Carolina Abortion Fund, see 22 Campbell L. Rev. 119 (1999).

For comment, "Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators," see 29 Campbell L. Rev. 761 (2007).

CASE NOTES

Burden of Proof. — The legislature did not intend to reverse the presumption of innocence, and the burden of proof in a prosecution is on the State to show that an abortion did not come within the exemptions of this section. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 35 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201.

Claims for relief for wrongful life and for wrongful birth are not cognizable at law in this jurisdiction. Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986).

To the extent the legislature has spoken to date, it has tended to discourage holding physicians or nurses liable for not acting in a manner which will result in abortion. Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986).

Defendants owed no duty to child who had not yet been conceived regarding genetic counseling rendered to her parents, and they could not be found liable to her on a wrongful life theory. Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986), aff'd in part and vacated in part on other grounds, 852 F.2d 773 (4th Cir. 1988).

A claim for "wrongful conception" or "wrongful pregnancy" is recognizable in this State. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

There is no rational basis for distinguishing between temporary and permanent methods of birth control for the purpose of determining whether a complaint states a cause of action for medical malpractice resulting in wrongful conception. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

Negligently Inducing Conception. — A cause of action exists in North Carolina when a health care provider negligently provides counseling and information which induces a couple to conceive a defective child. Gallagher v. Duke Univ., 638 F. Supp. 979 (M.D.N.C. 1986), aff'd in part and vacated in part on other grounds, 852 F.2d 773 (4th Cir. 1988).

Damages for "Wrongful Conception". — In an action for "wrongful conception", plaintiff wife may recover damages for the expenses associated with her pregnancy, but plaintiffs may not recover for the costs of rearing their child. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

Trespass at Abortion Clinic — Necessity Defense Unavailable. — The defense of "necessity" is unavailable to individuals who commit the crime of trespass in an effort to "save the lives" of fetuses from abortion. State v.

Thomas, 103 N.C. App. 264, 405 S.E.2d 214, cert. denied, 329 N.C. 792, 408 S.E.2d 528 (1991).

The North Carolina General Assembly has made a "clear and deliberate choice" regarding the competing values at issue by choosing to make those abortions performed in accordance with the provisions of this section lawful. Since there was no evidence at the defendants' trial that the clinic was performing or about to perform illegal abortions, it is implicit that the "evil" which the defendants sought to avoid by blocking the clinic's entrances was nonexistent. The nonexistence of an "evil" to avoid foreclosed the possibility of a defense based upon necessity. State v. Thomas, 103 N.C. App. 264, 405 S.E.2d 214, cert. denied, 329 N.C. 792, 408 S.E.2d 528 (1991).

Cited in Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

OPINIONS OF ATTORNEY GENERAL

Abortion Cannot Be Performed After Twenty Weeks for Sole Reason that Fetus Is Abnormal. — Even if a woman at 22 weeks of gestation is found to have a genetically abnormal fetus which will be severely mentally retarded and/or will not survive beyond the first year of life, an abortion cannot be performed in North Carolina for these reasons alone upon request of the woman. — See opinion of Attorney General to Mr. Lewis H. Nelson, M.D., Assistant Professor, Bowman Gray School of Medicine, 48 N.C.A.G. 136 (1979).

§ 14-46. Concealing birth of child.

If any person shall, by secretly burying or otherwise disposing of the dead body of a newborn child, endeavor to conceal the birth of such child, such person shall be punished as a Class I felon. Any person aiding, counseling or abetting any other person in concealing the birth of a child in violation of this statute shall be guilty of a Class 1 misdemeanor. (21 Jac. I, c. 27; 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; 1818, c. 985, P.R.; R.C., c. 34, s. 28; 1883, c. 390; Code, s. 1004; Rev., s. 3623; C.S., s. 4228; 1977, c. 577; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 24, 1148; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article, "Webster v. Reproductive Health Services: A Path to Constitutional Equilibrium," see 12 Campbell L. Rev. 181 (1990).

CASE NOTES

History. — Under the section as it stood after the amendment of 1818, the offense was the concealing of the death of a being on whom murder could have been committed. If, therefore, the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. State v. Joiner, 11 N.C. 350 (1826).

A former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. State v. Morgan, 95 N.C. 641 (1886).

Evidence Insufficient for Directed Verdict. — Under the provisions of this section making it a felony for any person to conceal the birth of a newborn child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. State v. Arrowood, 187 N.C. 715, 122 S.E. 759 (1924).

ARTICLE 12.

Libel and Slander.

§ 14-47. Communicating libelous matter to newspapers.

If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty of a Class 2 misdemeanor. (1901, c. 557, ss. 2, 3; Rev., s. 3635; C.S., s. 4229; 1969, c. 1224, s. 1; 1993, c. 539, s. 25; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to the truth of allegations in indictment for libel as a defense, see G.S. 15-168. As to derogatory reports about banks, see G.S. 53-128 and 53-129. As to libel by a newspaper, see G.S. 99-1 and 99-2.

Legal Periodicals. — For comment on responsibility of newspapermen, see 4 N.C.L. Rev. 27 (1926).

CASE NOTES

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961).

§ 14-48: Repealed by Session Laws 1975, c. 402.

ARTICLE 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; punishment.

(a) Any person who willfully and maliciously injures another by the use of any explosive or incendiary device or material is guilty of a Class D felony.

(b) Any person who willfully and maliciously damages any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a Class G felony.

(b1) Any person who willfully and maliciously damages, aids, counsels, or procures the damaging of any church, chapel, synagogue, mosque, masjid, or other building of worship by the use of any explosive or incendiary device or material is guilty of a Class E felony.

(b2) Any person who willfully and maliciously damages, aids, counsels, or procures the damaging of the State Capitol, the Legislative Building, the Justice Building, or any building owned or occupied by the State or any of its agencies, institutions, or subdivisions or by any county, incorporated city or town, or other governmental entity by the use of any explosive or incendiary device or material is guilty of a Class E felony.

(c) Repealed by Session Laws 1993, c. 539, s. 1149, effective October 1, 1994. (1923, c. 80, s. 1; C.S., s. 4231(a); 1951, c. 1126, s. 1; 1969, c. 869, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1149; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 751, s. 1; 2003-392, s. 3(c).)

Cross References. — For structured sentencing provisions, 1994, see G.S. 15A-1340.10 et seq.

CASE NOTES

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

The word "malicious" as used in this section connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

"Malicious" means more than intending wrong, it connotes actual ill will or resentment toward the owner or possessor of the property and is an element of preconceived revenge. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Count Charging Violation of This Section as Embracing a Charge Under § 14-127. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

"Feloniously" Not Substitute for "Maliciously" in Indictment Under This Section. — Use of the word "feloniously" in an indictment based on subsection (b) charging defendants with damaging real and personal property of another by use of an explosive was not a sufficient substitute for the word "maliciously" as used in the statute, since the word "feloniously" implies that the act charged to have been done proceeded from an evil heart and wicked purpose but does not allege the necessary element of actual ill will, hatred or animosity of the accused toward the person whose property was injured. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Without the element of malicious damage to property being alleged in the indictment, regardless of the method with which the damage was caused, the defendants were not apprised of the crime charged and the bill of indictment was defective. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Indictment Should Contain Identifying Description of Property. — Since no distinction whatever is made between real and personal property in this section an indictment under this section should contain an identifying description of the property which the defendant damaged or attempted to damage by the use of the explosive. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Where the Jury Can Consider Lesser Offense. — On an indictment under G.S. 14-49.1, if proof of occupancy fails, the jury can consider the lesser included offense of malicious injury to unoccupied property under this section. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his co-conspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Conviction Upheld. — Because there was some probability that defendant planned to use gasoline thrown on his victim as an explosive or incendiary device, the conviction for violating subsection (a) was upheld. State v. Cockerham, 129 N.C. App. 831, 497 S.E.2d 831 (1998), cert. denied, 348 N.C. 503, 510 S.E.2d 659 (1998).

Verdict in Consolidated Trial of Separate Indictments. — See same catchline in note under G.S. 14-49.1.

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

Cited in State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126 (1976); State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251 (1989).

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; punishment.

Any person who willfully and maliciously damages any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable as a Class D felony. (1967, c. 342; 1969, c. 869, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1150; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

A measurable amount of damage must be shown to bring an action within the purview of this section. State v. Bennett, 132 N.C. App. 187, 510 S.E.2d 698 (1999).

The word "malicious," as used in this section, connotes a feeling of animosity, hatred or ill will toward the owner, the possessor or the occupant. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

Evidence showing defendant's past disagreements and confrontations with a home's occupant, and defendant's conduct before a fire in which the home was burned sufficiently supported a reasonable inference of malice. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

Where the trial court's jury instruction referred to both express and implied malice and was in accordance with the pattern jury instructions for arson and homicide, the trial court's instruction was proper. State v. Sexton, 357 N.C. 235, 581 S.E.2d 57, 2003 N.C. LEXIS 608 (2003).

Description in the indictment of the property damaged as a "1974 Ford Torino owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr.," was sufficient to inform defendant with certainty as to the crime that he had allegedly committed. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

Indictment Should Include Description of Any Other Property Injured. — An indictment drawn under this section should include not only the description of the occupied property and the name of the occupant but any other property injured or attempted to be injured by the explosion so that if proof of occupancy fails, the jury could consider whether the defendant is guilty under G.S. 14-49 of the lesser included offense of malicious injury to unoccupied property. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Where the Jury Can Consider Lesser Offense. — On an indictment under this section, if proof of occupancy fails, the jury can consider the lesser included offense of malicious injury to unoccupied property under G.S. 14-49. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his co-conspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Evidence showing defendant's confrontation with a home's occupants the evening before the home burned, observations of defendant staring at the home, defendant running from the home after the fire started, defendant's flight when accused of starting the fire, cuts on defendant's arm after breaking glass was heard immediately before the fire started, and the presence of fuel containers in defendant's home sufficiently proved his malicious damage of the home by an incendiary device. State v. Sexton, 153 N.C. App. 641, 571 S.E.2d 41, 2002 N.C. App. LEXIS 1276 (2002), cert. granted, 356 N.C. 622, 575 S.E.2d 756 (2002).

No Measurable Damage Shown. — Evidence that the defendant started a fire in front of his jail cell that left a scorched spot on the concrete floor, and that the spot was barely visible after being stripped and waxed over, did not support a conviction under this section, since no measurable damage resulted. State v. Bennett, 132 N.C. App. 187, 510 S.E.2d 698 (1999).

Verdict in Consolidated Trial of Separate Indictments. — In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, where the evidence discloses but one explosion and the jury returns a verdict finding defendant guilty of malicious damage to the occupied dwelling, a further jury verdict finding defendant guilty of malicious damage to the automobile should be treated as surplusage, since the verdict of dynamiting the occupied dwelling contains the maximum charge under G.S. 14-49 as amended by this section. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Applied in State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771 (1969); State v. Williams, 67 N.C. App. 295, 313 S.E.2d 170 (1984).

Cited in State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126 (1976).

§ 14-50: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(4).

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-50.1. Explosive or incendiary device or material defined.

As used in this Article, "explosive or incendiary device or material" means nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used. (1969, c. 869, s. 6.)

CASE NOTES

Applied in State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666 (1975).

Cited in State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

§§ 14-50.2 through 14-50.14: Reserved for future codification purposes.

ARTICLE 13A.

North Carolina Street Gang Suppression Act.

§ 14-50.15. Short title.

This Article shall be known and may be cited as the "North Carolina Street Gang Suppression Act." (2008-214, s. 3.)

Editor's Note. — Session Laws 2008-214, s. 6, made this Article effective December 1, 2008, and applicable to offenses committed on or after that date.

§ 14-50.16. Pattern of criminal street gang activity.

(a) It is unlawful for any person employed by or associated with a criminal street gang to do either of the following:

(1) To conduct or participate in a pattern of criminal street gang activity.

(2) To acquire or maintain any interest in or control of any real or personal property through a pattern of criminal street gang activity.

A violation of this section is a Class H felony, except that a person who violates subdivision (a)(1) of this section, and is an organizer, supervisor, or acts in any other position of management with regard to the criminal street gang, shall be guilty of a Class F felony.

(b) As used in this Article, "criminal street gang" or "street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, that:

(1) Has as one of its primary activities the commission of one or more felony offenses, or delinquent acts that would be felonies if committed by an adult;

(2) Has three or more members individually or collectively engaged in, or who have engaged in, criminal street gang activity; and

(3) May have a common name, common identifying sign or symbol.

(c) As used in this Article, "criminal street gang activity" means to commit, to attempt to commit, or to solicit, coerce, or intimidate another person to commit an act or acts, with the specific intent that such act or acts were intended or committed for the purpose, or in furtherance, of the person's involvement in a criminal street gang or street gang. An act or acts are included if accompanied by the necessary mens rea or criminal intent and would be chargeable by indictment under the following laws of this State:

(1) Any offense under Article 5 of Chapter 90 of the General Statutes (Controlled Substances Act).

(2) Any offense under Chapter 14 of the General Statutes except Articles 9, 22A, 40, 46, 47, 59 thereof; and further excepting G.S. 14-78.1, 14-82, 14-86, 14-145, 14-179, 14-183, 14-184, 14-186, 14-190.9, 14-195, 14-197, 14-201, 14-247, 14-248, 14-313 thereof.

(d) As used in this Article, "pattern of criminal street gang activity" means engaging in, and having a conviction for, at least two prior incidents of criminal street gang activity, that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by common characteristics and are not isolated and unrelated incidents, provided that at least one of these offenses occurred after December 1, 2008, and the last of the offenses occurred within three years, excluding any periods of imprisonment, of prior criminal street gang activity. Any offenses committed by a defendant prior to indictment for an offense based upon a pattern of street gang activity shall not be used as the basis for any subsequent indictments for offenses involving a pattern of street gang activity. (2008-214, s. 3.)

§ 14-50.17. Soliciting; encouraging participation.

(a) It is unlawful for any person to cause, encourage, solicit, or coerce a person 16 years of age or older to participate in criminal street gang activity.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.18. Soliciting; encouraging participation; minor.

(a) It is unlawful for any person to cause, encourage, solicit, or coerce a person under 16 years of age to participate in criminal street gang activity.

(b) A violation of this section is a Class F felony.

(c) Nothing in this section shall preclude a person who commits a violation of this section from criminal culpability for the underlying offense committed by the minor under any other provision of law. (2008-214, s. 3.)

§ 14-50.19. Threats to deter from gang withdrawal.

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, with the intent to deter a person from assisting another to withdraw from membership in a criminal street gang.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.20. Threats of punishment or retaliation.

(a) It is unlawful for any person to communicate a threat of injury to a person, or to damage the property of another, as punishment or retaliation against a person for having withdrawn from a criminal street gang.

(b) A violation of this section is a Class H felony. (2008-214, s. 3.)

§ 14-50.21. Separate offense.

Any offense committed in violation of G.S. 14-50.16 through G.S. 14-50.20 shall be considered a separate offense. (2008-214, s. 3.)

§ 14-50.22. Enhanced offense for criminal gang activity.

A person age 15 or older who is convicted of a misdemeanor offense that is committed for the benefit of, at the direction of, or in association with, any criminal street gang is guilty of an offense that is one class higher than the offense committed. A Class A1 misdemeanor shall be enhanced to a Class I felony under this section. (2008-214, s. 3.)

§ 14-50.23. Contraband, seizure, and forfeiture.

(a) All property of every kind used or intended for use in the course of, derived from, or realized through criminal street gang activity or a pattern of criminal street gang activity is subject to the seizure and forfeiture provisions of G.S. 14-2.3.

(b) In any action under this section, the court may enter a restraining order in connection with any interest that is subject to forfeiture.

(c) Innocent Activities. — The provisions of this section shall not apply to property used for criminal street gang activity where the owner or person who has legal possession of the property does not have actual knowledge that the property is being used for criminal street gang activity. (2008-214, s. 3.)

§ 14-50.24. Real property used by criminal street gangs declared a public nuisance; abatement.

(a) Public Nuisance. — Any real property that is erected, established, maintained, owned, leased, or used by any criminal street gang for the purpose of conducting criminal street gang activity shall constitute a public nuisance and may be abated as provided by Article 1 of Chapter 19 of the General Statutes.

(b) Innocent Activities. — The provisions of this section shall not apply to real property used for criminal street gang activity where the owner or person who has legal possession of the real property does not have actual knowledge that the real property is being used for criminal street gang activity. (2008-214, s. 3.)

§ 14-50.25. Reports of disposition; criminal street gang activity.

When a defendant is found guilty of a criminal offense, other than an offense under G.S. 14-50.16 through G.S. 14-50.20, the presiding judge shall determine whether the offense involved criminal street gang activity. If the judge so determines, then the judge shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity. The clerk of court shall ensure that the official record of the defendant's conviction includes a notation of the court's determination. (2008-214, s. 3.)

§ 14-50.26. Matters proved in criminal trial court.

A conviction of an offense defined as criminal gang activity shall preclude the defendant from contesting any factual matters determined in the criminal proceeding in any subsequent civil action or proceeding based on the same conduct. (2008-214, s. 3.)

§ 14-50.27. Local ordinances not preempted by State law.

Nothing in this Article shall prevent a local governing body from adopting and enforcing ordinances relating to gangs and gang violence that are consistent with this Article. Where local laws duplicate or supplement the provisions of this Article, this Article shall be construed as providing alternative remedies and not as preempting the field. (2008-214, s. 3.)

§ 14-50.27A. Dissemination of criminal intelligence information.

A law enforcement agency may disseminate an assessment of criminal intelligence information to the principal of a school when necessary to avoid imminent danger to the life of a student or employee of the school or to the public school property pursuant to 28 C.F.R. § 23.20. The notification may be made in person or by telephone. As used in this subsection, the term "school" means any public or private school in the State under Chapter 115C of the General Statutes. (2009-93, s. 1.)

Editor's Note. — Session Laws 2009-93, s. 2, made this section effective December 1, 2009.

§ 14-50.28. Applicability to juveniles under the age of 16.

Except as provided in G.S. 14-50.22, 14-50.29, and 14-50.30, the provisions of this Article shall not apply to juveniles under the age of 16. (2008-214, s. 3.)

§ 14-50.29. Conditional discharge for first offenders under the age of 18.

(a) Whenever any person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, pleads guilty to or is guilty of (i) a Class H felony under this Article or (ii) an enhanced offense under G.S. 14-50.22, and the offense was committed before the person attained the age of 18 years, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require.

(b) If the court, in its discretion, defers proceedings pursuant to this section, it shall place the defendant on supervised probation for not less than one year, in addition to any other conditions. Prior to taking any action to discharge and dismiss under this section, the court shall make a finding that the defendant has no previous criminal convictions. Upon fulfillment of the terms and conditions of the probation provided for in this section, the court shall discharge the defendant and dismiss the proceedings against the defendant.

(c) Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Upon violation of a term or condition of the probation provided for in this section, the court may enter an adjudication of guilt and proceed as otherwise provided.

(d) Upon discharge and dismissal pursuant to this section, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 15A-145.1.

(e) **(Effective until October 1, 2010)** The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge.

(e) **(Effective October 1, 2010)** The clerk shall notify State and local agencies of the court's order as provided in G.S. 15A-150. (2008-214, s. 3; 2009-510, s. 2; 2009-577, s. 4.)

Subsection (e) Set Out Twice. — The first version of subsection (e) set out above is effective until October 1, 2010. The second version of subsection (e) set out above is effective October 1, 2010.

Effect of Amendments. — Session Laws 2009-510, s. 2, effective October 1, 2010, rewrote subsection (e).

Session Laws 2009-577, s. 4, effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date, in subsection (a), deleted "has not yet attained the age of 18 years, and" following "Whenever any person who" near the beginning, and inserted "and the offense was committed before the person attained the age of 18 years," near the middle; and, in subsection (d), substituted "G.S. 15A-145.1" for "G.S. 14-50.30(a)" at the end, and deleted the former second and third sentences which read: "If the court determines, after hearing, that such person was dismissed and the proceedings against the person discharged and that the person had not yet attained 18 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status the person occupied before such arrest or indictment or information."

§ 14-50.30. (See Editor's Note) Expunction of records.

Any person who has not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state, may, if the offense was committed before the person attained the age of 18 years, be eligible to apply for expunction of certain offenses under this Article pursuant to G.S. 15A-145.1. (2008-214, s. 3; 2009-510, s. 3; 2009-577, s. 5.)

Editor's Note. — This section was amended by Session Laws 2009-510, s. 3 and by Session Laws 2009-577, s. 5 in the coded bill drafting format provided by G.S. 120-20.1. Session Laws 2009-577, s. 5, effective December 1, 2009, made extensive amendments to the section. Session Laws 2009-510, s. 3, effective October 1, 2010, failed to account for the changes made by Session Laws 2009-577, s. 5. Therefore, effective October 1, 2010, the following words are added to the section: "information and that the conviction be expunged from the records of the court. agencies the Department of Correction, the Division of Motor Vehicles, and any other State or local government agencies identified by the petitioner as conviction petitioner's shall notify State and local agencies of the court's order as provided in G.S. 15A-150." The section has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-510, s. 3, effective October 1, 2010, in subsection (b), added "and that the conviction be expunged from the records of the court" at the end of the first sentence, rewrote the former third and fourth sentences, which read: "The court shall also order that the said conviction be expunged from the records of the court, and direct all law enforcement agencies bearing record of the same to expunge their records of the conviction as the result of a criminal charge. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency.", and deleted the former last sentence which read: "The sheriff, chief, or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation."

Session Laws 2009-577, s. 5, effective December 1, 2009, and applicable to petitions for expunctions filed on or after that date, rewrote the section.

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question. (1889, c. 434, s. 1; Rev., s. 3331; C.S., s. 4232; 1969, c. 543, s. 1.)

Cross References. — As to accessories, see G.S. 14-5.2 through 14-7. As to breaking into or entering jails with intent to kill or injure prisoners therein, see G.S. 14-221.

Legal Periodicals. — For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
  A. In General.
  B. First Degree.
  C. Second Degree.
III. Breaking and Entering.
IV. Dwelling House or Sleeping Apartment.
V. Curtilage.
VI. Nighttime.
VII. Felonious Intent.

VIII. Indictment.
IX. Lesser Offenses.
X. Evidence.
XI. Instructions.
XII. Verdict.

I. GENERAL CONSIDERATION.

Purpose of this section is to protect the habitations of men, where they repose and sleep, from meditated harm. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

The purpose of the law in the offense of first-degree burglary was and is to protect the habitations of men, where they repose and sleep, from meditated harm. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Attempt. — Burglary is defined in North Carolina by the common law and this section, as the breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein, whether such intent be executed or not. An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission. State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984), cert. denied, 313 N.C. 333, 327 S.E.2d 894 (1985).

Deadly Weapon as Aggravating Factor. — In a prosecution for first degree burglary, where the defendant broke into and entered a motel room by pointing a gun at the victim's head and driving him into the room, wherein he committed armed robbery, the trial court erred in sentencing him by considering as a factor in aggravation the use of a deadly weapon. If the evidence of the deadly weapon was removed, the state would have failed to prove three elements of the burglary: breaking, entering, and intent to commit a felony. State v. Edwards, 75 N.C. App. 588, 331 S.E.2d 183 (1985).

For case upholding burglary conviction on a theory of acting in concert, where defendant was involved in a common scheme or plan to "rough up" victims, see State v. Ruffin, 90 N.C. App. 712, 370 S.E.2d 279 (1988).

Steps on Appeal. — While convictions that result in a judgment of death are automatically appealable to the Supreme Court of North Carolina, all other convictions are properly appealed to the Court of Appeals pursuant to G.S. 7A-27 and N.C. R. App. P. 4(d), and while neither party filed a motion to bypass the Court of Appeals as to defendant's non-capital conviction for burglary, when he appealed his conviction for murder and his death sentence, the Supreme Court of North Carolina, on its own initiative, and consistently with N.C. R. App. P. 2, considered defendant's assignments of error that concerned his burglary conviction under G.S. 14-51 because the issue also related to one of his arguments regarding an aggravating circumstance. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

Applied in State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Walls, 211 N.C. 487, 191 S.E. 232 (1937); State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Elam, 263 N.C. 273, 139 S.E.2d 601 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979); State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); State v. Shaw, 106 N.C. App. 433, 417 S.E.2d 262 (1992); State v. Banks, 163 N.C. App. 31, 591 S.E.2d 917, 2004 N.C. App. LEXIS 257 (2004); State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

Cited in State v. Scales, 114 N.C. App. 735, 443 S.E.2d 124; State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Hamlet, 206 N.C. 568, 174 S.E. 451 (1934); State v. Brown, 206 N.C. 747, 175 S.E. 116 (1934); State v. Stevenson, 212 N.C. 648, 194 S.E. 81 (1937); State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977); State v. Wright, 304 N.C. 349, 283 S.E.2d 502 (1981); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981); State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581 (1982); State v. Schneider, 306 N.C. 351, 293 S.E.2d 157 (1982); State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984); In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831 (1985); State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Poucher, 87 N.C. App. 279, 360 S.E.2d 505 (1987); State v. Flowers, 100 N.C. App. 58, 394 S.E.2d 296 (1990); State v. Redfern, 98 N.C. App. 129, 389 S.E.2d 846 (1990); State v. Tilley, 100 N.C. App. 588, 397 S.E.2d 368 (1990); State v. Whitaker, 103 N.C. App. 386, 405 S.E.2d 911 (1991); State v. Owen, 111 N.C. App. 300, 432 S.E.2d 378 (1993); State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994); State v. Montgomery, 341 N.C. 553, 461 S.E.2d 732 (1995); State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996);

State v. Little, 126 N.C. App. 262, 484 S.E.2d 835 (1997); State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999); State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 2000 N.C. LEXIS 894 (2000); State v. Osborne, 149 N.C. App. 235, 562 S.E.2d 528, 2002 N.C. App. LEXIS 217 (2002); State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1, 2002 N.C. App. LEXIS 296 (2002); State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002); State v. Keitt, 153 N.C. App. 671, 571 S.E.2d 35, 2002 N.C. App. LEXIS 1248 (2002); State v. Little, 163 N.C. App. 235, 593 S.E.2d 113, 2004 N.C. App. LEXIS 376 (2004); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. McAllister, 190 N.C. App. 289, 660 S.E.2d 247, 2008 N.C. App. LEXIS 832 (2008).

II. ELEMENTS OF OFFENSE.

A. In General.

Elements. — The crime of burglary at common law was composed of five distinct elements, which were: (1) the breaking; (2) the entering; (3) that the breaking and entry be into a mansion house; (4) that the breaking and entering were in the nighttime, and (5) that the breaking and entering were with the intent to commit a felony. State v. Whit, 49 N.C. 349 (1857).

Burglary is a common-law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947); State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

Burglary is a common-law offense. It consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984), cert. denied, 313 N.C. 333, 327 S.E.2d 894 (1985).

Common-law burglary is defined as the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Because the location of the offense is not an element of first-degree burglary, the variance as to the location of the house in question between the proof at trial and defendant's indictment did not constitute grounds to arrest the judgment. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

Common Law Changed. — Burglary, as defined at common law, was a capital offense, i.e., the breaking into and entering of the "mansion or dwelling house of another in the nighttime, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not. This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923); State v. Morris, 215 N.C. 552, 2 S.E.2d 554 (1939).

First and Second Degree Burglary Distinguished. — If the burglary occurred — i.e., the breaking and entry occurred — while the dwelling house was actually occupied, that is, while some person other than the intruder was in the house, the crime is burglary in the first degree. If the house was then unoccupied, however momentarily, and whether known to the intruder or not, the offense is burglary in the second degree. Otherwise, the elements of the two offenses are identical. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

The bill of indictment returned by the grand jury charged all of the elements of burglary in the first degree. Consequently, it necessarily charged all of the elements of burglary in the second degree plus the additional allegation that the dwelling house in question was actually occupied at the time of the alleged breaking and entry by the defendant. This further element of actual occupancy at the time of the breaking and entering is the only distinction between the two degrees of burglary. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, 317 N.C. 457, 346 S.E.2d 646 (1986).

If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973); State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974); State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

By this section the offense of burglary is divided into two degrees, first and second. The distinction between the two degrees depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

If the intrusion is into a place where people are present, then burglary in the first degree has been committed. If the intrusion is into a place where it is likely that the repose of one of the household would be disturbed if one were present (but is not), then burglary in the second degree has been committed. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

The sole distinction between the two degrees of burglary is the element of actual occupancy of the dwelling house or sleeping apartment at the time of the breaking and entering. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Value of Goods Stolen Immaterial. — A person who burglariously broke and entered a dwelling at nighttime while the same was occupied was guilty of burglary in the first degree, and the fact that the value of the goods stolen from the dwelling was less than $20.00 was no defense to the charge of burglary in the first degree, since the provision of G.S. 14-72, dividing larceny into two degrees, by its terms had no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

B. First Degree.

Elements. — Burglary in the first degree consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling house or sleeping apartment of another, in the nighttime, with the further concurrent intent, which may be executed or not, then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony must be proved, in addition to the more general one, in order to make out the offense. State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, rehearing denied, 471 U.S. 1050, 105 S. Ct. 2044, 85 L. Ed. 2d 342 (1985).

The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment in any house or sleeping apartment (6) which is actually occupied at the time of the offense. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Meadows, 306 N.C. 683, 295 S.E.2d 394 (1982), overruled on other grounds, 307 N.C. 662, 300 S.E.2d 361 (1983); State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985); State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986).

Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984); State v. Brewer, 80 N.C. App. 195, 341 S.E.2d 354 (1986); State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

The crime of burglary in the first degree is complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein whether or not anything was actually stolen from the house. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

The essential elements of first degree burglary include breaking and entering a dwelling at nighttime, with the intent to commit a felony therein. In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

In order to support a verdict of guilty of first degree burglary, there must be evidence from which a jury could determine that the defendant broke and entered an occupied dwelling house of another at nighttime, with the intent to commit a felony therein. State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988).

In a prosecution for first-degree burglary, the burden is on the State to prove that the defendant committed: (1) a breaking; (2) and entering; (3) at nighttime; (4) into the dwelling house, or a room used as a sleeping apartment, of another; (5) which is actually occupied at the time; and (6) with the intent to commit a felony therein. State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997), cert. denied, 347 N.C. 584, 502 S.E.2d 616 (1998).

"Breaking" is essential element of the offense of first-degree burglary. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984).

To support charge of first degree burglary, the

State must present substantial evidence that there was a breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony. State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

Proof that the offense was planned is not an essential element of burglary in the first degree. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

Felonious Intent Element. — The trial judge erroneously submitted second-degree murder as the intended felony for first-degree burglary; because second-degree murder does not involve the intent to kill, it cannot serve as the felonious intent element for purposes of burglary. State v. Van Jordan, 140 N.C. App. 594, 537 S.E.2d 843, 2000 N.C. App. LEXIS 1246 (2000).

Concealed Officers as Persons in Actual Occupation. — Police officers concealed in a dwelling house with the knowledge and consent of the absent owner are persons in actual occupation within the meaning of this section; breaking and entering such a dwelling house would thus constitute burglary in the first degree. State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16 (1982).

Marital Relationship Alone Not a Complete Defense. — The marital relationship, in and of itself, does constitute a complete defense to the offense of burglary in the first degree. State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100, cert. denied, 313 N.C. 605, 330 S.E.2d 612 (1985).

In an action for first-degree burglary under the "acting in concert" principle, the defendant's contention that the State failed to provide evidence establishing that the burglary was part of a common plan was without merit, where a plan to "rough up" the victim required either gaining entry into her house or persuading her to come outside. Clearly, breaking into her home was in pursuance of the common purpose to assault her. State v. Barnes, 91 N.C. App. 484, 372 S.E.2d 352 (1988), modified on other grounds, 324 N.C. 539, 380 S.E.2d 118 (1989).

Property "of Another" Requirement Met. — The defendant committed burglary by breaking into his grandmother's house to murder her although defendant had a key, paid rent, kept personal belongings in the house, and had recently lived there. The victim/grandmother had exclusive possession of her residence at the time the defendant broke and entered into it, she had expressly refused to allow him entry into her house, and locked the screen door to keep others, including defendant and his girlfriend, from entering. State v. Blyther, 138 N.C. App. 443, 531 S.E.2d 855, 2000 N.C. App. LEXIS 619 (2000).

Failure to Allege Occupation. — Defendant's first-degree burglary conviction would be reversed where the State failed to allege that dwelling house was occupied at the time of the breaking and entering and where the offense of burglary and the offense of discharging a firearm into occupied property were mutually exclusive, since defendant could not be entering the dwelling and firing "into" it from the outside at the same time. State v. Surcey, 139 N.C. App. 432, 533 S.E.2d 479, 2000 N.C. App. LEXIS 899 (2000).

Evidence Held Sufficient. — Under the evidence, with all reasonable inferences drawn in the State's favor, a jury could reasonably have found that defendant showed a preconceived intent to rape the prosecutrix, so as to support a charge of first degree burglary, (1) by entering motel room shortly after prosecutrix's male companion had left, (2) by remaining in the room after he knew for certain that a woman was in it, and (3) by then closing and locking the room door before jumping on the prosecutrix, who lay in bed, and that he committed an overt act toward the commission of rape necessary for a conviction of attempted second-degree rape. The fact that the prosecutrix was more than a match for defendant, causing him to abandon any such intent and flee the room, would not absolve him from responsibility for his actions. State v. Planter, 87 N.C. App. 585, 361 S.E.2d 768 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 666 (1988).

Where defendant broke into skating rink which had an apartment, struck victim on the head with a stick as he was leaving with a briefcase containing the night's receipts and $300 which had been lying on the desk in the apartment, the State's evidence was sufficient to support the conviction of burglary in the first degree. State v. Brandon, 120 N.C. App. 815, 463 S.E.2d 798 (1995).

Given that the State presented sufficient evidence showing that defendant and two other men committed a breaking and entering into the victims' occupied residence, at night, taking a chain necklace, a PlayStation, some games, and a VCR and asking, "where is the money?" every element of a charge of first-degree burglary was shown to support the denial of a motion to dismiss. State v. Farrar, 190 N.C. App. 202, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008).

Evidence Held Insufficient. — Where a breaking and entering could have occurred any time before the sun rose, the evidence was only sufficient to raise a "suspicion or conjecture" that the breaking and entering occurred at nighttime, and the state failed to produce evidence of one element of first-degree burglary, entitling defendant to have the charge of burglary against him dismissed. However, the jury, in convicting defendant of first-degree burglary, necessarily found facts which established felonious breaking and entering. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Jury Instruction at Variance with Indictment Benefitted Defendant and Was Not Prejudicial Error. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

C. Second Degree.

Elements. — Second degree burglary is the breaking and entering of an unoccupied dwelling house during the nighttime with the intent to commit a felony therein. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

The constituent elements of second-degree burglary are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or sleeping apartment (5) of another (6) with the intent to commit a felony therein. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

In order to support a conviction for second degree burglary, there must be evidence from which a jury could find that defendants broke and entered a dwelling house at nighttime, with the intent to commit a felony therein. State v. Humphries, 82 N.C. App. 749, 348 S.E.2d 167 (1986).

Felonious Intent. — An essential element of second-degree burglary, as derived from the common law, is the intent of the perpetrator to commit a felony after accomplishing the breaking and entering of a dwelling house belonging to another in the nighttime. State v. Foust, 40 N.C. App. 71, 251 S.E.2d 893 (1979).

Both Breaking and Entering Must Be Proven. — Unlike felonious breaking or entering with intent to commit larceny, second degree burglary requires proof of both a breaking and an entering. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Actual Occupancy Not an Element. — Burglary in the second degree consists of all the elements of burglary in the first degree save the element of actual occupancy. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Occupancy Is No Defense. — If the bill of indictment, by omitting any allegation as to occupancy of the building, charged second-degree burglary only and if the evidence is sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering is not a defense to the charge. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971), overruled on other grounds, 317 N.C. 457, 346 S.E.2d 646 (1986).

Dwelling Need Only Be Momentarily Unoccupied. — If the burglarized dwelling is occupied, the crime is burglary in the first degree; but, if it is unoccupied, however momentarily, and whether known to the intruder or not, the crime is burglary in the second degree. State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983).

Evidence Held Sufficient. — Defendant's admission that on the night in question he pried open the door to victim's house and entered with the intent to steal anything of value that he could find, and that he, in fact, stole several items from the residence, coupled with the other evidence presented, provided sufficient evidence to justify submission of charge of second-degree burglary and to support the jury's finding of guilt. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Defendant's conduct of approaching a house from the rear and standing approximately 60 seconds in the front doorway before walking away and after defendant had talked to the homeowner about certain furniture constituted sufficient overt acts which went beyond mere preparation but fell just short of the completed offense of burglary in violation of G.S. 14-51; based on defendant's conduct, the jury could infer that, when defendant was standing on the door sill, defendant was attempting to gain entry into the home and was sufficient to deny defendant's motion to dismiss. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Evidence Held Insufficient. — Where evidence presented by defendants and the State indicated that each defendant believed the apartment which was entered to be the dwelling of the other's girlfriend, each defendant presented evidence that he believed the other defendant had permission to enter the apartment, and nothing in the apartment, according to the owner, had been disturbed, there was insufficient evidence to sustain a verdict of second degree burglary. However, there was evidence from which the jury could have found defendants guilty of misdemeanor breaking or entering under G.S. 14-54(b). State v. Humphries, 82 N.C. App. 749, 348 S.E.2d 167 (1986).

III. BREAKING AND ENTERING.

Breaking may be actual or constructive. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Edwards, 75 N.C. App. 588, 331 S.E.2d 183 (1985); State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads: (1) when entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened, (2) when in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters, (3) when entrance is obtained by procuring the servants or some inmate to remove the fastening, (4) when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, (5) when some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being open, enters. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115, modified on other grounds, 311 N.C. 145, 316 S.E.2d 75 (1984); State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984).

The list of five types of possible constructive breakings is not exhaustive but illustrative; the list merely provides a series of examples which illustrate certain general types of fact situations that might give rise to a constructive breaking, i.e., a breaking in law. State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984).

A constructive breaking in the law of burglary occurs, quite simply, when an opening is made not by the defendant but by some other person and, under the circumstances, the law regards the defendant as the author thereof. State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984).

A constructive breaking may be accomplished in a number of different ways, such as by tricking the occupant into opening the door, or by threatening the occupant with a deadly weapon. State v. Edwards, 75 N.C. App. 588, 331 S.E.2d 183 (1985).

A defendant commits a constructive breaking when the opening is made by a person other than the defendant, if that person is acting at the direction of, or in concert with, the defendant. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986); State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

A constructive breaking occurs where entrance is obtained in consequence of violence commenced or threatened by defendant. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Constructive breaking is as sufficient a breaking for the purposes of this offense as any physical removal by the defendant of a barrier to entry. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1984).

Constructive breaking occurs when confederate within house opens the door to admit defendant. The "confederate" or "other person" who actually creates the opening need not be an "inmate" or someone who regularly resides in the dwelling; it is enough if that person is acting at the direction, express or implied, of defendant, or is acting in concert with defendant, or both. State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984).

If any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369, rehearing denied, 471 U.S. 1050, 105 S. Ct. 2044, 85 L. Ed. 2d 342 (1985); State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984), cert. denied, 313 N.C. 333, 327 S.E.2d 894 (1985).

Unlocking Door or Opening Window. — There is a sufficient "breaking" to sustain a charge of first-degree burglary when a person unlocks a door with a key, or opens a closed, but not fastened window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Moving and raising of the window would be a breaking within the meaning of the law. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

Unlocked Door. — The mere pushing or pulling open of an unlocked door constitutes a breaking. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976); State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

Evidence that defendant entered through an unlocked door onto the porch of the house was sufficient to show a breaking and an entering. State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985).

The trial court did not need to find an aggravating factor for the breaking and entering count since the defendant was convicted of a misdemeanor which is not subject to G.S. 15A-1340.4(b). The finding of an aggravating factor for the misdemeanor conviction, therefore, was superfluous and nonprejudicial error. The extent of punishment for misdemeanors is referred to the discretion of the trial court and its sentence may not be interfered with by the appellate court, except in cases of manifest and gross abuse. State v. Clark, 107 N.C. App. 184, 419 S.E.2d 188 (1992).

Entry through an open window or door does not constitute a breaking. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

There was sufficient evidence that a "breaking" occurred since the victim here testified that she had screens on her windows and they were in place when she went to bed that night and since her nephew usually shut the door when he left. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Damage to Window or Door Not Required. — In order to show a breaking it is not required that the State offer evidence of damage to a door or window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Proof That Windows and Doors Closed Prior to Entry. — Proof that a breaking occurred, or from which it may reasonably be inferred that the defendant broke into the dwelling, is usually accomplished by testimony showing that prior to the entry all doors and windows were closed. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272, cert. denied, 283 N.C. 666, 198 S.E.2d 721; 284 N.C. 255, 200 S.E.2d 655 (1973).

"Busting" Door Open. — There was sufficient evidence of a "breaking" to support the trial court's charge on burglary where the state's evidence tended to show that defendant and a male accomplice gained access to deceased's dwelling by pushing a female accomplice out of the way, "busting" the door open and rushing into the dwelling. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Breaking Occurred Although Victim "Cracked" Door Open. — In a prosecution for first-degree burglary and second-degree rape, defendant's entry was accomplished by a "breaking" notwithstanding the fact that the prosecuting witness "cracked" her door to see who was there. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Pushing Victim into Room as Door Opened. — Where the evidence showed that defendant gained entry into victim's motel room by pushing victim into the room as he opened the door, this clearly constituted a constructive breaking. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Failure to Prove Both Breaking and Entering Personally Committed by Defendant. — Where there was no evidence from which the jury reasonably could have concluded that defendant, rather than codefendant, removed window screen and pried open window, and it was just as likely that defendant crawled through window after codefendant opened it, and where the court failed to instruct the jury on acting in concert, the evidence did not permit a finding that defendant personally committed each element of the offense of second degree burglary. However, by finding defendant guilty of second degree burglary the jury necessarily found facts that would support defendant's conviction of felonious breaking or entering. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986), vacating conviction of second degree burglary and remanding for entry of a judgment as upon a conviction of felonious breaking or entering.

Where the State offered no evidence to raise an inference that any force was employed to gain entry to the victim's apartment, and the victim testified concerning the type of lock on the only door to the apartment, but never stated that the door and two windows were closed when she went to sleep, and there was no evidence of forced entry, the defendant could not properly be convicted of burglary, but in view of evidence that the defendant entered the victim's apartment with the intent to commit an assault upon her, he could be convicted of felonious breaking or entering. State v. Eldridge, 83 N.C. App. 312, 349 S.E.2d 881 (1986).

Showing of Nonconsent by Occupant. — While consent to entry by the owner of a dwelling house constitutes a defense to burglary, in order to convict a person of burglary it is not necessary to show nonconsent by the owner when the premises are occupied by another, but only nonconsent by the occupant. State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

Inference from Possession of Stolen Articles. — Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

Inferences from Possession of Implements Used in Housebreaking. — the State was required to prove that defendant personally committed each essential element of the offense of burglary, including an actual breaking. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

Evidence held sufficient to permit a finding that defendant and another were acting in concert to further their joint effort to evade the authorities when the other individual committed a breaking on victim's house, and therefore, under a constructive breaking theory, there was sufficient evidence that defendant broke into the house. State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

IV. DWELLING HOUSE OR SLEEPING APARTMENT.

Sleeping Apartment. — The sleeping apartment referred to in the section is one in which a person regularly sleeps. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

Store with Sleeping Quarters. — The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

Tent or Booth. — Burglary could not be committed in a tent or booth erected in a market or fair, although the owner lodged in it. State v. Jake, 60 N.C. 471 (1864).

Sorority House Rooms. — If entered, the rooms assigned to each sorority member, as well as the quarters solely occupied by the caretakers, would properly be considered individual dwelling houses for purposes of our burglary statute. State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (1995).

Trial court's statement to the jury that the motel room in question was a sleeping apartment was an impermissible expression of opinion, or an assumption that a material fact had been proved within the meaning of G.S. 15A-1232. However, since there could be no serious contention that a motel room, regularly and usually occupied by travelers for the purpose of sleeping, was not in fact a "sleeping apartment" within the meaning of this section and its predecessors, nor did defendants contest the "sleeping apartment" issue at trial, other than by their general pleas of not guilty, there was no reasonable possibility that this error contributed to defendant's conviction or that a different result would have been obtained had the language complained of been omitted, therefore, the error was harmless. State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979), cert. denied, 446 U.S. 929, 100 S. Ct. 1867, 64 L. Ed. 2d 282 (1980).

Storage room built at the back of a house behind a bedroom was "appurtenant" to the main dwelling and a robbery therefrom would constitute first-degree burglary. State v. Green, 305 N.C. 463, 290 S.E.2d 625 (1982).

Travel Trailer. — An occupied travel trailer can satisfy the occupied dwelling element of first degree burglary. State v. Taylor, 109 N.C. App. 692, 428 S.E.2d 273 (1993).

An uninhabited, unoccupied residential condominium unit, available for rent, is a "dwelling house or sleeping apartment" as those terms are used in the definition of burglary. State v. Hobgood, 112 N.C. App. 262, 434 S.E.2d 881 (1993).

Dwelling Broken into Must Be that of Another. — Requirement that dwelling house or sleeping apartment broken into be that of someone other than defendant was an element of burglary at common law and is implicitly incorporated in this section. State v. Harold, 312 N.C. 787, 325 S.E.2d 219 (1985).

One cannot commit the offense of burglary by breaking into one's own house. State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100, cert. denied, 313 N.C. 605, 330 S.E.2d 612 (1985).

Occupation or Possession Is Equivalent to Ownership. — In burglary cases occupation or possession of a dwelling is equivalent to ownership, and actual ownership of the premises need not be proved. The inquiry relevant to this element of the crime is whether the premises is the dwelling of another, not whether it is owned by another. State v. Harold, 312 N.C. 787, 325 S.E.2d 219 (1985).

In burglary cases, occupation or possession of a dwelling or sleeping apartment is tantamount to ownership. State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100, cert. denied, 313 N.C. 605, 330 S.E.2d 612 (1985).

Ownership Need Not Be Alleged. — There is no requirement that actual ownership of the occupied premises be alleged and proved. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Occupation of Dwelling House by One Other Than Owner. — A structure does not lose its status as a dwelling house because it is being occupied by someone other than the owner. State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

Where individual living in house was not paying rent and he was living there to protect it and its contents for its owners, this fact did not negate the evidence, which clearly showed that the structure was a dwelling house. State v. Watts, 76 N.C. App. 656, 334 S.E.2d 68 (1985), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

Owners Not Present. — A dwelling house does not lose its character merely because its elderly owner/occupant is residing elsewhere, due to ill health. State v. Smith, 121 N.C. App. 41, 464 S.E.2d 471 (1995).

The character of a dwelling place does not change simply because its owners are absent for a time, especially where there are objects of value left in the homes and there are persons who maintain the homes in the owners' absence. State v. Smith, 121 N.C. App. 41, 464 S.E.2d 471 (1995).

Occupant Need Not Be Asleep. — There is no requirement that there be an individual asleep in the house which is broken into in order for burglary to be committed. Edwards v.

Garrison, 529 F.2d 1374 (4th Cir. 1975), cert. denied, 424 U.S. 950, 96 S. Ct. 1421, 47 L. Ed. 2d 355 (1976).

Whether House Is Occupied Is for Jury. — The question whether a house is actually occupied at the time an intruder breaks and enters is for the jury. State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983).

V. CURTILAGE.

Definition. — The meaning of the term curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. State v. Twitty, 2 N.C. 102 (1794).

The curtilage is the land around a dwelling house upon which those outbuildings lie that are commonly used with the dwelling house. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Visual and auditory proximity of outbuildings that serve the comfort and convenience of the homeowner is still a useful theoretical measure of whether those buildings lie within or beyond the curtilage. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Shed that housed tools, garden equipment, nonperishable food, and a freezer and that was located at least 45 feet from dwelling was not within the curtilage of dwelling house for purposes of the burglary statute. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Common Areas. — The common areas of sorority house, appurtenant to the caretaker's private apartment, were within the curtilage and a portion of the caretaker's "dwelling house" for purposes of the burglary statute. State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (1995).

VI. NIGHTTIME.

Nighttime. — The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight. With respect to burglary, there is no statutory definition of nighttime in this State. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985); State v. Lyszaj, 314 N.C. 256, 333 S.E.2d 288 (1985).

Both Degrees of Offense Must Occur at Night. — Since 1889, burglary has been divided into two degrees by this section. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur in the nighttime, and this common law requirement is still the law in this State. State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

Hour Need Not Be Alleged. — Although the common law required an indictment for burglary to allege the hour the crime was committed, today it is sufficient to aver that the crime was committed in the nighttime. State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974).

Since nine o'clock at night in January in this longitude is two hours or more after darkness begins, that evidence justifies the inference that the breaking and entry also occurred during the dark of night. State v. Squalls, 65 N.C. App. 599, 309 S.E.2d 558 (1983).

Circumstantial Evidence as to Nighttime. — The State is not limited to proving solely by direct evidence that the breaking and entering was accomplished in the nighttime; this essential element may be shown by proof of circumstances which convince a reasonable mind of the fact. State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986).

The defendant presented sufficient evidence entitling him to an instruction on the definition of nighttime where a question existed as to whether the crimes, including one charge pursuant to this section, were committed in the early morning after nighttime had ended. State v. McKeithan, 140 N.C. App. 422, 537 S.E.2d 526, 2000 N.C. App. LEXIS 1205 (2000).

Evidence Held Sufficient. — Testimony of victim that it was dark in victim's room and dark outside when men entered his bedroom, along with testimony of accomplice that when they arrived at victim's residence, it was about 9:10 p.m., and they waited outside until he turned the light out, viewed in the light most favorable to the State, constituted substantial evidence that the unauthorized entry was during the nighttime. State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

Testimony that the burglary did not occur until after two victims returned from the store which was after 8:00 p.m., was sufficient to allow a reasonable juror to find that the breaking and entering occurred during the nighttime and thus, the support a conviction for first-degree burglary. State v. Yarborough, — N.C. App. —, 679 S.E.2d 397, 2009 N.C. App. LEXIS 1078 (July 7, 2009).

Evidence Held Insufficient. — Where no substantial evidence existed as to the essential element that defendant perfected his breaking and entering during the nighttime, defendant's conviction for second-degree burglary was reversed. State v. Rick, 342 N.C. 91, 463 S.E.2d 182 (1995).

VII. FELONIOUS INTENT.

Felonious intent is an essential element of burglary which the State must allege and prove, and the felonious intent proven must be the felonious intent alleged. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

A specific felonious intent is an essential element of burglary which must be alleged and proved and the state is held to proof of the intent alleged in the indictment, and it is error for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment. State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

First-degree burglary and second-degree burglary under this section and felonious breaking and entering under subsection (a) of G.S. 14-54 require, for conviction, proof of intent to commit a felony. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983).

Felonious intent is an essential element which the State must allege and prove in order to sustain a charge of first-degree burglary. State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997), cert. denied, 347 N.C. 584, 502 S.E.2d 616 (1998).

Since felonious intent is a state of mind and may be inferred from a defendant's acts and conduct, it is within the province of the jury to determine whether the defendant had the requisite felonious intent at the time of the breaking and entering. State v. Wright, 127 N.C. App. 592, 492 S.E.2d 365 (1997), cert. denied, 347 N.C. 584, 502 S.E.2d 616 (1998).

Intent Must Exist at Time of Breaking and Entering. — The fifth element of burglary — the intent to commit a felony — must exist at the time of the breaking and entering. Intent, being a state of mind, is difficult to prove and ordinarily is a question for the jury to decide. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272, cert. denied, 283 N.C. 666, 198 S.E.2d 721, 284 N.C. 255, 200 S.E.2d 655 (1973).

The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983).

If at the time of a breaking and entering a person does not possess the intent to commit a felony therein, he may only properly be convicted of misdemeanor breaking or entering. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

The defendant's intent to commit a felony must exist at the time of entry, but it is no defense that defendant abandoned the intent after entering. State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988); State v. Robinson, 97 N.C. App. 597, 389 S.E.2d 417, appeal dismissed, 326 N.C. 804, 393 S.E.2d 904 (1990).

Actual Commission of Felony Not Required. — Actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974); State v. Brewer, 80 N.C. App. 195, 341 S.E.2d 354 (1986).

The actual commission of the intended felony is not essential to the crime of burglary. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

The crime of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Because there was substantial evidence from which the jury could have plausibly determined that defendant entered with the intent of committing rape, but did not follow through with his plans where he ripped off the victim's clothes and choked her prior to letting her go, the trial court correctly denied defendant's request to dismiss the case at the close of evidence. State v. Holt, 181 N.C. App. 328, 639 S.E.2d 65, 2007 N.C. App. LEXIS 22 (2007).

Defendant Need Not Retain Intent Throughout Intrusion. — The intent to commit a felony must exist at the time of entry, but it is not necessary that defendant retain that intent throughout the intrusion. State v. Norris, 65 N.C. App. 336, 309 S.E.2d 507 (1983).

The requisite felonious intent need exist only at the time of the breaking and entering. It is no defense that the defendant later abandoned his intent because of unexpected or startling resistance or outcry. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part and remanded for resentencing, 318 N.C. 669, 351 S.E.2d 294 (1987).

Intent Usually Proved by Circumstances. — Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

Commission of Felony as Proof of Intent. — The fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary, but is only evidence from which such intent at the time of the breaking and entering may be found. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

Evidence that the defendant committed larceny once inside the apartment which he broke into was some evidence of intent at the time of the break-in, although it was not positive proof.

State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

Usual Purpose Is Theft. — In the absence of evidence of other intent or explanation for breaking and entering, the usual object or purpose of burglarizing a dwelling house at night is theft. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981), cert. denied, 305 N.C. 591, 292 S.E.2d 16, cert. withdrawn as improvidently granted sub nom. State v. Christmas, 305 N.C. 654, 290 S.E.2d 613 (1982).

Fact of entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Evidence of unauthorized entry at night and flight upon discovery, in the absence of any other explanation, will support an inference of larcenous intent. The fact that the jury found that defendant did not accomplish the larceny does not negate the inference, since it is the intent at the time of the breaking and entering that is determinative. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part and remanded for resentencing, 318 N.C. 669, 351 S.E.2d 294 (1987).

The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others, in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

Defendant Not Aided by Fact that Valuables Undisturbed. — In a prosecution for first-degree burglary, where the State attempts to show intent to commit larceny, the fact that defendant did not disturb any of the valuables in the house does not aid him. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jury Question. — Where the evidence is sufficient for submission to the jury upon the allegations contained in the indictment, it is for the jury to determine, under all the circumstances, whether the defendant had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The indictment having identified the intent necessary, the State is held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

Evidence Held Sufficient to Show Intent. — Evidence held sufficient for a rational trier of fact to infer that defendant in burglary prosecution intended to commit the felony of rape. State v. Powell, 74 N.C. App. 584, 328 S.E.2d 613 (1985).

Trial court did not err in denying defendant's motion to dismiss his first-degree burglary charge and the evidence was sufficient to support the jury's finding that defendant intended to rape the victim at the time that he forced his way into the victim's residence where: (1) defendant forced the victim into her bedroom, pushed her onto the bed, threw his body on top of hers, and pinned her down; (2) defendant removed duct tape from his pocket, whereupon the victim renewed her efforts to escape and called for help; (3) defendant repeatedly touched the victim's breast and genitals and, despite her resistance, did not end the assault until law enforcement officers arrived; and (4) although defendant asserted that he merely wished to use the telephone or the restroom when he entered the home, none of the acts he committed within the residence furthered these asserted goals. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Evidence held sufficient to support finding of intent to rape so as to permit a conviction of first-degree burglary. State v. Wortham, 80 N.C. App. 54, 341 S.E.2d 76 (1986), rev'd in part and remanded for resentencing, 318 N.C. 669, 351 S.E.2d 294 (1987).

Evidence Held Sufficient to Establish Felony of Taking Indecent Liberties with a Child. — Testimony of 13-year-old victim that intruder was feeling on his "private area" permitted the jury to reasonably conclude that the activity concerned the victim's genital area, and taken with the remainder of State's evidence, was sufficient to establish the underlying felony of taking indecent liberties with a child and, a fortiori, the offense of first degree burglary. State v. Oakman, 97 N.C. App. 433, 388 S.E.2d 579 (1990).

Evidence held insufficient to show overt manifestation of an intended forcible sexual gratification, even when it was considered that defendant had been previously convicted of a rape carried out in the same apartment complex by a similar method. State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988).

VIII. INDICTMENT.

Felony Must Be Specified. — In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923), superseded by statute, specifically G.S. 15A-924(a)(5), as stated in State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994), and State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The particular felony which it is alleged the accused intended to commit must be specified. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

When the prosecution amended an indictment for felonious breaking and entering in such a manner that the defendant could no longer rely upon its statement of the felony defendant allegedly intended, such an amendment was a substantial alteration and was prohibited by G.S. 15A-923(e), as to allow such practice would enable the state to thwart the very purpose of an indictment, which was to enable the accused to prepare for trial. State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006), rev'd in part, 361 N.C. 675, 651 S.E.2d 865 (2007), aff'd on remand, — N.C. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008), State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

It is axiomatic that where the state alleges an intent to commit a specific felony as an element of burglary in the indictment, the jury is required to find defendant possessed the intent to commit the specific felony alleged in order to convict on the charge. State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006), rev'd in part, 361 N.C. 675, 651 S.E.2d 865 (2007), aff'd on remand, — N.C. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008), State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

But Not Fully and Specifically. — The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony where the State is relying only upon the charge of burglary. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to commit therein the crime of larceny, rape or arson. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

There was not a fatal variance between the indictment charging that defendant broke into the victim's residence with an intent to sexually assault the victim, a crime not recognized in North Carolina, and the evidence offered at trial as there was not a requirement that a burglary indictment specify the crime a defendant intended to commit at the time that he broke into a victim's residence, and the indictment properly alleged that defendant intended to commit a felony at the time of the breaking and entering; further, the indictment alleged that defendant intended to kidnap the victim, a crime for which he was convicted. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Charging Intent to Commit "a Felony" Insufficient. — In an indictment for burglary it is not enough to charge generally an intent to commit "a felony" in the dwelling house of another. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Description of Stolen Property Not Required. — It is not required that indictment for first-degree burglary describe property which defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Indictment Sufficient to Support Conviction of Lesser Offense. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and G.S. 15-170 provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or a lesser degree of the same crime. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Although, in its jury charge on the offense of first-degree burglary, the court did not instruct the jury on the lesser-included offense of felonious breaking or entering, the indictment charging only burglary and the instructions thereon were nonetheless sufficient to support a conviction for felonious breaking or entering. State v. Eldridge, 83 N.C. App. 312, 349 S.E.2d 881 (1986).

Indictment Sufficient to Charge Larceny Punishable as a Felony. — An indictment that alleged larceny was committed "pursuant to a violation of G.S. 14-51" was in the language of G.S. 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

Failure to Identify Premises Fatal. — Indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Indictment for Burglarizing Unoccupied Toolshed Was Defective. — Indictment for burglary in the second degree, which specified that defendant broke into and entered an unoccupied toolshed at nighttime with felonious intent, was defective and should have been quashed, and the trial court was remiss in not dismissing charges of burglary in the second degree based upon that indictment. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Burglary Indictment Insufficient. — An indictment alleging that defendant broke and entered, with intent to commit a felony within, to wit: "by sexually assaulting a female," did not charge the defendant with the crime of burglary and would not support the imposition of a sentence to life imprisonment for first-degree burglary. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Proof of Element Not Essential to Intended Felony Was Not Fatal Variance. — Evidence that defendant followed his victims to apartment, that as they attempted to close the apartment door he pushed his way into the apartment, and that he took a purse from one of his victims and then fled supported a finding that he intended to commit and in fact did commit larceny from the person, so as to support conviction of first-degree burglary. The fact that he was required to use force against his victim in order to take the purse, thereby placing the victim in fear and elevating his crime to that of common-law robbery, did not establish a fatal variance in the indictment and the proof. State v. Brewer, 80 N.C. App. 195, 341 S.E.2d 354 (1986).

What Must Be Proved Where Indictment Charges Intent to Commit Rape. — Where bill of indictment stated that defendant broke and entered the dwelling house of the victim with the intent to commit a felony therein, to wit, rape, the state was required to introduce substantial evidence to permit the jury to find that, at the time defendant broke and entered, he intended to have vaginal intercourse with the victim by force and against her will. Furthermore, the state's evidence had to present some overt manifestation of an intended forcible sexual gratification by defendant to prevail. State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988).

IX. LESSER OFFENSES.

Lesser Offense Set Forth in § 14-54. — The statutory offense set forth in G.S. 14-54 is a less degree of the offense of burglary in the first degree as defined in this section. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of G.S. 14-54, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of G.S. 14-54 is a lesser degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first and second degrees. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

To justify submission of felonious breaking or entering as a permissible verdict in a prosecution for burglary there must be evidence tending to show that defendant could have gained entry to victim's motel room by means other than a burglarious breaking, i.e., a forcible entry. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Misdemeanor breaking or entering is a lesser included offense of burglary in the first degree. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986); State v. Planter, 87 N.C. App. 585, 361 S.E.2d 768 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 666 (1988).

Distinction between misdemeanor breaking or entering and burglary rests on whether the unlawful breaking or entering was done with the intent to commit the felony named in the indictment. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986); State v. Planter, 87 N.C. App. 585, 361 S.E.2d 768 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 666 (1988).

Where only evidence of intent to commit larceny was the fact that defendant broke and entered into victim's apartment, the trial court erred in failing to submit the lesser included offense of misdemeanor breaking or entering to the jury as a possible verdict. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

Forcible trespass and trespass are not lesser included offenses of attempted first-degree burglary. Attempted first-degree burglary does not require a commandment forbidding entry for an order to leave as does trespass under G.S. 14-134. It also does not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as does forcible trespass under G.S. 14-126. State v. McAlister, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, 307 N.C. 471, 299 S.E.2d 226 (1983).

Resentencing for Misdemeanor Breaking and Entering on Vacation of First Degree Burglary Conviction. — By finding defendant guilty of first-degree burglary, the jury necessarily found facts which would support defendant's conviction of misdemeanor breaking or entering, and thus where judgment on the verdict of guilty of first-degree burglary was vacated for failure to prove intent to commit a felony, the cause would be remanded to the superior court for resentencing on the misdemeanor breaking or entering conviction. State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988).

X. EVIDENCE.

Fingerprint Evidence. — Evidence that the occupant of a burglarized residence did not know defendant and had never seen him before, coupled with lack of evidence that defendant had ever been on the premises before, was substantial evidence that the accused's fingerprints found inside the residence could only have been impressed at the time of the offense. State v. Wright, 78 N.C. App. 673, 334 S.E.2d 84 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Evidence that respondent entered a house at night because somebody was chasing her was evidence of other intent, and precluded application of the presumption that when a party enters the dwelling of another, in the nighttime, while the inmates are asleep, the usual intent is to steal. In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987).

Recent Possession. — Larceny and burglary convictions upheld under the doctrine of recent possession. State v. Walker, 86 N.C. App. 336, 357 S.E.2d 384 (1987), aff'd, 321 N.C. 593, 364 S.E.2d 141 (1988).

Evidence Establishing Constructive Presence. — Where state's evidence tended to show defendant was waiting with a gun either five or six yards from the house or down the road, but close enough to lend aid by apprehending a victim who fled from the house immediately after a burglary, the court held there was sufficient evidence to establish defendant's constructive presence and to submit the charge of burglary to the jury under the theory of acting in concert. State v. Barnes, 91 N.C. App. 484, 372 S.E.2d 352 (1988), modified and aff'd, 324 N.C. 539, 380 S.E.2d 118 (1989).

Sufficiency of Evidence. — When the solicitor (now district attorney) announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Evidence Was Sufficient to Deny Motion to Dismiss. — Where defendant took the principals to dwelling at night, armed them and told them to "rough up" the inhabitants, the trial court did not err in denying defendant's motion to dismiss or to set aside his conviction of first-degree burglary on grounds that he neither procured nor participated in breaking and entering. State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988).

Trial judge did not err in denying defendant's motion to dismiss the charges of first degree burglary, felonious larceny, and felonious possession of stolen goods; the presence of defendant's fingerprints on both sides of a window to a room in which there was no apparent reason for his presence and from which a television had recently been taken was evidence sufficient to support a conclusion with respect to the charges against the defendant. State v. Williams, 95 N.C. App. 627, 383 S.E.2d 456 (1989).

In view of uncontroverted evidence presented by homeowner that the dwelling in question was occupied at the time defendant entered, it was not error for the trial court to deny his motion to dismiss the charge of first degree burglary on ground that state had failed to prove this. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

Defendants' convictions in a joint trial for one count of first degree burglary and five counts of first degree kidnapping were affirmed because defendants and three other men entered a residence and tied up the five people that they found in the residence, hit some of the people that they tied up, took money from one of the people, and unplugged and moved a stereo system that they planned to take with them before police officers arrived upon the scene and arrested defendants. Furthermore, the trial court did not abuse its discretion in denying a motion to sever defendants' trials because of defendants' collective criminal behavior in the commission of the crimes. State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004).

Trial court properly denied defendant's motion to dismiss criminal charges against him; evidence that defendant forced the victim at knifepoint from the front of her home to a bedroom and then sexually assaulted her constituted sufficient evidence to satisfy the charge of kidnapping under G.S. 14-39(a), as well as the charge of rape under G.S. 14-27.2 and burglary under G.S. 14-51. State v. Blizzard, 169 N.C. App. 285, 610 S.E.2d 245, 2005 N.C. App. LEXIS 680 (2005).

Evidence held sufficient to convict defendant of both first degree burglary and robbery with a dangerous weapon. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Defendant's second-degree burglary conviction under G.S. 14-51 was upheld because there was sufficient evidence that he intended to commit armed robbery when he entered the victim's hotel room; defendant held the victim at gunpoint while the victim was forced into his room and robbed. A constructive breaking occurred when the victim was forced into his room. State v. Irons, 189 N.C. App. 201, 657 S.E.2d 733, 2008 N.C. App. LEXIS 408 (2008).

Sufficient Evidence of Burglary in the First Degree. — There was sufficient evidence to convict defendant of burglary in the first degree under G.S. 14-51, given that the State showed that he broke and entered his murder victim's home in the nighttime. While the evidence that the victim was in or near her nightclothes at the time of the murder was not dispositive of whether the breaking and entering occurred at night, such evidence was relative and was properly considered with the other evidence that tended to show that the crime occurred during the nighttime. State v. Elliott, 360 N.C. 400, 628 S.E.2d 735, 2006 N.C. LEXIS 46 (2006).

XI. INSTRUCTIONS.

Instruction as to Second Degree Burglary Not Authorized Where All Evidence Proves First Degree Burglary. — Where all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Where a burglarious breaking into a dwelling house had been charged in the bill of indictment, and the evidence tended only to establish the first degree burglary, an instruction to the jury that they might return a verdict of guilty in either degree was erroneous. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923), superseded by statute as stated in State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994), and State v. Silas, 360 N.C. 377, 627 S.E.2d 603 (2006).

Failure to Instruct on Specific Intent Held Error. — The trial court's aiding and abetting instructions were erroneous in failing to require that the jury find the defendant possessed the specific criminal intent for commission of first degree burglary and second degree kidnapping. The trial court's use of the phrases "knowingly encouraged and[/or] aided" did not "adequately convey" the requisite specific intent concept as expressly requested by defendant in writing. State v. Lucas, 138 N.C. App. 226, 530 S.E.2d 602, 2000 N.C. App. LEXIS 596 (2000).

Charge of Misdemeanor Breaking and Entering Not Required. — Where the prosecutrix's testimony supported the conclusion that defendant attempted to rape her, and neither the State nor defendant submitted any evidence from which to infer another reason for defendant's entry into the prosecutrix's room, the trial court did not err in failing to submit the lesser-included offense of misdemeanor breaking or entering to the jury as a possible verdict for defendant. State v. Planter, 87 N.C. App. 585, 361 S.E.2d 768 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 666 (1988).

Where overwhelming evidence showed that prior to breaking into the house defendant had decided to kill his estranged wife's family, all the evidence relevant to the time before defendant broke and entered supported an inference that defendant possessed the intent to kill, and no evidence tended to negate this intent, a rational trier of fact could not have concluded defendant did not possess the intent to commit murder, and the trial court did not err in refusing to instruct on the lesser-included offense of misdemeanor breaking or entering. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

Evidence of intoxication was insufficient to require an instruction on misdemeanor breaking and entering where the only evidence of defendant's intoxication was the testimony defendant was an alcoholic, defendant's testimony that he had been drinking on the dates in question, and the fact that the police, on a later date, found beer in his car. State v. Howie, 116 N.C. App. 609, 448 S.E.2d 867 (1994).

Where State's evidence clearly satisfied the elements of first-degree burglary and first-degree statutory rape, and there was no substantial evidence of misdemeanor breaking or entering, it was not error for judge to refuse to instruct on the lesser offense. State v. Campbell, 133 N.C. App. 531, 515 S.E.2d 732, 1999 N.C. App. LEXIS 619 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 370 (1999).

Charge of Felonious Breaking and Entering Not Required. — Defendant who was charged with first degree burglary was not entitled to a jury instruction on the lesser included offense of felonious breaking and entering where the state's evidence was sufficient to satisfy its burden of proof on each element of the greater offense. State v. Crawford, 179 N.C. App. 613, 634 S.E.2d 909, 2006 N.C. App. LEXIS 2019 (2006).

Error Not to Instruct on Misdemeanor Breaking and Entering. — The trial court erred in not instructing the jury on the lesser-included offense of misdemeanor breaking or entering and the error was not cured by the guilty verdict of first-degree burglary since it cannot be known whether the jury would have convicted defendant of misdemeanor breaking or entering had it been properly instructed. State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (1994).

Instruction that defendant must have intended to commit rape or robbery with a dangerous weapon, or both at the time of the breaking and entering was proper and did not violate defendant's right to a unanimous jury verdict, where the indictment was phrased in the conjunctive, e.g., rape and robbery. It was proper for the trial court to instruct the jury that it could convict for the indicted offense if it found that defendant committed either or both of the particular felonies alleged to support the indictment. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instructions as to Lesser Offenses Supported by Evidence. — Where there is evidence of a burglarious entry into a dwelling house sufficient to convict of first degree burglary, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923), superseded by statute as stated in State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994), and State v. Silas, 360 N.C. 377, 627 S.E.2d 603 (2006).

Instructions as to Lesser Offense Not Supported by Evidence. — Ample evidence from which the jury could infer that defendant entered the victim's house with the intent to commit rape and to commit other offenses against the victims did not conflict with evidence that he intended to commit rape, but was irrelevant for purposes of proof of burglary and of felony murder. Therefore, the State's evidence was positive as to each element of burglary based on the intent to commit rape, and no evidence contradicted any element of this charge. Thus, the trial court did not err in refusing to submit the lesser-included offenses of second-degree murder and involuntary manslaughter to the jury. State v. Yelverton, 334 N.C. 532, 434 S.E.2d 183 (1993).

Failure to instruct on the lesser-included offense of misdemeanor breaking or entering was not error where there was no evidence to support the lesser charge. State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993).

Failure to Charge Lesser Offense. — Since a rational trier of fact could have found that the drugged and intoxicated defendant did not form an intent to commit larceny before breaking and entering, the trial court prejudicially erred in failing to instruct on misdemeanor breaking and entering. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

Instruction That Verdict of Burglary in Second Degree Not Permissible. — Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible is without error. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Where all of the evidence presented showed the dwelling was occupied at the time of the breaking and entering, the court was not authorized to instruct the jury it could return a verdict of burglary in the second degree. State v. Gilreath, 118 N.C. App. 200, 454 S.E.2d 871 (1995).

Where evidence showed that house was unoccupied for approximately half an hour, there was no error in instructing the jury that if it did not find from the evidence, beyond a reasonable doubt, that the house was occupied at the time of the breaking and entering, it should find the defendant not guilty of burglary in the first degree, but it should return a verdict of burglary in the second degree if it did so find each of the elements thereof. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Sufficient Evidence to Submit Question of First-Degree Burglary to Jury. — Evidence that the house was broken into by forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed and led to the defendant's room in another house in a distant part of the city, where defendant was apprehended, was held sufficient to be submitted to the jury on the question of defendant's guilt of burglary in the first degree. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

Where evidence supported an inference that second victim had been forced, through violence and the threat of violence, back into his upstairs apartment before being killed, trial court did not err in submitting the charge of first-degree burglary to the jury. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Sufficient Evidence to Submit Question of Second-Degree Burglary. — Evidence that the defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, was sufficient to be submitted to the jury on the charge of second-degree burglary, the method of entry being a constructive "breaking." State v. Rodgers, 216 N.C. 572, 5 S.E.2d 831 (1939).

Submission of Question of Guilt of Nonburglarious Breaking. — The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that a window of the room in which felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there was no evidence of burglary in the second degree, the evidence tended to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant could be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constituted reversible error. State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1941).

Failure to Define Larceny. — Where an indictment for second-degree burglary alleged that the defendant's intent was to commit larceny, but the trial judge failed to define the term "larceny" in its instructions, the omission was prejudicial and erroneous and required a new trial. State v. Foust, 40 N.C. App. 71, 251 S.E.2d 893 (1979).

Charge Where Only Issue Was Time of Offense. — Where one charged with burglary in the first degree admitted the entering and taking, the only question remaining was whether it was done at nighttime, and the jury should not have been charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. State v. McKnight, 111 N.C. 690, 16 S.E. 319 (1892).

Opinion of What Constituted Dwelling House. — Challenged instruction of the trial court, which constituted an indirect statement that apartment and the common areas of sorority house constituted a single "dwelling house" for purposes of application of the burglary statute, violated G.S. 15A-1232 by expressing an opinion as to the existence of a material fact. State v. Merritt, 120 N.C. App. 732, 463 S.E.2d 590 (1995).

XII. VERDICT.

Discretion of Jury as to Degree. — The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence shows burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second-degree burglary may be returned if the evidence shows such an offense. State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree was not authorized. State v. Alston, 113 N.C. 666, 18 S.E. 692 (1893); State v. Johnston, 119 N.C. 883, 26 S.E. 163 (1896).

Attempt to Commit Burglary. — The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Effect of Requesting Verdict of Second Degree Burglary on Indictment Charging Burglary in First Degree. — The defendant was charged with burglary in the first degree in the bill of indictment, and when the solicitor (now district attorney) stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital charge. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside. — Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Verdict Considered as Verdict for Lesser Offense Where Breaking Not Shown. — Where there was insufficient evidence from which the jury could find that defendant committed an actual breaking under the court's instructions, the verdicts of second degree burglary returned by the jury would be considered verdicts of guilty of felonious breaking or entering. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

Double Jeopardy. — The offense of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the intent to commit the designated felony therein. The crime has been committed even though, after entering the house, the accused abandons his intent to commit the designated felony. Consequently, the felonious intent required as an element of burglary cannot be equated with the commission of the underlying felony, and if a burglar after breaking and entering proceeds to commit the underlying felony inside the dwelling, he can be convicted of both crimes. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Defendant's burglary conviction did not violate double jeopardy principles where he was also convicted for first degree felony-murder; there was no inconsistency in the jury finding a lack of premeditation and deliberation required for first degree murder but finding the requisite intent to satisfy a felony-murder conviction. State v. Blyther, 138 N.C. App. 443, 531 S.E.2d 855, 2000 N.C. App. LEXIS 619 (2000).

§ 14-51.1. Use of deadly physical force against an intruder.

(a) A lawful occupant within a home or other place of residence is justified in using any degree of force that the occupant reasonably believes is necessary, including deadly force, against an intruder to prevent a forcible entry into the home or residence or to terminate the intruder's unlawful entry (i) if the occupant reasonably apprehends that the intruder may kill or inflict serious bodily harm to the occupant or others in the home or residence, or (ii) if the occupant reasonably believes that the intruder intends to commit a felony in the home or residence.

(b) A lawful occupant within a home or other place of residence does not have a duty to retreat from an intruder in the circumstances described in this section.

(c) This section is not intended to repeal, expand, or limit any other defense that may exist under the common law. (1993 (Reg. Sess., 1994), c. 673, s. 1.)

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Front Porch of Home. — The court properly instructed the jury with regard to the defendant's right to defend himself pursuant to this section, notwithstanding the defendant's assertion that the trial court committed prejudicial error when it failed to instruct the jury that the front porch was part of his home's curtilage and thus covered thereunder; the jury asked whether the front porch was "a part of the home or inside the home," and the trial court properly replied that the "front porch is a part of the home," and "a front porch is not inside the home." State v. Blue, 143 N.C. App. 478, 550 S.E.2d 6, 2001 N.C. App. LEXIS 301 (2001).

Whether a porch, deck, garage, or other appurtenance attached to a dwelling is within the home or residence for purposes of G.S. 14-51.1 is a question of fact best left for the jury's determination based on the evidence presented at trial. State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

When a trial judge, in response to the jury's question asking whether a porch was inside a home, responded that "a porch is not inside the home," this was tantamount to instructing the jury that the porch could not as a matter of law be inside the home for purposes of a defense of habitation defense under G.S. 14-51.1, and it improperly invaded the province of the jury and commented on the evidence. State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

Construction. — In enacting G.S. 14-51.1, the general assembly broadened the defense of habitation to make the use of deadly force justifiable whether to prevent unlawful entry into the home or to terminate an unlawful entry by an intruder. State v. Blue, 356 N.C. 79, 565 S.E.2d 133, 2002 N.C. LEXIS 540 (2002).

§ 14-52. Punishment for burglary.

Burglary in the first degree shall be punishable as a Class D felony, and burglary in the second degree shall be punishable as a Class G felony. (1870-1, c. 222; Code, s. 994; 1889, c. 434, s. 2; Rev., s. 3330; C.S., s. 4233; 1941, c. 215, s. 1; 1949, c. 299, s. 2; 1973, c. 1201, s. 3; 1977, c. 871, s. 2; 1979, c. 672; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1151; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to eligibility of prisoners serving life sentence for parole, see G.S. 15A-1371. As to facilities and program for youthful offenders, see G.S. 148-49.10 et seq.

Legal Periodicals. — For article, "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

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Convictions Remain Valid. — The Supreme Court of the United States has held that the imposition of the death penalty, under certain state statutes and in the application thereof, is unconstitutional. That decision does not affect the conviction but only the death sentence. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Sentence to Run Consecutively with Any Other Sentence. — The plain meaning of the last sentence of this section is that a term imposed for burglary under the statute is to run consecutively with any other sentence being served by the defendant. State v. Warren, 313 N.C. 254, 328 S.E.2d 256 (1985).

Prison Term. — In the absence of any aggravating or mitigating factors, the Fair Sentencing Act requires the imposition of the presumptive term when a prison term is imposed. Further, notwithstanding the Fair Sentencing Act, this section prohibits the trial judge from suspending a sentence or placing a defendant on probation for first-degree burglary. State v. Goodman, 71 N.C. App. 343, 322 S.E.2d 408 (1984), cert. denied, 313 N.C. 333, 327 S.E.2d 894 (1985).

Applied in In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. McAfee, 247 N.C. 98, 100 S.E.2d 249 (1957); State v. Conyers, 267 N.C. 618, 148 S.E.2d 569 (1966); Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967); Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785 (1970); State v. Green, 280 N.C. 431, 185 S.E.2d 872 (1972); Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975); State v. Caldwell, 293 N.C. 336, 237 S.E.2d 742 (1977); State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983); State v. Lucas, 353 N.C. 568, 548 S.E.2d 712, 2001 N.C. LEXIS 668 (2001).

Cited in State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940); State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981); State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987); State v. Ruffin, 90 N.C. App. 705, 370 S.E.2d 275 (1988); State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989); State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998); Teasley v. Beck, 155 N.C. App. 282, 574 S.E.2d 137, 2002 N.C. App. LEXIS 1600 (2002);

State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-53. Breaking out of dwelling house burglary.

If any person shall enter the dwelling house of another with intent to commit any felony or larceny therein, or being in such dwelling house, shall commit any felony or larceny therein, and shall, in either case, break out of such dwelling house in the nighttime, such person shall be punished as a Class D felon. (12 Anne, c. 7, s. 3; R.C., c. 34, s. 8; Code, s. 995; Rev., s. 3332; C.S., s. 4234; 1969, c. 543, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

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Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

Indictment Must Charge Breaking Out. — One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. State v. McPherson, 70 N.C. 239 (1874).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984); State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998).

§ 14-54. Breaking or entering buildings generally.

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

(b) Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor.

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property. (1874-5, c. 166; 1879, c. 323; Code, s. 996; Rev., s. 3333; C.S., s. 4235; 1955, c. 1015; 1969, c. 543, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 26; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 538 (1955).

For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

For comment on alleging and proving elements of offense under this section and G.S. 14-72, see 3 Wake Forest Intra. L. Rev. 1 (1967).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

For note discussing the evolution of the law governing double jeopardy and multiple punishments in a single prosecution context, particularly with regard to larceny and breaking and entering, in light of State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986), see 65 N.C.L. Rev. 1267 (1987).

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I. General Consideration.
II. Elements of Offense.
III. Breaking or Entering.
IV. Building.
V. Intent.
VI. Larceny.
VII. Indictment.
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IX. Trial.
  A. Burden of Proof.
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X. Appeal.

I. GENERAL CONSIDERATION.

Constitutionality. — This section and G.S. 14-72 do not violate the equal protection or due process provisions of either the State or federal Constitutions. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

This section and G.S. 14-72 are reasonably related to valid legislative goals. The legislature has determined that breaking or entering with intent to commit larceny is a more serious crime than breaking or entering without the intent to commit larceny or any felony, and that larceny committed pursuant to breaking or entering is more serious than simple larceny. The legislature was acting within its authority in designating these crimes as felonies and in fixing punishment commensurate with their serious nature. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

This section and G.S. 14-72 meet the test of equal protection because all persons who fall under the terms of the statutes are subject to the same sentence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Double Jeopardy. — Where a defendant has been tried for breaking and entering, and then the State tries him for a felony in which breaking and entering is an indispensable element, he has suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), vacated on other grounds, North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971).

Defendant's convictions for kidnapping, nonfelonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

Same — Larceny. — Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907).

Conviction and punishment for both felony breaking or entering and felonious larceny based upon the same breaking or entering in a single trial is not prohibited by the provisions of either the Constitution of the United States or the Constitution of North Carolina. State v. Edmondson, 316 N.C. 187, 340 S.E.2d 110 (1986).

A defendant may be tried for, convicted of, and punished separately for the crime of breaking or entering and the crime of felony larceny following that breaking or entering when the cases are jointly tried. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

It was proper to convict defendant of felonious larceny even though he had been acquitted of felonious breaking or entering when the trial court had instructed the jury on guilt based upon the acting in concert theory. State v. Weaver, 79 N.C. App. 244, 339 S.E.2d 40, rev'd on other grounds, 318 N.C. 400, 348 S.E.2d 791 (1986).

Breaking or entering with the intention to commit larceny under this section and larceny following a break-in under G.S. 14-72 are separate offenses for which punishment can be imposed without violating the constitutional restriction against double jeopardy. State v. Hall, 81 N.C. App. 650, 344 S.E.2d 811, cert. denied, 318 N.C. 510, 349 S.E.2d 868 (1986).

Same — Conspiracy. — Convictions of both felonious conspiracy to commit felonious breaking and entering and felonious conspiracy to commit felonious larceny could not both be allowed to stand where there was evidence of only one agreement. State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Statutory Offense. — The offense defined in this section, commonly referred to as house breaking or nonburglarious breaking, is a statutory, not a common-law, offense. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Prior to the 1955 amendment, a nude defendant who entered the sleeping quarters of hospital nurses was not guilty of an offense under this section, where he did not flee when discovered but merely asked for a girl who worked at the hospital, and left upon demand without any attempt at larceny. State v. Cook, 242 N.C. 700, 89 S.E.2d 383 (1955).

Effect and Application of 1969 Amendment. — The title of the 1969 amendatory act, Session Laws 1969, c. 543, s. 7, expresses the legislative intent to clarify, not to repeal, "the laws relating to burglar and related offenses." It is, therefore, clear that the 1969 act amended, rather than repealed, this section. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant may be prosecuted, and if lawfully convicted may be punished, after the effective date of the 1969 amendment for a violation of this section as it existed prior to the effective date of that amendment, May 23, 1969, where the offense was committed prior to the effective date of May 23, 1969. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant is entitled to have the jury instructed as to what facts they were required to find in order to find him guilty under the statute as it existed on the date the offense was alleged to have been committed, without reference to the less stringent requirements of the amended statute. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

Construction With Armed Career Criminal Act. — Burglary convictions under G.S. 14-54 were violent felonies for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C.S. § 924(e); district court did not violate defendant's right to trial by jury under the Sixth Amendment to the U.S. Constitution or commit other error when it reviewed the record to determine if defendant was convicted of violating G.S. 14-54 on separate occasions without submitting that issue to a jury, found that he was subject to enhanced punishment under the ACCA, and sentenced him to fifteen years' imprisonment, five years of supervised release, and a $100 special assessment. United States v. Thompson, 421 F.3d 278, 2005 U.S. App. LEXIS 19223 (4th Cir. 2005), cert. denied, — U.S. —, 126 S. Ct. 1463, 164 L. Ed. 2d 250 (2006).

This section concerns only crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in G.S. 14-72. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Evidence held to show a single conspiracy to feloniously break or enter various Durham retail stores within a four month period, and not 10 separate conspiracies to break or enter on 10 separate occasions. State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987).

Guilty Plea Supported. — Arresting officer's testimony established a sufficient factual basis to support defendant's guilty plea to breaking and entering; the officer testified that he found defendant's truck near a burglarized residence, that he saw jewelry and boxes in the truck, that footprints in the snow led up to the residence where a window was broken, and that, during a search of the residence, the officer found defendant underneath a bed with a stolen rifle laying next to him. State v. Poore, 172 N.C. App. 839, 616 S.E.2d 639, 2005 N.C. App. LEXIS 1774 (2005).

Applied in State v. Minton, 228 N.C. 518, 46 S.E.2d 296 (1948); State v. Templeton, 237 N.C. 440, 75 S.E.2d 243 (1953); State v. Bentley, 240 N.C. 112, 81 S.E.2d 206 (1954); State v. Jones, 247 N.C. 260, 100 S.E.2d 845 (1957); State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965); State v. Mullinax, 263 N.C. 512, 139 S.E.2d 639 (1965); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Morgan, 265 N.C. 597, 144 S.E.2d 633 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966); State v. Jones, 267 N.C. 434, 148 S.E.2d 236 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Dawson, 268 N.C. 603, 151 S.E.2d 203 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Lovelace, 271 N.C. 613, 157 S.E.2d 209 (1967); State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967); State v. Foster, 271 N.C. 727, 157 S.E.2d 542 (1967); State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968); State v. Parrish, 273 N.C. 477, 160 S.E.2d 153 (1968); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968); State v. Evers, 1 N.C. App. 81, 159 S.E.2d 372 (1968); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Martin, 2 N.C. App. 148, 162 S.E.2d 667 (1968); State v. Morris, 2 N.C. App. 611, 163 S.E.2d 539 (1968); State v. Kelly, 3 N.C. App. 72, 164 S.E.2d 22 (1968); State v.

Biggs, 3 N.C. App. 589, 165 S.E.2d 560 (1969); State v. Wilson, 6 N.C. App. 618, 170 S.E.2d 557 (1969); State v. McDonald, 6 N.C. App. 627, 170 S.E.2d 551 (1969); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Gordon, 12 N.C. App. 38, 182 S.E.2d 14 (1971); State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971); State v. Oliver, 13 N.C. App. 184, 184 S.E.2d 900 (1971); State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Perry, 13 N.C. App. 304, 185 S.E.2d 467 (1971); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315 (1972); State v. Goode, 16 N.C. App. 188, 191 S.E.2d 241 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); In re Meyers, 22 N.C. App. 11, 205 S.E.2d 569 (1974); In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975); State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Chambers, 52 N.C. App. 713, 280 S.E.2d 175 (1981); State v. Quilliams, 55 N.C. App. 349, 285 S.E.2d 617 (1982); State v. Dawkins, 305 N.C. 289, 287 S.E.2d 885 (1982); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982); State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983); State v. Moore, 62 N.C. App. 431, 303 S.E.2d 230 (1983); State v. Simons, 65 N.C. App. 164, 308 S.E.2d 502 (1983); State v. Oates, 65 N.C. App. 112, 308 S.E.2d 507 (1983); State v. Hankins, 310 N.C. 622, 313 S.E.2d 579 (1984); State v. Bunn, 79 N.C. App. 480, 339 S.E.2d 673 (1986); In re Cousin, 93 N.C. App. 224, 377 S.E.2d 275 (1989); State v. Evans, 99 N.C. App. 88, 392 S.E.2d 441 (1990); State v. Lawson, 105 N.C. App. 329, 412 S.E.2d 685 (1992); State v. Briggs, 137 N.C. App. 125, 526 S.E.2d 678, 2000 N.C. App. LEXIS 255 (2000); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

Cited in State v. Ellsworth, 130 N.C. 690, 41 S.E. 548 (1902); State v. Setzer, 198 N.C. 663, 153 S.E. 118 (1930); State v. Ratcliff, 199 N.C. 9, 153 S.E. 605 (1930); In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. Alston, 233 N.C. 341, 64 S.E.2d 3 (1951); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968); State v. Stafford, 274 N.C. 519, 164 S.E.2d 371 (1968); State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971); Withers v. North Carolina, 328 F. Supp. 1152 (W.D.N.C. 1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Smith, 11 N.C. App. 552, 181 S.E.2d 778 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Boltinhouse, 49 N.C. App. 665, 272 S.E.2d 148 (1980); State v. Wright, 304 N.C. 349, 283 S.E.2d 502 (1981); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Douglas, 304 N.C. 713, 285 S.E.2d 802 (1982); State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Rush, 56 N.C. App. 787, 290 S.E.2d 383 (1982); In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983); State v. Hankins, 64 N.C. App. 324, 307 S.E.2d 440 (1983); State v. Locklear, 60 N.C. App. 428, 298 S.E.2d 766 (1983); State v. Downing, 66 N.C. App. 686, 311 S.E.2d 702 (1984); State v. Reid, 66 N.C. App. 698, 311 S.E.2d 675 (1984); State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Tate, 73 N.C. App. 573, 327 S.E.2d 27 (1985); State v. McRae, 85 N.C. App. 270, 354 S.E.2d 30 (1987); In re Mitchell, 87 N.C. App. 164, 359 S.E.2d 809 (1987); State v. Warrick, 87 N.C. App. 505, 361 S.E.2d 607 (1987); State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); Flippo v. Hayes, 98 N.C. App. 115, 389 S.E.2d 613 (1990); State v. Williams, 330 N.C. 579, 411 S.E.2d 814 (1992); State v. Mitchell, 109 N.C. App. 222, 426 S.E.2d 443 (1993); State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (1993); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996); State v. Williamson, 122 N.C. App. 229, 468 S.E.2d 840 (1996); State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000); State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002); State v. Silas, 168 N.C. App. 627, 609 S.E.2d 400, 2005 N.C. App. LEXIS 456 (2005); State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006); State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

II. ELEMENTS OF OFFENSE.

Felonious Breaking or Entering. — Under the provisions of this section, if any person breaks and enters or enters any storehouse, shop or other building where any merchandise, chattel, money, valuable security or other personal property shall be, with the intent to commit the felony of larceny, he shall be guilty of a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. State v. Litchford, 78 N.C. App. 722, 338 S.E.2d 575 (1986); State v. White, 84 N.C. App. 299, 352 S.E.2d 261, cert. denied, 321 N.C. 123, 361 S.E.2d 603 (1987).

In respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by this section. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

This section condemns three separate felonies as follows: (1) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony; (2) if any person, with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, shop, warehouse, banking house, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, he shall be guilty of a felony; (3) if any person, with intent to commit a felony or other infamous crime therein, shall break or enter any uninhabited house, he shall be guilty of a felony. State v. McDowell, 1 N.C. App. 361, 161 S.E.2d 769 (1968).

To support a conviction for felonious breaking and entering under this statute, there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein. State v. Walton, 90 N.C. App. 532, 369 S.E.2d 101 (1988).

Court properly denied defendant's motion to dismiss a felony breaking and entering charge because there was sufficient evidence that he intended to commit a felony (i.e. larceny) in the building he broke into, which was one of the essential elements of felonious breaking and entering under G.S. 14-54(a); the evidence tended to show that (1) the security system keypad to the building's office was destroyed, (2) the contents of an employee's desk had been removed and strewn around, (3) the keypad to the motion detector system for the office was destroyed, and (4) a computer monitor and processor were missing. State v. Cogdell, — N.C. App. —, — S.E.2d —, 2004 N.C. App. LEXIS 717 (May 4, 2004).

Misdemeanor breaking and entering, subsection (b), requires only proof of the wrongful breaking or entry into any building. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983); State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983).

Trial court did not err in denying defendant's motion to dismiss the charge of misdemeanor breaking and entering because defendant broke or entered into a trailer without the consent of the owners or the tenants; although defendant pointed to her lease agreement as establishing a claim of right, there was substantial evidence that defendant had no claim of right to enter the trailer, and viewed in the light most favorable to the State, that evidence was sufficient to allow a reasonable juror to conclude that defendant did not have a claim of right to enter the trailer. State v. Young, — N.C. App. —, 671 S.E.2d 372, 2009 N.C. App. LEXIS 57 (2009).

Intent is not a prescribed element of wrongful breaking and entering under subsection (b) of this section. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Identification of Owner of Property Not An Element. — Relying on analogous statute, G.S. 14-54(a), prohibiting breaking and entering, the appellate court found that the identification of the owner of the property was not an element of breaking into a coin-operated machine under G.S. 14-56.1; therefore, defendant was properly convicted of breaking into a coin-operated machine, although the State did not allege that the owner of the property was a natural person or a person capable of owning property. State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Distinction between misdemeanor breaking or entering and burglary rests on whether the unlawful breaking or entering was done with the intent to commit the felony named in the indictment. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

Aiding and Abetting. — Evidence held to support defendant's convictions on breaking or entering charges, since he aided and abetted the principal perpetrators, and he was therefore equally culpable even though he did not physically enter the buildings. State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987).

III. BREAKING OR ENTERING.

"Unlawful Breaking or Entering" Essential to Both Offenses. — The unlawful breaking or entering of a building described in this section is an essential element of both the felony and misdemeanor offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

This section defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968); State v. Green, 2 N.C. App. 221, 162 S.E.2d 513 (1968).

But Both Breaking and Entering Need Not Be Shown. — Evidence of a breaking when available is relevant, but the absence of such evidence is not a fatal defect of proof to support a conviction of breaking and entering under this section where there is proof of entry. Nor is proof of entry where there is proof of breaking necessary to support a conviction on a charge of breaking and entering under this section. Blakeney v. State, 2 N.C. App. 312, 163 S.E.2d 69 (1968).

Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of this section. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Since subsection (a) of this section is in the disjunctive, the contention that there is no evidence that defendant broke and entered a house was not well taken. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

To convict a defendant of a violation of subsection (a) of this section, it is sufficient if the State's evidence shows either a breaking or an entering; it need not show both. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

To convict of violating this section, it is sufficient if the State's evidence shows either a breaking or an entering; it need not show both. State v. Barnett, 41 N.C. App. 171, 254 S.E.2d 199 (1979).

It is evident it was the intention of the legislature to make it a penal offense to willfully break into a storehouse where merchandise, etc., is kept, or into an uninhabited house, or to willfully enter into a dwelling house in the night otherwise than by breaking, with the intent to commit a felony. State v. Hughes, 86 N.C. 662 (1882).

For conviction of felonious breaking or entering it is not necessary that the State show both a breaking and an entering; proof of either is sufficient if committed with the requisite felonious intent. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

By the disjunctive language of this section, the State meets its burden by offering substantial evidence that defendant either "broke" or "entered" the building with the requisite unlawful intent. The State need not show both a breaking and an entering. State v. Myrick, 306 N.C. 110, 291 S.E.2d 577 (1982).

The absence of evidence of breaking does not constitute a fatal defect of proof. State v. Vester, 22 N.C. App. 16, 205 S.E.2d 556, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974), 419 U.S. 1116, 95 S. Ct. 795, 42 L. Ed. 2d 814 (1975).

Breaking Not Required Where Entry Shown. — Housebreaking or nonburglarious breaking is a statutory and not a common-law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant proof of a breaking is not essential to sustain conviction. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

A breaking is not now and has never been a prerequisite of guilt and proof thereof is not required. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

A breaking is not a necessary element of the offense defined in this section and the offense defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Lassiter, 15 N.C. App. 265, 189 S.E.2d 798, cert. denied, 281 N.C. 761, 191 S.E.2d 358 (1972).

Where the State offered no evidence to raise an inference that any force was employed to gain entry to the victim's apartment, and the victim testified concerning the type of lock on the only door to the apartment, but never stated that the door and two windows were closed when she went to sleep, and there was no evidence of forced entry, the defendant could not properly be convicted of burglary, but in view of evidence that the defendant entered the victim's apartment with the intent to commit an assault upon her, he could be convicted of felonious breaking or entering. State v. Eldridge, 83 N.C. App. 312, 349 S.E.2d 881 (1986).

Entry Not Required When Breaking Shown. — The fact that the shaking of a door and its opening was not followed by a physical entrance into the building does not prevent a finding by the jury that defendants broke and entered the building. They had actually opened the door although they had not entered and the crime was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

Breaking of store window with requisite intent to commit a felony therein, completes offense, even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. State v. Jones, 272 N.C. 108, 157 S.E.2d 610 (1967); State v. Burgess, 1 N.C. App. 104, 160 S.E.2d 110 (1968); State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968).

Violation of subsection (a) of this section was complete when defendant broke open the door with the obvious intention to enter and take something from the store. State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

Breaking of store window, with the requisite intent to commit a felony therein, constitutes a breaking and completes the offense under subsection (a) of this section, even if defendant never physically enters the building. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Entry Prohibited by Separation Agreement. — Bill of indictment charging defendant with felonious breaking and entering and felonious larceny of antique guns was not subject to being quashed on grounds that defendant was married to the occupier of the premises, where defendant's entry of the premises was expressly prohibited by a marital separation agreement. State v. Lindley, 81 N.C. App. 490, 344 S.E.2d 291 (1986).

Entry with Consent of Owner. — In order to convict a person of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner in company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

While the statute does not make absence of consent an element of the offense, and entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry. State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), cert. denied and appeal dismissed, 307 N.C. 582, 299 S.E.2d 650 (1983).

An entry is found to be a lawful one where the owner of the premises gives the defendant permission to enter, and where the entry is with the consent and at the instance of the owner. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

The entry proscribed by this section contemplates an unauthorized or unpermitted entry, and thus an entry with the consent of the owner is not an unlawful entry. State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978), modified and aff'd, 297 N.C. 652, 256 S.E.2d 683 (1979).

An entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis for conviction of felonious entry under subsection (a). State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

An entry is punishable under this statute only if it is wrongful, i.e., without the owner's consent. State v. Wheeler, 70 N.C. App. 191, 319 S.E.2d 631, cert. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

While defendant entered a law office with implied consent from the firm, that consent was void ab initio when defendant went into areas of the firm that were not open to the public so that defendant could commit theft; thus, defendant's convictions for felonious breaking and entering and felonious larceny were supported by sufficient evidence. State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

Trial court did not err in denying defendant juvenile's motion to dismiss the charge of felonious breaking and entering and larceny and then finding defendant delinquent on the charges because the State presented substantial evidence of a felonious breaking and entry sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt; the office of a county cooperative extension service director was not held out to the public, and even if defendant had implied consent to enter the office because it was necessary for the general public to have access to it, stealing cash from the director's purse constituted an act sufficient to render implied consent void ab initio. In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

Entering Place of Business During Business Hours. — A person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry. State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978), modified and aff'd, 297 N.C. 652, 256 S.E.2d

683 (1979); State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

Where defendant entered a store at a time when it was open to the public, his entry was thus with the consent, implied if not express, of the owner and it cannot serve as the basis for a conviction for felonious entry. State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

Concealment Voided Consent to Entry During Business Hours. — Although a person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry, where defendant entered the building during normal business hours, but thereafter without the consent of the owner, he went into an area not open to the public and there secreted himself, and remained concealed until well beyond the closing of business hours for the store for the purpose of participating in a theft, these acts voided any consent to the entry. Going into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful. State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

Where "consent" is obtained by fraud or trickery, the law treats defendant's action as a "constructive breaking," sufficient to sustain a conviction under this section. State v. Wheeler, 70 N.C. App. 191, 319 S.E.2d 631, cert. denied, 312 N.C. 624, 323 S.E.2d 925 (1984).

Any Act of Force, However Slight, Constitutes Breaking. — A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. State v. Myrick, 306 N.C. 110, 291 S.E.2d 577 (1982).

Unlocking Door with Key. — There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

Dislocation of a door of a grill from its locked position was a sufficient breaking even if defendant did not otherwise enter the building. State v. Myrick, 306 N.C. 110, 291 S.E.2d 577 (1982).

Putting one's arm through a tear in a screen constitutes an entry. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Damage to Door or Window Not Required. — The State is not required to offer evidence of damage to a door or window. A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Possession of Stolen Goods Conviction Vacated. — Where defendant was acquitted on the underlying charge; the trial court erred in accepting the jury's guilty verdict on a charge of felony possession of stolen goods when the jury found defendant not guilty of the underlying breaking and entering charge. State v. Goblet, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

IV. BUILDING.

"Building" should be given its common and usual meaning. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Items listed in this section denote qualities of permanence and immobility, while those listed in G.S. 14-56 are characterized by a high degree of mobility. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982); State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

Dwelling house is the place wherein a man reposes. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Room in a rooming house is included in the meaning of the term "dwelling house." State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Occupancy is not an element of this section and § 14-72. State v. Young, 60 N.C. App. 705, 299 S.E.2d 834 (1983).

Indictment was sufficient under G.S. 15A-924(a)(5) to charge defendant with felonious breaking and entering under G.S. 14-54(a) because the statement that defendant did break and enter a building used as a residence was surplusage as whether a building was a residence or not was not an essential element of the crime; the garage that defendant allegedly broke into was within the curtilage of the residence although it was an independent structure. State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008).

Mobile Home. — An unoccupied mobile home not affixed to the premises and intended for retail sale is a "building" within the meaning of this section. State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

An unoccupied mobile home located on a dealer's lot is a "building" within the meaning of this section. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a "building" within the meaning of this section and is not covered by G.S. 14-56. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

The mere fact of a mobile home's capability of being transported from place to place on wheels attached to its frame should not remove it from the ambit of this section. State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981), aff'd, 304 N.C. 713, 285 S.E.2d 802 (1982).

"Trailers" and Other Items Named in § 14-56. — Whether "trailers," "railroad cars" or other items specifically named in G.S. 14-56 qualify as "buildings" under this section depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

Clerk's Office. — The office of the clerk of a superior court in a county courthouse is a "structure designed to house or secure within it any activity or property" within the meaning of subsection (c) of this section and therefore is by statutory definition a "building" under subsection (b) of this section. Even though the office may be open to the public, it is still protected by the statute during the time that it is not open for public business. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

Several connected buildings, with different building numbers, constructed at different times, and treated as separate buildings by those using them, but connected by passageways that permitted unrestricted access from one building to the other, were properly treated as separate buildings for purposes of this section. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Fenced-In Area. — The word "building" in this section is restricted to that which has, or is intended to have, one or more walls and a roof, thus, as any structure must be ejusdem generis with this definition, a fenced-in area is not contemplated by this section. State v. Gamble, 56 N.C. App. 55, 286 S.E.2d 804 (1982).

V. INTENT.

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the "intent to steal." State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968); State v. Jackson, 4 N.C. App. 459, 167 S.E.2d 20 (1969).

In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. State v. Spear, 164 N.C. 452, 79 S.E. 869 (1913), disapproving dictum in State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907). See also State v. Crisp, 188 N.C. 799, 125 S.E. 543 (1924).

In order to satisfy the felony requirement of this section it must be made to appear that there was a breaking or entering into a designated building or room "with intent to commit a felony or other infamous crime therein." State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957); State v. Walton, 90 N.C. App. 532, 369 S.E.2d 101 (1988).

The crime defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964).

To convict a person of the felony defined in this section, the State must satisfy the jury from the evidence beyond a reasonable doubt that a building described in this section was broken into or entered "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

First-degree burglary and second-degree burglary under G.S. 14-51 and felonious breaking and entering under subsection (a) of this section require, for conviction, proof of intent to commit a felony. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983).

Intent Must Exist at Time of Breaking or Entering. — An essential element of the crime stated in subsection (a) of this section is that the intent exist at the time of the breaking or entering. State v. Hill, 38 N.C. App. 75, 247 S.E.2d 295 (1978); State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. State v. Freeman, 307 N.C. 445, 298 S.E.2d 376 (1983).

Completion of Intended Felony or Larceny Not Required. — Under this section, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Smith, 266 N.C. 747, 147 S.E.2d 165 (1966); State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966); State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

If a person breaks or enters with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. His criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968); State v. Sawyer, 283 N.C. 289, 196 S.E.2d 250 (1973); State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

If there is a breaking and entering with the felonious intent to steal, the accomplishment of the felonious intent is not a prerequisite of guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

The crime of larceny has an element not present in the crime of felonious breaking or entering, to wit, a wrongful taking and carrying away of the personal property of another. As a result it was not inconsistent for the jury to determine that the defendant entered a mobile home with the intent to commit larceny yet find that no larceny was in fact committed. State v. Brown, 308 N.C. 181, 301 S.E.2d 89 (1983), overruled on other grounds, 315 N.C. 222, 337 S.E.2d 487 (1985).

To prove a defendant guilty of felonious breaking or entering, it is not necessary to prove that he was also guilty of larceny. Rather it is only necessary to prove that the defendant intended to commit a felony, to wit, larceny. State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984).

Intent to Commit Crime May Be Inferred from Its Commission. — The intent to commit larceny may be inferred from the fact that defendant committed larceny. State v. Thompkins, 83 N.C. App. 42, 348 S.E.2d 605 (1986).

Evidence that the defendant committed rape after he entered the building is evidence he intended to commit rape at the time he broke into the building. State v. Gray, 322 N.C. 457, 368 S.E.2d 627 (1988).

Effect of Arrest of Judgment on Conviction Under § 14-72(b). — The trial court's arrest of judgment on defendant's conviction for felonious larceny under G.S. 14-72(b) had no effect on his conviction for felonious breaking or entering since it is not necessary for conviction of breaking and entering under subsection (a) of this section that a felony or larceny actually be committed in the building broken into; it is merely the intent at the time of the breaking or entering to commit the felony or larceny within the building that is required. State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

Intent May Be Inferred from Circumstances. — Without other explanation for breaking into building or a showing of the owner's consent, intent may be inferred from the circumstances. State v. Myrick, 306 N.C. 110, 291 S.E.2d 577 (1982).

Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972); State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

In determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

The jury may infer the requisite specific intent to commit larceny at the time of the breaking or entering from the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense charged. State v. Costigan, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

Where defendant offered no exculpatory evidence as to his intent when he entered a young girl's room through her bedroom window, that intent could properly be inferred from the circumstances and the court properly denied his motion to dismiss the charge of felony breaking and entering for insufficient evidence. State v. Roberts, 135 N.C. App. 690, 522 S.E.2d 130, 1999 N.C. App. LEXIS 1245 (1999).

Trial court properly denied motion to dismiss the charge of felonious breaking and entering, under G.S. 14-54(a) where substantial evidence existed that defendant and two accomplices entered a locked building without permission in the early morning hours, they ransacked the inside of the building, and they placed items that belonged to the business located in the building into bags. The jury could infer that defendant and his accomplices intended to commit larceny. State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

And Conduct Within Building. — The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Evidence of what a defendant does after he breaks and enters a house is evidence of his intent at the time of the breaking and entering. State v. Gray, 322 N.C. 457, 368 S.E.2d 627 (1988).

Evidence tending to show an unexplained breaking or entering into a dwelling at night, accompanied by flight when discovered, is sufficient under the law to support the inference that the breaking or entering was done with the intent to steal or commit a felony. The intent inferred is sufficient under the law to support a charge of felonious breaking or entering and warrant its submission to the jury. State v. Salters, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

Dual Intent. — When an intruder unlawfully enters one's home and commits two crimes therein, it is illogical to presume that he entered for one purpose only. At least a jury should not be precluded from finding that he entered with a dual purpose. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Where rape victim testified that prior to defendant's unlawful entry into her home on the night in question, she had seven dollars in her purse and that upon defendant's departure she discovered that the money was missing from her purse, this evidence was sufficient for the jury to find that defendant entered her home for the purpose of committing larceny. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Misdemeanor Instruction Not Warranted Where Intent to Murder Proven. — The submission of misdemeanor breaking or entering as a lesser-included offense of first-degree burglary was not warranted where the evidence was clear and positive that defendant entered the mobile home with the intent to commit murder. State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807, 2000 N.C. LEXIS 441 (2000).

As to sufficiency of evidence to justify an inference of intent to rape, see State v. Rushing, 61 N.C. App. 62, 300 S.E.2d 445, aff'd, 308 N.C. 804, 303 S.E.2d 822 (1983).

Intoxication as Defense. — Intoxication which renders an offender utterly unable to form the required specific intent may be shown as a defense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Voluntary intoxication is not a defense. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

VI. LARCENY.

Value of Stolen Property Immaterial. — Larceny by breaking and entering a building is a felony without regard to the value of the stolen property. State v. Stubbs, 266 N.C. 274, 145 S.E.2d 896 (1966), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Evidence was legally sufficient to support defendant's conviction for felonious larceny under G.S. 14-72(a) because although the value of the items taken was less than $1,000, the crime was elevated to a felony when it was committed pursuant to a breaking and entering under G.S. 14-54. State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008).

Ownership of Property Is Immaterial. — It is incumbent upon the State to establish that, at the time the defendant broke and entered, he intended to steal something. However, it is not incumbent upon the State to establish the ownership of the property which he intended to steal, the particular ownership being immaterial. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968); State v. Young, 60 N.C. App. 705, 299 S.E.2d 834 (1983).

Nonownership Not a Defense. — It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. The same rule applies to breaking and entering with larcenous intent. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Owner of Property Sought to Be Stolen Need Not Be Identified. — If there is a breaking and entering with the felonious intent to steal, the identification of the owner of the personal property sought to be stolen is not a prerequisite to guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

VII. INDICTMENT.

Indictment Must Sufficiently Describe Crime. — The bill of indictment under this section must describe the crime alleged in such detail as would enable the defendant to plead his conviction or acquittal thereof as a bar to another prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Where larceny charge should have been dismissed by the trial court due to a variance between the indictment and the evidence at trial, a breaking and entering felony conviction was vacated. State v. Craycraft, 152 N.C. App. 211, 567 S.E.2d 206, 2002 N.C. App. LEXIS 892 (2002).

Intended Felony Must Be Alleged. — An indictment charging the offense of felonious breaking or entering is sufficient only if it alleges the particular felony which is intended to be committed. State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (1984), overruled as stated in State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (2006), see the following case note.

Overruling of Case Law on Indictment Requirements. — There is no requirement that an indictment for felonious breaking or entering contain specific allegations of the intended felony, and State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (N.C. Ct. App. 1984), is overruled insofar as it is inconsistent with this; however, if an indictment does specifically allege the intended felony, G.S. § 15A-923(e) mandates such allegations may not be amended. State v. Silas, 360 N.C. 377, 627 S.E.2d 604, 2006 N.C. LEXIS 26 (2006).

Description of Building. — In an indictment under this section punishing the breaking and entering of buildings, a building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

Particular identification in the indictment of the building alleged to have been broken into and entered is desirable. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

In light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises in a bill of indictment under this section by street address, highway address, rural road address or some clear description and designation to set the subject premises apart from like and other structures described in Article 14 of this Chapter. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Under this section, the breaking or entering of any building with intent to commit a felony or larceny therein constitutes a felony. Thus the necessity for describing the building in the bill of indictment for the purpose of showing that it is within the statute no longer exists. It remains necessary, however, to identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

An indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the section and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

The recommended practice is to identify the location of the subject premises by street address, rural road address or some other clear description. However, an indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the statute and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

Felonious breaking and entering indictments were sufficient to reasonably identify the building in which the crime was committed, as required by G.S. 14-54, because, although the victim owned several buildings, including six rental houses, the indictment identified the building as the one in which defendant resided. State v. Ly, 189 N.C. App. 422, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (2008).

Same — Bill of Particulars. — If a defendant is in doubt as to the identity of the building he is charged with having feloniously broken into and entered, he can call for a bill of particulars. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

"Unlawfully Breaking" Charges Intent. — An indictment under this section for housebreaking is sufficient when charging "that defendant did break and enter (otherwise than by burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., feloniously to steal, etc.," and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony." State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

Indictment Charging Intent to Commit More Than One Offense. — An indictment for entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. State v. Christmas, 101 N.C. 749, 8 S.E. 361 (1888).

Defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering; therefore, his felonious larceny pursuant to a breaking or entering charge was reversed and his sentence on that charge was vacated. State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992).

Ownership. — A person is guilty of feloniously breaking and entering a dwelling house if he unlawfully breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

But see State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976) which held that, in a prosecution for breaking and entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential and proof of ownership should not vary from ownership as alleged. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

Conviction of Lesser Degree of Offense Charged. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and G.S. 15-170 provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Indictment Held Sufficient. — See Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, G.S. 14-72 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970), aff'd, 435 F.2d 1305 (4th Cir. 1971).

Though not sufficient as an indictment for burglary, an indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleging that the defendant, at the specified time, broke and entered the dwelling house therein described, was sufficient to support a conviction under subsection (b) for wrongfully breaking and entering a building. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Although, in its jury charge on the offense of first degree burglary, the court did not instruct the jury on the lesser-included offense of felonious breaking or entering, the indictment charging only burglary and the instructions thereon were nonetheless sufficient to support a conviction for felonious breaking or entering. State v. Eldridge, 83 N.C. App. 312, 349 S.E.2d 881 (1986).

Indictment alleging that defendant entered into an agreement with two or more persons to commit, on December 20, 1985, the unlawful act of breaking and entering to commit larceny contained sufficient allegations to meet the requirements of G.S. 15A-924(a)(5). State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Variance. — In a prosecution for breaking and entering a building with intent to steal, the fact that the indictment alleges an intent to steal the property of a named corporation while the evidence discloses the property actually stolen belonged to another is not fatal. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

If evidence offered at trial fails to show ownership as alleged in indictment of premises entered and property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

There was no fatal variance where the indictment alleged a breaking and entering with intent to steal of a "building occupied by Julian Jones used as a garage" and the evidence showed that the building was a storage shed and no longer used by Mr. Jones, since it was not incumbent on the State to establish the owner of the property defendant intended to steal but only the intent to steal upon breaking or entering. State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

VIII. LESSER OFFENSES.

Misdemeanor Breaking and Entering Is Lesser Included Offense of Felonious Breaking and Entering. — The misdemeanor defined in this section must be considered "a less degree of the same crime," an included offense, within the meaning of G.S. 15-170. State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968).

Misdemeanor breaking or entering, under subsection (b) of this section, is a lesser included offense of felonious breaking or entering and requires only proof of wrongful breaking or entry into any building. State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Wrongful breaking or entering without intent to commit a felony or other infamous crime is a lesser degree of felonious breaking or entering within this section. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

The misdemeanor of nonfelonious breaking and entering, if there is evidence to support it, is a lesser included offense of the felony of breaking and entering with intent to commit a felony as described in this section. State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968);

State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

Wrongful breaking and entering without intent to commit a felony or other infamous crime is a lesser included offense of the felony of breaking or entering with intent to commit a felony under this section. State v. Fowler, 1 N.C. App. 549, 162 S.E.2d 39 (1968); State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972), cert. denied, 283 N.C. 258, 283 N.C. 259, 195 S.E.2d 691, 195 S.E.2d 691 (1973).

Any person who breaks or enters any building described in this section with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of G.S. 15-170. State v. Dozier, 19 N.C. App. 740, 200 S.E.2d 348 (1973), cert. denied, 284 N.C. 618, 201 S.E.2d 690 (1974).

Breaking and Entering Is Lesser Offense of Burglary. — The statutory offense set forth in this section is a less degree of the offense of burglary in the first degree set forth in G.S. 14-51. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968); State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973), aff'd, 285 N.C. 746, 208 S.E.2d 506 (1974).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of this section, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of this section is a less degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Misdemeanor breaking or entering is a lesser included offense of burglary in the first degree. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

The statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first and second degree. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Felonious breaking or entering is a lesser included offense of second degree burglary and only requires proof of a breaking or entering with the intent to commit any felony or larceny therein. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

The defendant's burglary conviction was vacated because the evidence failed to support the state's theory that he entered with the intent to commit a sex offense; and the case was remanded for an appropriate entry of judgment where the jury found facts that would support defendant's conviction for non-felonious breaking and entering, pursuant to this section. State v. Cooper, 138 N.C. App. 495, 530 S.E.2d 73, 2000 N.C. App. LEXIS 637 (2000), aff'd, 353 N.C. 260, 538 S.E.2d 912 (2000).

Conviction for Burglary Reversed. — Conviction for first degree burglary was reversed and the matter remanded for imposition of a judgment for misdemeanor breaking or entering because the evidence, which included defendant reaching in and pulling the victim out of the house after the victim opened the door, showed an intent to commit robbery outside, not inside, the victim's house. State v. Goldsmith, 187 N.C. App. 162, 652 S.E.2d 336, 2007 N.C. App. LEXIS 2310 (2007).

First-degree trespass is a lesser included offense of felony breaking or entering. State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

To justify submission of felonious breaking or entering as a permissible verdict in a prosecution for burglary there must be evidence tending to show that defendant could have gained entry to victim's motel room by means other than a burglarious breaking, i.e., a forcible entry. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Offenses of breaking or entering and larceny are separate and distinct crimes, neither one a lesser included offense of the other. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Edmondson, 70 N.C. App. 426, 320 S.E.2d 315 (1984), aff'd, 316 N.C. 187, 340 S.E.2d 110 (1986).

Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v. Miller, 18 N.C. App. 489, 197 S.E.2d 46, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Felonious Breaking and Entering as Lesser Included Offense of Felony-Murder. — Where proof that defendant feloniously broke into and entered a dwelling is an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling, the conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, is based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering, and the felonious breaking and entering is a lesser included offense of the felony-murder. Hence, a separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

IX. TRIAL.

A. Burden of Proof.

Proof of recent possession of stolen property by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

Insanity as Defense. — Insanity is an affirmative defense and the burden of carrying it is upon the defendant. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

B. Evidence.

Circumstantial Evidence. — Neither this statute nor State v. Walton, 90 N.C. App. 532, 369 S.E.2d 101 (1988) requires that evidence be direct; rather, the evidence must be substantial. It is well-established in the appellate courts of this State that jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence. State v. Sluka, 107 N.C. App. 200, 419 S.E.2d 200 (1992).

Evidence Concerning Accomplice Immaterial. — Where defendant was charged under this section with nonburglariously breaking and entering and the evidence showed that he sat in his car while a friend unlawfully entered the house of another, the defendant was a principal in the crime being committed and the fact that his friend did not enter by burglarious breaking is immaterial. State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

Acquittal of Third Persons Not Relevant. — Since breaking and entering, larceny and uttering a forged check are offenses that require only one perpetrator, the acquittal of third persons arrested with the accused for the crime is not relevant evidence at defendant's trial. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

Evidence of Entry Without Breaking. — Where the evidence in the case and the inferences to be reasonably drawn therefrom were not such as would have required the jury to find that defendant entered by a burglarious breaking, the jury might reasonably have inferred that defendant made his entry without a burglarious breaking. State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

Inference From Possession of Recently Stolen Property. — Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property. State v. Snuggs, 18 N.C. App. 226, 196 S.E.2d 525 (1973).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

While possession of recently stolen property will support both a presumption of guilt of larceny and an inference of guilt of breaking and entering, they are mere inferences which the jury may consider along with other evidence in the case, which other evidence may be sufficient to tip the scales with respect to one count but not the other. State v. Barnes, 30 N.C. App. 671, 228 S.E.2d 83 (1976).

The presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt that: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and were subject to his control and disposition to the exclusion of others, though they need not necessarily be found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilty. State v. Hamlet, 316 N.C. 41, 340 S.E.2d 418 (1986).

Lapse of nine days held not to defeat the inference of defendant's guilt arising from his possession of recently stolen property. State v. Washington, 86 N.C. App. 235, 357 S.E.2d 419 (1987), cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Tracing Stolen Articles to Defendant. — It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Evidence Concerning Owner's Permission. — Where the evidence tended to show that a homeowner was locked out of his house and was trying to gain entry by using a credit card when defendant approached him and opened the door with an eight inch knife, the homeowner and defendant entered the house, drank alcoholic beverages and removed some items belonging to the homeowner, and both then left the house whereupon the homeowner called the police, testimony by the homeowner that he did not forbid defendant to come into the house because he was afraid defendant had a gun or knife was evidence from which the jury could conclude defendant did not have the owner's permission to enter the house. State v. Bartlett, 45 N.C. App. 704, 263 S.E.2d 800 (1980).

Fingerprints. — In prosecution for breaking and entering testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

In prosecution for breaking and entering, where the State's evidence established that: (1) defendant's right thumbprint was found on the lock at the scene of the crime, a fact defendant solemnly admitted in open court; (2) no other fingerprints — of defendant or any one else — were found at the scene; and (3) when informed of the fingerprint defendant stated to the police that he had never been in the business establishment alleged to have been broken into, a statement now conceded to be false, defendant's motion to nonsuit on the breaking and entering count was properly denied. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

The defendant's fingerprint, found at the scene of the crimes, standing alone, did not constitute substantial evidence that defendant was present at the time the crimes were committed, so his convictions for breaking or entering and larceny were reversed. State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694, 2001 N.C. App. LEXIS 136 (2001).

For the State to survive a motion to dismiss under § 15A-1227(a)(1), it must present evidence that defendant entered a building within the meaning of subsection (b) of this section and that he did so wrongfully, that is, that he entered without any consent or permission of the owner or occupant. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

Evidence Held Sufficient. — Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. State v. Williams, 187 N.C. 492, 122 S.E. 13 (1924).

The evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering. State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Evidence held sufficient to sustain conviction under this section. State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929); State v. Thompkins, 83 N.C. App. 42, 348 S.E.2d 605 (1986).

Evidence held sufficient to overrule nonsuit in the prosecution for unlawfully breaking and entering a building with intent to steal merchandise therefrom. State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967).

Evidence that around midnight the defendant and a companion broke the glass door of a hardware store and took away guns and ammunition was held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

The court properly denied a motion for nonsuit where the State, having introduced substantial evidence of each element of the offense of breaking or entering the building as charged in the indictment and that defendant was one of the persons who committed the offense, the question of guilt or innocence was properly submitted to the jury. State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975).

There was sufficient circumstantial evidence from which the court could have found that respondent committed the breaking or entering: (1) Numerous items similar though not identified, as those stolen were found in the car driven by respondent; (2) respondent's companion in the car had a fresh cut on his hand and at the store that was broken into, blood was found on the window and near the cash register; (3) and the officer's observation of the car being driven by respondent under suspicious circumstances "backing out from behind" the store and thereafter stopping the car. In re Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

Where the evidence shows (1) that a breaking and entering occurred; (2) that prior thereto the accused had possession of an instrument used to effect it; (3) that such possession occurred within a short time prior to the breaking and entering; (4) and that the instrument was found at the scene of the crime immediately after the crime was committed, a jury would be justified in finding that the instrument had been brought there by the person who had been shown to have previously possessed it and that such person used it to effect the breaking and entering. If the evidence is also sufficient to show that the crime of larceny was committed pursuant to the breaking and entering, then the jury may infer that the accused is guilty of larceny as well as breaking and entering. State v. McNair, 36 N.C. App. 196, 243 S.E.2d 805 (1978).

Where evidence presented by defendants and the State indicated that each defendant believed the apartment which was entered to be the dwelling of the other's girl friend, each defendant presented evidence that he believed the other defendant had permission to enter the apartment, and nothing in the apartment, according to the owner, had been disturbed, there was insufficient evidence to sustain a verdict of second degree burglary. However, there was evidence from which the jury could have found defendants guilty of misdemeanor breaking or entering under this section. State v. Humphries, 82 N.C. App. 749, 348 S.E.2d 167 (1986).

Evidence held to sufficiently satisfy the intent requirement of the offense of felonious breaking or entering. State v. White, 84 N.C. App. 299, 352 S.E.2d 261, cert. denied, 321 N.C. 123, 361 S.E.2d 603 (1987).

Evidence held sufficient for the jury to conclude beyond a reasonable doubt that defendant's entry into victim's home was nonconsensual and, therefore, wrongful. State v. Locklear, 320 N.C. 754, 360 S.E.2d 682 (1987).

Evidence of nonconsensual entry held to justify submission of that issue to the jury. State v. Murphy, 321 N.C. 72, 361 S.E.2d 745 (1987).

Evidence that a window in victim's apartment was open and the screen was on the ground, that flower pots on the windowsill were disturbed, and that defendant's fingerprints were on the screen and the windowsill, considered in the light most favorable to the State, supported submission of the breaking issue to the jury. State v. Murphy, 321 N.C. 72, 361 S.E.2d 745 (1987).

Where defendant's fingerprints were found on frame of window broken by alleged perpetrator, and he was spotted at the crime scene shortly before break-in occurred, denial of defendant's motion to dismiss was proper. State v. Barnette, 96 N.C. App. 199, 385 S.E.2d 163 (1989).

Though the owner of the goods allegedly stolen by defendant after he broke and entered the owner's home did not testify, evidence that defendant exited the premise through a window with a crowbar in his hand, as well as a knapsack or jacket containing the goods, and that pry marks were located on the window, was sufficient to convict him under this section. State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

There was sufficient circumstantial evidence to support convictions of breaking and entering and larceny where defendant's car was seen at a burglary scene with its tailgate open, pulled up to the door of the house, a coffee table from the house was in the car, and a witness placed defendant next door to the crime scene on the day the offenses occurred. State v. Ethridge, 168 N.C. App. 359, 607 S.E.2d 325, 2005 N.C. App. LEXIS 253 (2005), aff'd, — N.C. —, 625 S.E.2d 777 (2006).

State of North Carolina met its burden of proving each element of breaking and entering under G.S. 14-54(a), including intent, because the evidence presented was sufficient for the jury to conclude that defendants intended to commit robbery with a dangerous weapon at the time defendants entered the home of the victims. State v. Ly, 189 N.C. App. 422, 658 S.E.2d 300, 2008 N.C. App. LEXIS 650 (2008).

Evidence that a man matching defendant's description was seen leaning against the company truck, which was known to be in defendant's possession on the date of the larceny; that the truck and the man were seen outside the shed while the shed door was partway open; and that the company truck and at least some of the equipment stolen from the storage building were recovered a few days later at defendant's residence was sufficient to support defendant's convictions for breaking or entering and larceny. State v. Milligan, — N.C. App. —, 666 S.E.2d 183, 2008 N.C. App. LEXIS 1654 (2008).

Evidence Held Insufficient. — There was insufficient evidence from which the jury could find that defendant committed the breaking and entering where no fingerprints were taken linking the defendant to the break-in, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

In a prosecution of defendant for breaking or entering, evidence relating to the actions of a bloodhound should have been excluded because the State failed to show that the dog was put on the trail of the guilty party under such circumstances as to afford substantial assurance that the person trailed was in fact the person suspected, and the case should have been dismissed for insufficiency of evidence where the evidence tended to show that one and a half to two hours after a breaking occurred, one and a half to two miles away, defendant was found on a little sandbar by a creek; there was no evidence tending to establish that defendant was ever at the residence broken into; the only witness to the crime was unable to identify the man he had seen leaving the residence; there was no evidence defendant was at the place at which the dog was released to track the thieves; there was no evidence placing stolen guns or other stolen items in defendant's possession; there was evidence of footprints in the vicinity of the residence, but no evidence indicating they were defendant's footprints; and there was no evidence that defendant attempted to flee to avoid capture. State v. Lanier, 50 N.C. App. 383, 273 S.E.2d 746, cert. denied, 302 N.C. 632, 280 S.E.2d 445 (1981).

Same — Evidence of Intoxication. — Evidence that defendant was in an intoxicated condition at the time he was apprehended fell short of a showing that defendant was in such an intoxicated condition that he was utterly unable to form the intent required. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

C. Instructions.

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First-Degree Burglary. — Where the evidence is sufficient to justify it upon a bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Same — Illustration. — The State's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran away when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant was entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. State v. Feyd, 213 N.C. 617, 197 S.E. 171 (1938).

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940).

Charge on Lesser Offense Not Required Absent Evidence Thereof. — Where the State's evidence, which was all that the jury had to go on since defendant presented none, tended to show only that defendant forcibly entered apartment by breaking through a screened window, and did not tend to show that defendant entered the apartment without force through an open, unscreened window, the court was only required to instruct the jury on the offense of first degree burglary, and was not required to charge on the lesser included offense of felonious breaking and entering. State v. Mayfield, 74 N.C. App. 601, 329 S.E.2d 419, cert. denied, 314 N.C. 335, 333 S.E.2d 495 (1985).

Instruction on a lesser included offense is proper only where there is evidence that would permit a jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater offense; therefore, in a trial under this section, the possibility that a jury might partially accept or reject the State's evidence against defendant was not sufficient to require an instruction on the lesser included offense of misdemeanor breaking or entering. State v. Barnette, 96 N.C. App. 199, 385 S.E.2d 163 (1989).

Where overwhelming evidence showed that prior to breaking into the house defendant had decided to kill his estranged wife's family, all the evidence relevant to the time before defendant broke and entered supported an inference that defendant possessed the intent to kill, and no evidence tended to negate this intent, a rational trier of fact could not have concluded defendant did not possess the intent to commit murder, and the trial court did not err in refusing to instruct on the lesser included offense of misdemeanor breaking or entering. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993), cert. denied, 512 U.S. 1246, 114 S. Ct. 2767, 129 L. Ed. 2d 881 (1994).

A jury instruction on the lesser included offenses of misdemeanor breaking or entering and first degree trespass was not required in a prosecution for felonious breaking or entering, where there was no evidence that defendant entered the store for some reason other than larceny, particularly as items were stolen from the premises. State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

Trial court committed no plain error in failing to instruct the jury on non-felonious breaking and entering where there was substantial evidence that: (1) defendant entered the residence in order to rape the victim; (2) once inside, defendant pushed the victim into her room and onto her bed, held her arms tightly behind her back, removed duct tape from his pocket, and repeatedly touched the victim's breast and between her legs; and (3) although defendant argued that there was evidence that he merely wanted to use the telephone and the restroom, none of the above-stated acts committed by defendant were in furtherance of defendant's stated intent to use the telephone or restroom. State v. Mangum, 158 N.C. App. 187, 580 S.E.2d 750, 2003 N.C. App. LEXIS 1036 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 378 (2003).

Defendant who was charged with first degree burglary was not entitled to a jury instruction on the lesser included offense of felonious breaking and entering where the state's evidence was sufficient to satisfy its burden of proof on each element of the greater offense. State v. Crawford, 179 N.C. App. 613, 634 S.E.2d 909, 2006 N.C. App. LEXIS 2019 (2006).

With regard to defendant's conviction for first-degree burglary wherein the State established by positive and uncontroverted evidence that defendant and another broke and entered the dwelling of the victim during the nighttime with a weapon, and the only element of first-degree burglary that was controverted was defendant's intent when he entered the home, because the State established all the elements of first-degree burglary, except the intent with which defendant entered the home, with positive and uncontroverted evidence, it also established the elements of felonious breaking or entering except for intent and, therefore, it was not error for the trial court to omit an instruction for the lesser included offense of felonious breaking or entering. Instead, because the evidence as to defendant's intent was circumstantial and controverted, the trial court was required to instruct on the lesser included offense of misdemeanor non-felonious breaking or entering, which it did. State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639, 2007 N.C. App. LEXIS 2110 (2007), review denied, appeal dismissed, 362 N.C. 477, 666 S.E.2d 765 (2008).

Where only evidence of defendant's intent to commit larceny was the fact that he broke and entered into victim's apartment, the trial court erred in failing to submit the lesser included offense of misdemeanor breaking or entering to the jury as a possible verdict. State v. Patton, 80 N.C. App. 302, 341 S.E.2d 744 (1986).

Any failure by the court to set forth fully the elements of breaking or entering was harmless error, where the court properly instructed the jury regarding the elements of second degree burglary, as by finding defendant guilty of second degree burglary the jury necessarily found that he had committed each element of the offense of felonious breaking or entering. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Charge on Felony Not Due Process Violation. — No due process violation occurred when, after further research, the trial court reversed its prior ruling, made at the close of the State's evidence, that it would submit misdemeanor breaking and entering, and submitted the charge of felonious breaking and entering to the jury. State v. White, 84 N.C. App. 299, 352 S.E.2d 261, cert. denied, 321 N.C. 123, 361 S.E.2d 603 (1987).

Failure to Charge on Misdemeanor Prejudicial Error. — Where the evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony, it was prejudicial error for the court to fail to charge that the jury could find a verdict of nonfelonious breaking and entering, a misdemeanor, and for the court to fail to explain the full contents of this section to the jury. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

In a prosecution for rape and felonious breaking and entering, where the jury was not compelled to find from the evidence that defendant intended to commit rape at the time he entered the building, and if the jury had not found that defendant intended to commit rape at the time he entered the building and found the other elements of breaking or entering, they should have found him guilty of misdemeanor breaking or entering, it was error not to submit this possible verdict to the jury. State v. Gray, 322 N.C. 457, 368 S.E.2d 627 (1988).

Evidence that defendant admitted to breaking into a property with sole intent of finding a place to sleep was sufficient to support giving instruction on lesser included offense of misdemeanor breaking and entering. State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004).

The term "larceny" is a vital element of the crime of breaking and entering with the intent to commit larceny and the trial judge's failure to define such term in his instructions constituted error requiring a new trial. State v. Elliott, 21 N.C. App. 555, 205 S.E.2d 106 (1974).

Proper Instruction. — See State v. Jones, 272 N.C. 108, 157 S.E.2d 601 (1967).

Same — Instruction in Words of Section. — Where the court charged in the words of this section, the instruction was free from prejudicial error. State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714, cert. denied, 281 N.C. 627, 190 S.E.2d 470 (1972).

Same — Instruction Allowing Conviction on Alternative Propositions. — In prosecutions under this section, where the indictment charges the defendant with breaking and entering, proof by the State of either a breaking or an entering is sufficient, and instructions allowing juries to convict on the alternative propositions are proper. State v.

Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Reagan, 35 N.C. App. 140, 240 S.E.2d 805 (1978); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

Instruction As To Diminished Capacity Defense. — Trial court did not commit plain error by failing to instruct the jury on diminished capacity from defendant having taken medication before breaking and entering into a building with his accomplices, despite defendant's contention that he was in a fog, because defendant's two statements regarding his mental condition were insufficient to create a reasonable doubt in the juror's minds that defendant was unable to form the specific intent necessary to commit the crime of breaking and entering. State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292, 2005 N.C. App. LEXIS 2493 (2005).

D. Verdict.

Verdict of Felonious "B. & E." Disapproved. — In a prosecution for felonious breaking and entering, a verdict that defendant is guilty of felonious "B. & E." is disapproved. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Larceny Verdict After Acquittal of Felonious Breaking and Entering. — Where a defendant is acquitted of felonious breaking or entering, he cannot be convicted of felonious larceny based on the felonious breaking or entering charge, and a jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981).

Reduction of Burglary Conviction to Felonious Breaking or Entering. — Where there was no evidence from which the jury reasonably could have concluded that defendant, rather than codefendant, removed window screen and pried open window, and it was just as likely that defendant crawled through window after codefendant opened it, and where the court failed to instruct the jury on acting in concert, the evidence did not permit a finding that defendant personally committed each element of the offense of second degree burglary. However, by finding defendant guilty of second degree burglary, the jury necessarily found facts that would support defendant's conviction of felonious breaking or entering. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986), vacating conviction of second degree burglary and remanding for entry of a judgment as upon a conviction of felonious breaking or entering.

Where there was insufficient evidence from which the jury could find that defendant committed an actual breaking under the court's instructions, the verdicts of second degree burglary returned by the jury would be considered verdicts of guilty of felonious breaking or entering. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

E. Sentencing.

Editor's Note. — *Some of the cases in the following annotations were decided under the section as it stood prior to the effective date of the 1979 amendment.*

Trial court did not err in failing to find nonstatutory mitigating factor, on sentencing defendant on convictions of felonious breaking or entering and felonious larceny, that the victim suffered only insubstantial loss, where the victim's loss was insubstantial merely because the police stopped defendant's accomplice in the middle of the larceny. State v. Litchford, 78 N.C. App. 722, 338 S.E.2d 575 (1986).

Sentence Under Former Provisions Held Not Cruel or Unusual. — See State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967); State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967); State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

Maximum Sentence. — The punishment for a violation of this section may be a maximum of 10 years. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

The maximum punishment for the felony of breaking and entering is 10 years' imprisonment. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Perryman, 4 N.C. App. 684, 167 S.E.2d 517 (1969).

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200.00 (now $400.00) in value, are felonious, each of which may be punishable by imprisonment for as much as 10 years. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36, rev'd in part on other grounds, 275 N.C. 432, 168 S.E.2d 380 (1969).

A sentence of 10 years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of subsection (a) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

X. APPEAL.

Scope of Review. — Each defendant having entered a plea of guilty to a valid information charging the felony of nonburglarious breaking, their appeal brings up for review only the question whether the facts charged constitute an offense punishable under the laws and Constitution. Defendants' plea established a violation of this section. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

Sentence Where Misdemeanor and Felony Charges Consolidated. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Sentence Exceeding Maximum. — Where the maximum term of a sentence is set beyond statutory authorization under this section, the sentence imposed is not void in toto. Petitioner is not entitled to be released from custody since he has not served that part of the sentence which is within lawful limits. State v. Clendon, 249 N.C. 44, 105 S.E.2d 93 (1958).

§ 14-54.1. Breaking or entering a building that is a place of religious worship.

(a) Any person who wrongfully breaks or enters any building that is a place of religious worship with intent to commit any felony or larceny therein is guilty of a Class G felony.

(b) As used in this section, a "building that is a place of religious worship" shall be construed to include any church, chapel, meetinghouse, synagogue, temple, longhouse, or mosque, or other building that is regularly used, and clearly identifiable, as a place for religious worship. (2005-235, s. 1.)

§ 14-55. Preparation to commit burglary or other housebreakings.

If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class I felon. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C.S., s. 4236; 1969, c. 543, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1152; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Possession of Housebreaking Implements.
  A. In General.
  B. Implements.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

This section defines three separate offenses. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966); State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971); State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

This section defines three separate offenses, and the part of this section relating to possession of implements of housebreaking is a separate offense. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

Offenses of Being Armed and Possessing Housebreaking Implements Are Separate. — The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. State v. Baldwin, 226

N.C. 295, 37 S.E.2d 898 (1946).

Applied in State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973); State v. McAlister, 59 N.C. App. 58, 295 S.E.2d 501 (1982).

Cited in State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949); State v. McPeak, 243 N.C. 243, 90 S.E.2d 501 (1955); State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Searcy, 37 N.C. App. 68, 245 S.E.2d 412 (1978); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581 (1982); State v. Martin, 67 N.C. App. 265, 313 S.E.2d 15 (1984); State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); United States v. Bowden, 975 F.2d 1080 (4th Cir. 1992).

II. POSSESSION OF HOUSE-BREAKING IMPLEMENTS.

A. In General.

Elements of Offense. — The gravamen of the offense of possession of housebreaking implements, as defined by this section lies in the possession, without lawful excuse, of an implement or implements either enumerated in the statute or which fairly come within the meaning of the term other implements of housebreaking. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

The essential elements of the crime of possession of implements of housebreaking are (1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Police officer had probable cause to arrest defendant for possession of burglary tools under G.S. 14-55 because her suspicion that defendant possessed implements of housebreaking was supported by: (1) defendant's possession of a flashlight; (2) defendant's possession of a backpack containing unknown items; and (3) all of the factors supporting the finding of reasonable suspicion for the initial stop of defendant, including the time of day, defendant's proximity to the location of the crime, and the absence of other persons in the area. State v. Campbell, 188 N.C. App. 701, 656 S.E.2d 721, 2008 N.C. App. LEXIS 280 (2008).

Burden of Proof. — The gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943); State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966); State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967); State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968); State v. McCloud, 7 N.C. App. 132, 171 S.E.2d 470, aff'd, 276 N.C. 518, 173 S.E.2d 753 (1970); State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971); State v. Beard, 22 N.C. App. 596, 207 S.E.2d 390 (1974).

The phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of alcoholic beverages such possession is not within the meaning of this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

Proof of "Intent" or "Unlawful Use" Not Required. — The offense of possessing implements of housebreaking without lawful excuse, does not require the proof of any "intent" or "unlawful use." State v. Vick, 213 N.C. 235, 195 S.E. 779 (1938).

The offense of possessing implements of housebreaking does not require the proof of "intent" in this State. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

A prosecution under this section does not require proof of any specific intent to break into a particular building at a particular time and place. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

But State Must Show General Intent To Use Unlawfully. — Although a prosecution under this section does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the state to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Where defendant is charged with possession of certain specific items condemned by this section, it is not necessary for the court to determine whether tools or implements that have legitimate purposes were being possessed for an illegitimate purpose. State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968).

Character of Object of Burglary Immaterial. — The possession of an implement with intent to burglarize and not the character of the object (be it a house or vending machine) of the burglary brings the act within the condemnation of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1979).

Proof That All Articles in Defendant's Possession Are Implements of Housebreaking Not Required. — The State is not required to prove that all the articles the defendant had in his possession are implements of housebreaking. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Constructive Possession. — The State need not always prove an actual possession of implements of housebreaking, but may show constructive possession by circumstantial evidence. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

B. Implements.

"Implements of Housebreaking" Generally. — If tools enumerated in an indictment are embraced within the general term "other implement of housebreaking," their possession without lawful excuse is prohibited by this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Items which are "implements of housebreaking" are not specifically named in this section, so if their possession without lawful excuse is proscribed at all it is under the general language of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

An article may be deemed an implement of housebreaking, the possession of which is made criminal by the statute, when (1) it is a picklock, key, bit, or any other instrument capable of being used for the purpose of housebreaking, and (2) at the time and place alleged, the person charged with its possession did in fact possess it for that purpose, i.e., without lawful excuse. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Nature and Purpose of Tools. — This section defines a separate felony for mere possession without lawful excuse of tools or implements of housebreaking, and it is the inherent nature and purpose of the tool, or the clear effect of a combination of otherwise innocent tools, which is condemned. State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968), disapproved, State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Use to Which Instrument Is Put Is Not Controlling. — The fact that certain implements were possessed and used by the defendant in breaking open a window in a building is not determinative of the question of whether or not they were implements of housebreaking possessed in violation of this section. The use to which a tool or instrument is put is not necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Crowbar is clearly a breaking tool. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Combination of Crowbar and Big Screwdriver. — Under the circumstances the possession of a crowbar and a big screwdriver were without lawful excuse, and said crowbar and big screwdriver were other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Combination of Gloves, Tapes, Chisels, Crowbars, Hammers, and Punches. — While gloves, tapes, chisels, crowbars, hammers, and punches all have their honest and legitimate uses, when no explanation is offered for this combination of articles by a man several hundred miles from his home, in the middle of the night, it is ample to sustain a possession of wrongful and unlawful possession of tools used in store breaking. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

Picklock. — This section contemplates a picklock as being a burglary tool when it is in the possession of someone without lawful excuse. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

A "lockpick" and a "picklock" are the same thing. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

Chisels and Screwdrivers May Be Implements of Housebreaking. — Although the instruments have other uses which are legitimate and were not made for the specific purpose of breaking into buildings, it is common knowledge that chisels and screwdrivers can be, and may be, used as implements of housebreaking. State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971).

Screwdrivers and Icepicks May Be Implements of Housebreaking. — Although the tools possessed by defendant were capable of legitimate use, under the circumstances shown by the State, a legitimate inference could be drawn that defendant possessed the screwdriver and icepick for the purpose of breaking into the building, so as to come within the proscription of this section as "other implements of housebreaking." State v. Robinson, 115 N.C. App. 358, 444 S.E.2d 475, cert. denied, 337 N.C. 697, 448 S.E.2d 538 (1994).

Tire Tool Not Necessarily an Implement For Housebreaking. — A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires; not only is there lawful excuse for its possession, but there is little or no excuse for a motorist to be on the road without one. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965).

There is some doubt whether a tire tool, under the ejusdem generis rule, is of the same classification as a picklock, key, or bit, and hence, condemned by this section. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965); State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968), disapproved, State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

But May Be Under Certain Circumstances. — A tire tool was an implement of housebreaking within the meaning of this section where there was plenary circumstantial evidence which implied that defendant was in actual or constructive possession of the tire tool, that the tire tool was reasonably capable of use for the purpose of breaking into a building, and that defendant did in fact possess it for that purpose at the time and place of his arrest. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Small Screwdrivers, Tire Tool, Gloves, Flashlights, and Socks Held Not Implements of Housebreaking. — Two small screwdrivers, a tire tool, gloves, flashlights, and socks in defendant's possession at time store was broken into and entered by defendant were not other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Pistol is not an "implement of housebreaking" within the intent and meaning of this section. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

In a prosecution under this section for having possession without lawful excuse of a crowbar, hack saw and automatic pistol, the burden is on the State to prove beyond a reasonable doubt that the possession of the implements was "without lawful excuse" within the spirit of the statute, and the possession of a pistol for personal protection, even though unauthorized, cannot be unlawful possession within the meaning of the statute. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

Implements for Opening Car Doors. — This section does not make it illegal to possess implements used for opening car doors. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Ladder and Torch Not Housebreaking Implements. — Neither a three-foot long ladder nor an acetylene torch with tanks mounted on a wheeled stand possessed by defendant was reasonably adapted for use in housebreaking, and they do not qualify as implements of housebreaking within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Judicial Knowledge of Housebreaking Implements. — Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

III. PRACTICE AND PROCEDURE.

Sufficiency of Indictment. — An indictment under this section is not fatally defective because of its failure to enumerate any of the articles specified in the statute as implements of housebreaking when it does specify implements coming within the generic term of "implements of housebreaking." State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Surplusage in Indictment. — Where a count in an indictment contains words set forth in the second offense defined in this section, namely, "having in his possession without lawful excuse," those words are mere surplusage where the count sufficiently embraces the first offense defined in this section. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

Reference in an indictment to the defendant's possession of items not illegal under this section was mere surplusage and did not render the charge ambiguous since the indictment also charged the possession of specific items listed in the statute, and the proof showed that defendant possessed these specific items as well as other items which came within the generic term of implements of housebreaking. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Possession of Bolt-Cutter Raises Inference of Unlawful Purpose. — The conduct of defendants and the circumstances under which they were in possession of a bolt-cutter may raise the inference that its possession is for an unlawful purpose. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

It is reasonable to perceive that a burglar with a bolt-cutter, on the prowl to steal that which belongs to others, would clip a padlock and enter and steal from a service station building as readily as he would clip a metal band securing a vending machine and steal its contents. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Jury Must Decide Conflicting Evidence. — The evidence as to whether the possession of an implement was lawful, being in conflict, is for the jury to decide and a nonsuit would be improper. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Testimony of Police May Be Competent Evidence of Possession of Burglary Tools. — Testimony of police officers in regard to the lack of defendant's need for certain tools in his employment may be competent evidence of possession of burglary tools without lawful excuse within this section. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Ownership of Automobile and Location of Tools Therein Need Not Be Shown. — Where the evidence tended to show that defendant was in control of an automobile, that he owned tools and had placed them therein, then who owned the automobile, and where the tools were located therein, were not essential elements which had to be shown in order to convict defendant of possession of burglary tools. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Inference Where Accused Is Borrower of Vehicle Containing Contraband. — Where contraband material, such as burglary tools, is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Rebuttal of Such Inference. — If the owner of a vehicle loans the vehicle to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference of knowledge and possession of the contents. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Evidence Held Sufficient. — Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Evidence that implements of housebreaking were found in car which defendant was operating was sufficient to take the case to the jury in prosecution under this section. State v. Roberts, 82 N.C. App. 733, 348 S.E.2d 151 (1986).

There was sufficient evidence to support the denial of defendant's motion to dismiss and the jury's finding that defendant possessed stolen goods under G.S. 14-71.1 and burglary tools under G.S. 14-55 as: (1) the camera and camcorder were stolen and both items were identified at trial; (2) the items were seized from a trailer, and defendant claimed the items belonged to defendant; and (3) a break-in had occurred at the victim's office, and that the tools found with the camera and camcorder in the trailer were consistent with the tools typically used to break and enter locked properties. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Evidence Held Insufficient. — The evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

Upon an indictment charging possession, without lawful excuse, of a crowbar, hack saw and automatic pistol, in a prosecution under this section, the evidence was held insufficient to be submitted to the jury. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

Evidence tending to show that defendant was a passenger in a car in which implements of housebreaking were found, without any evidence that defendant had any control whatsoever over either the automobile or the implements of housebreaking found therein, and without evidence showing when, where, or under what circumstances defendant entered the automobile, or disclosing his relationship or association with the driver thereof, is insufficient to be submitted to the jury in prosecution for possession of implements of housebreaking without lawful excuse. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

Instruction on Elements of Offense Erroneous. — Where defendant was charged with the first offense defined in this section, the trial court erred by instructing the jury on the first and second offense defined in this section when it substituted "implementation of housebreaking," an element of the second offense, for "dangerous or offensive weapon," an element of the first offense defined. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

Instruction as to Tire Tool. — In a prosecution for felonious possession of implements of storebreaking pursuant to this section, it was not error for the trial court to permit the jury to conclude that a tire tool was an implement of storebreaking, where there is abundant evidence to show that the tire tool was used in the breaking, no explanation appears of record which would justify the presence of the tire tool inside the store after the breaking, no suggestion appears of record that any automobile tire was in need of or receiving repair on the premises in question at the time defendant and his companion were apprehended, and the jury was properly instructed on the principles of actual and constructive possession. State v. Bagley, 43 N.C. App. 171, 258 S.E.2d 427 (1979), aff'd, 300 N.C. 736, 268 S.E.2d 77 (1980).

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value, or, after having committed any felony or larceny therein, breaks out of any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft. (1907, c. 468; C.S., s. 4237; 1969, c. 543, s. 5; 1979, c. 437; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 10; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Gravamen of the offense is the breaking and entering with intent to commit larceny. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

Actual Larceny Need Not Be Completed. — The language of this section does not require the actual larceny of anything in order to convict of felonious breaking or entering. It is the breaking or entering with intent to commit larceny that is proscribed. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

The success of the larceny venture does not determine the grade of the breaking or entering as defendants argue. It is only necessary to establish the intent to commit larceny in order to establish a felonious breaking or entering of the motor vehicle. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

Larceny May Be Felony or Misdemeanor. — This section makes it a felony to break or enter a motor vehicle containing any goods, wares, freight or other thing of value with intent to commit larceny, whether the larceny be felonious or misdemeanor larceny. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

Subject of Larceny. — Papers, a shoe bag and cigarettes are without question personal property, and as such they may be the subject of larceny within the meaning of this section. State v. Quick, 20 N.C. App. 589, 202 S.E.2d 299 (1974).

Items Listed Characterized by High Degree of Mobility. — Items listed in G.S. 14-54 denote qualities of permanence and immobility, while those listed in this section are characterized by a high degree of mobility. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

The chief distinction between the categories of items enumerated in G.S. 14-54 and this section is the property of permanence. The items listed in G.S. 14-54 denote the qualities of permanence and immobility while those listed in this section are characterized by a high degree of mobility. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

When "Trailers," etc., Qualify as Buildings Under § 14-54. — Whether "trailers," "railroad cars" or other items specifically named in this section qualify as "buildings" under G.S. 14-54 depends upon the circumstances in each case; they may qualify as "buildings" if under the circumstances of their use and location at the time in question they have lost their character of mobility and have attained a character of permanence. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

The term "trailer" and other property specifically named in this section applies to the specifically named property when being primarily used for its intended purpose. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

Mobile Home Not Covered by Section. — A mobile home, as used in the sense of a residence, distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes, as the chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary; thus, a mobile home is a building within the meaning of G.S. 14-54 and is not covered by this section. State v. Douglas, 54 N.C. App. 85, 282 S.E.2d 832 (1981).

Trailer on Construction Site. — A trailer used for the storage of tools and equipment of a construction company on the construction site during the building of a bridge lost its characteristics of mobility and became a structure used primarily for storage of property so that it attained the status of a building within the meaning of G.S. 14-54. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

Chain Lock on Hood of Car Does Not Preclude Finding of Entry. — The mere fact that a chain lock on the hood of a car prevented the hood from opening beyond 12-18 inches did not preclude a finding that there was an entry. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Entitlement to Charge on Lesser Degree of Offense. — Mere fact that defendant was not successful in his effort to commit a felony within the vehicle in which he was caught did not entitle him to a charge on a lesser degree of the crime charged. State v. Carver, 96 N.C. App. 230, 385 S.E.2d 145 (1989).

Evidence Held to Establish Entry. — Although there was no testimony that either defendant was actually seen with a portion of his body under the hood of the car, testimony of the arresting officer that one defendant was squatting down and looking up under the hood, which the other defendant was trying to raise, led to the obvious conclusion that there was an entry. Certainly, when one raises the hood of a car he must first extend some portion of his hand beneath the hood to release the hood latch. State v. Nealy, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Possession of Recently Stolen Goods. — In a prosecution under this section, the doctrine of possession of recently stolen goods does not apply unless there is proof that the property had been stolen. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

In a prosecution under this section, the doctrine of inference of guilt derived from the possession of recently stolen goods applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Possession of recently stolen goods does not have to be such that the goods are actually in the hands or on the person of the accused. It is sufficient if the property was under his exclusive personal control. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Allegation of Ownership of Vehicle and Property Therein. — Where the bill of indictment specifically lays the ownership of the property contained in the motor vehicle in another named person, thereby negating the possibility of defendant's breaking and entering the vehicle to steal his own property, and the motor vehicle involved is described in detail and its possession is alleged to be in another, the technical ownership of the vehicle broken into is immaterial. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

Lack of Consent. — Lack of vehicle owner's consent is not an element of an offense under this section; however, where there was circumstantial evidence, based upon which lack of consent could be inferred (i.e., locked doors), and other evidence to support trial court's finding that defendant had committed the offense charged, defendant's motion to dismiss was properly denied. State v. Carver, 96 N.C. App. 230, 385 S.E.2d 145 (1989).

The State's evidence was sufficient for submission of the question to the jury as to whether an entry had been committed by the defendant where the defendant was standing on the street at the open door of a van with the upper part of his body inside the van. State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978).

Evidence of Control by Defendant Lacking. In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

Section 20-107(a) Not a Lesser Included Offense of This Section. — A lesser included offense is one which is composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense; while most of the elements of G.S. 20-107(a) are present in this section, neither injuring or tampering with the vehicle itself nor breaking or removing a part of it (elements of G.S. 20-107) are part of the greater offense found in this section. State v. Carver, 96 N.C. App. 230, 385 S.E.2d 145 (1989).

G.S. 20-107(a) prohibits any person from willfully injuring or tampering with any vehicles or breaking or removing any part or parts of or from a vehicle without the consent of the owner; while most of the elements of G.S. 20-107(a) are present in G.S. 14-56, neither injuring or tampering with the vehicle itself, nor breaking or removing a part of the car are part of the greater offense, and thus, neither part of G.S. 20-107 is a lesser included offense of G.S. 14-56. State v. Jackson, 162 N.C. App. 695, 592 S.E.2d 575, 2004 N.C. App. LEXIS 265 (2004).

Where the record was devoid of evidence that victim's vehicle contained any items of even trivial value that belonged to the victim or to anyone else, the trial court erred in submitting the issue of defendant's guilt of this offense to the jury. State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987).

Trivial effects found in a vehicle, which are sufficient to cause the charge to go to the jury on the fourth element for breaking and entering a motor vehicle, are effects that are not inherently a part of the functioning vehicle. Where the State's only proof of that element was proof that a car that was on an auto dealership lot for detailing and resale contained the keys and parts of the car, the fourth element was not met, and it was error to submit the charge to the jury. State v. Jackson, 162 N.C. App. 695, 592 S.E.2d 575, 2004 N.C. App. LEXIS 265 (2004).

Evidence Sufficient to Show Each Element. — Where the evidence showed that defendant, along with two others, walked toward a truck, and that, after a loud noise defendant and the others then emerged carrying boxes of wine, and where it further showed that, the next morning, the padlock to the tractor trailer was missing and, when the truck was opened, wine was discovered missing, this evidence was sufficient to show each of the elements of the crime charged under this section, and that defendant actively participated in the breaking and entering. State v. Riggs, 100 N.C. App. 149, 394 S.E.2d 670 (1990).

There was sufficient evidence to support a conviction for breaking or entering a motor vehicle with an intent to commit larceny where defendant shared a common purpose with his co-defendant to open a truck, to wrongfully remove a satchel with an intent to deprive the victim of the satchel and its contents, and to appropriate them to defendant's use. Although the co-defendant broke into the vehicle and grabbed a satchel, defendant hastily drove away from the scene with his co-defendant in the passenger seat, holding the satchel. State v. Baskin, 190 N.C. App. 102, 660 S.E.2d 566, 2008 N.C. App. LEXIS 895 (2008).

Evidence Not Sufficient to Support Conviction Under This Section. — Where the evidence tended to show that defendant grabbed victim and at gunpoint forced her back into her automobile, that defendant bound victim, kidnapped her, committed armed robbery and returned victim to hospital parking lot, the evidence supported convictions for second-degree kidnapping and robbery with dangerous weapon and might have supported verdicts for other offenses had they been charged, but did not support conviction for breaking or entering motor vehicle. State v. Ellis, 100 N.C. App. 591, 397 S.E.2d 518 (1990), cert. denied, 328 N.C. 273, 400 S.E.2d 457 (1991).

Cited in State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Douglas, 51 N.C. App. 594, 277 S.E.2d 467 (1981); State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115 (1984); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Wilson, 98 N.C. App. 86, 389 S.E.2d 626 (1990); State v. Taylor, 109 N.C. App. 692, 428 S.E.2d 273 (1993); State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005).

§ 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

Any person who forcibly breaks into, or by the unauthorized use of a key or other instrument opens, any coin- or currency-operated machine with intent to steal any property or moneys therein shall be guilty of a Class 1 misdemeanor, but if such person has previously been convicted of violating this section, such person shall be punished as a Class I felon. The term "coin- or currency-operated machine" shall mean any coin- or currency-operated vending machine, pay telephone, telephone coin or currency receptacle, or other coin- or currency-activated machine or device.

There shall be posted on the machines referred to in G.S. 14-56.1 a decal stating that it is a crime to break into vending machines, and that a second offense is a felony. The absence of such a decal is not a defense to a prosecution for the crime described in this section. (1963, c. 814, s. 1; 1977, c. 723, ss. 1, 3; 1979, c. 760, s. 5; c. 767, s. 1; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 27, 1153; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Identification of Owner of Property Not An Element. — Relying on an analogous statute, G.S. 14-54(a), prohibiting breaking and entering, the appellate court found that the identification of the owner of the property was not an element of breaking into a coin-operated machine under G.S. 14-56.1; therefore, defendant was properly convicted of breaking into a coin-operated machine, although the State did not allege that the owner of the property was a natural person or a person capable of owning property. State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Cited in Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979); State v. Ford, 71 N.C. App. 452, 322 S.E.2d 431 (1984); State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-56.2. Damaging or destroying coin- or currency-operated machines.

Any person who shall willfully and maliciously damage or destroy any coin- or currency-operated machine shall be guilty of a Class 1 misdemeanor. The term "coin- or currency-operated machine" shall be defined as set out in G.S. 14-56.1. (1963, c. 814, s. 2; 1977, c. 723, s. 2; 1993, c. 539, s. 28; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-56.3. Breaking into paper currency machines.

Any person, who with intent to steal any moneys therein forcibly breaks into any vending or dispensing machine or device which is operated or activated by the use, deposit or insertion of United States paper currency, shall be guilty of a Class 1 misdemeanor, but if such person has previously been convicted of violating this section, such person shall be punished as a Class I felon.

There shall be posted on the machines referred to in this section a decal stating that it is a crime to break into paper currency machines. The absence of such a decal is not a defense to a prosecution for the crime described in this section. (1977, c. 853, ss. 1, 2; 1979, c. 760, s. 5; c. 767, s. 2; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 29, 115; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-56.4. Preparation to commit breaking or entering into motor vehicles.

(a) For purposes of this section:

(1) "Manipulative key" means a key, device or instrument, other than a key that is designed to operate a specific lock, that can be variably positioned and manipulated in a vehicle keyway to operate a lock or cylinder or multiple locks or cylinders, including a wiggle key, jiggle key, or rocket key.

(2) "Master key" means a key that operates all the keyed locks or cylinders in a similar type or group of locks.

(b) It is unlawful for any person to possess any motor vehicle master key, manipulative key, or other motor vehicle lock-picking device or hot wiring device, with the intent to commit any felony, larceny, or unauthorized use of a motor propelled conveyance.

(c) It is unlawful for a person to willfully buy, sell, or transfer a motor vehicle master key, manipulative key or device, key-cutting device, lock pick or lock-picking device, or hot wiring device, designed to open or capable of opening the door or trunk of any motor vehicle or of starting the engine of a motor vehicle for use in any manner prohibited by this section.

(d) Violation of this section is a Class 1 misdemeanor. A second or subsequent violation of this section is a Class I felony.

(e) This section shall not apply to any person who is a dealer of new or used motor vehicles, a car rental agent, a locksmith, an employee of a towing service, an employee of an automotive repair business, a person who is lawfully repossessing a vehicle, or a state, county, or municipal law enforcement officer, when that person is acting within the scope of the person's official duties or employment. This section shall not apply to a business which has a key-cutting device located and used on the premises for the purpose of making replacement keys for the owner or person who is in lawful custody of a vehicle. (2005-352, s. 1.)

§ 14-57. Burglary with explosives.

Any person who, with intent to commit any felony or larceny therein, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as a Class D felon. (1921, c. 5; C.S., s. 4237(a); 1969, c. 543, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1155; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in G.S. 14-51. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944).

This section is not void for vagueness. Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967).

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

Applied in In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. Roux, 263 N.C. 149, 139 S.E.2d 189 (1964); State v. Roux, 266 N.C. 555, 146 S.E.2d 654 (1966).

Cited in State v. Vick, 213 N.C. 235, 195 S.E. 779 (1938); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

Article 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class D felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class G felony. (R.C., c. 34, s. 2; 1870-1, c. 222; Code, s. 985; Rev., s. 3335; C.S., s. 4238; 1941, c. 215, s. 2; 1949, c. 299, s. 3; 1973, c. 1201, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1156; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to eligibility of prisoners serving life sentence for parole, see G.S. 15A-1371. As to arrests and prosecutions by Attorney General, see G.S. 58-79-5.

Legal Periodicals. — For article, "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

For comment on capital punishment in North Carolina, see 59 N.C.L. Rev. 911 (1981).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

Purpose. — The main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

Legislative Intent. — The intent of the Legislature in enacting G.S. 14-58.1 and G.S. 14-58.2 was to extend protection against wilful and malicious burning to mobile and manufactured housing, it did not intend to remove that protection when, in 1979, it amended this section and G.S. 14-58.2 to classify the crime of arson in separate degrees for sentencing purposes. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Common-Law Offense. — Arson is not defined by statute but is a common-law offense. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974); State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Specific intent is not an essential element of the crime of common-law arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

In this State, the crime of arson has not been defined by statute, therefore the common-law definition of arson remains in force. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982); State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

First-degree arson is an offense against both persons and property. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Evidence that defendant carried out his plan to murder and rob the victim and then burned the evidence of those crimes as parts of one continuous transaction was sufficient to support defendant's conviction for first-degree arson. State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995).

"Arson" Defined. — As defined at common law, arson is the willful and malicious burning of the dwelling house of another person. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982); State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

"Burning". — To satisfy the proof of a "burning" it is not necessary that the building be wholly consumed or even materially damaged. It is sufficient if any part, however small, is consumed. A building is burned within the common-law definition of arson when it is charred. State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

The crime of arson is consummated by the burning of any, the smallest part of the house, and it is burned within the common-law definition of the offense when it is charred, that is, when the wood is reduced to coal and its identity changed, but not merely scorched or discolored by heat. State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982).

Some portion of the dwelling itself, in contrast to its mere contents, must be burned to constitute arson; however, the least burning of any part of the building, no matter how small, is sufficient, and it is not necessary that the building be consumed or materially damaged by the fire. State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982).

The "burning" element of arson requires that some portion of the dwelling itself be burned. State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

"Dwelling house" as contemplated in the definition of arson means an inhabited house. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

A house is a "dwelling house" if someone lives there. State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

Mobile Homes and Manufactured Housing. — It is certainly common knowledge that many of our citizens inhabit mobile homes and manufactured housing and we hold the words "dwelling" and "dwelling house" apply to those structures as surely as those made of lumber and brick. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

The malicious and willful burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second degree arson. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Dwelling of "Another". — The need for protection from willful and malicious burning of a dwelling house is so compelling that the common-law arson requirement that the dwelling burned be that of "another" is satisfied by a showing that some other person or persons, together with the arsonist, were joint occupants of the same dwelling unit. State v. Shaw, 305 N.C. 327, 289 S.E.2d 325 (1982).

A house is the dwelling house "of another" if someone other than the defendant lives there. State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

If a dweller in an apartment house burns the building, he or she is guilty of arson, even if the fire is confined to the rooms occupied by the wrongdoer, because the building is the dwelling house of the other tenants. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

For a burning to be "willful and malicious" in the law of arson, it must simply be done voluntarily, without excuse or justification, and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of the offense of common-law arson. State v. Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Property Must Be Inhabited. — Since arson is an offense against the security of the habitation and not the property, an essential element of the crime is that the property be inhabited by some person. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Continuous Transaction. — A dwelling is occupied for purposes of the arson statute when the interval between the mortal blow and the burning is short, and the murder and the arson constitute parts of a continuous transaction. State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992).

Temporary Absence of Occupants. — Common-law arson results from the burning of a dwelling even if its occupants are temporarily absent at the time of the burning. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Inhabitant's Death Renders Property Uninhabited. — While temporary absence from a dwelling will not affect its status as an inhabited dwelling, an inhabitant's death certainly renders it uninhabited since someone must "live" in a dwelling for it to be "inhabited." State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

Property Was Not Inhabited Where Occupants Permanently Absent. — Where there were only two inhabitants of the trailer before it burned and the State's evidence showed the trailer was uninhabited at the time it was burned as one inhabitant had been murdered and the other inhabitant had disconnected the power to the trailer and vacated it, defendant could not be convicted of common law arson since both prior inhabitants of the trailer were permanently absent from the trailer at the time it was burned. State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251, cert. denied, 325 N.C. 276, 384 S.E.2d 528 (1989).

No evidence was needed to prove that dwelling was "occupied" for purposes of this section, where the burning of a downstairs apartment, after the murder of that apartment's tenant, and the murder of an upstairs victim were parts of a continuous transaction. State v. Parker, 350 N.C. 411, 516 S.E.2d 106, 1999 N.C. App. LEXIS 424 (1999), cert. denied, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000).

Burning of Interior Wallpaper Substantiates Charring. — Wallpaper affixed to an interior wall is unquestionably a part of the dwelling's framework, and where the evidence discloses that the wallpaper in a dwelling has been burned, it competently substantiates the charring element of arson. State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982).

Common-law definition of arson is still in force in this State. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956); State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

Second-Degree Arson — Defined. — Under this section, if the dwelling that burned was unoccupied at the time of the burning, the offense is arson in the second degree. State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

Second-Degree Arson — Elements. — Combining the definitions found in the common law definition of arson and those found in this section, the court found the elements of second-degree arson to be: (1) the malicious and willful (2) burning of a structure; (3) which is the dwelling house of another; and (4) which is unoccupied at the time of the burning. State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

Same — Evidence Held Sufficient. — Evidence held sufficient to support conviction of second-degree arson. State v. Eubanks, 83 N.C. App. 338, 349 S.E.2d 884 (1986).

Second-Degree Arson — Not Submitted. — Defendant was not entitled to submit second degree arson as a possible verdict where, during the time which elapsed between the murder and the arson, the defendant took additional actions designed to further his "criminal scheme," i.e, defendant and co-defendant disposed of the murder weapon, burned their blood-soiled clothes, purchased gasoline to ignite the fire at the victim's house, and set the house on fire. State v. Holder, 138 N.C. App. 89, 530 S.E.2d 562, 2000 N.C. App. LEXIS 552 (2000).

Sufficiency of Indictment. — An indictment was sufficient to charge defendant with common-law arson of an apartment where it alleged that apartment 9F was burned and apartment 9E was occupied by a named person, since Building 9 of the apartments, comprised of apartments A through F, constituted one dwelling house such that the requirement of a burning could be satisfied by the charring in 9F while the requirement of occupancy could be satisfied by the tenant's presence in 9E. State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

Even though the statutory reference was incorrect, the body of the indictment was sufficient to properly charge defendant with the burning of a mobile home. State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

Validity of Trial Upheld. — Although indictments charging attempted first-degree arson recited that the charges were brought pursuant to this section, they actually charged a violation of G.S. 14-67 which prohibits attempted arson; this mistake in the citation of the statute did not affect the validity of the trial. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993), cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

Aggravating and Mitigating Factors. — It is incorrect for the trial judge to find as an aggravating factor the fact that the inhabitants were not at home when the offense was committed. If anything, this should be considered a mitigating factor. State v. Jones, 59 N.C. App. 472, 297 S.E.2d 132 (1982), cert. denied, 307 N.C. 579, 299 S.E.2d 651 (1983).

It is not an appropriate aggravating factor for a trial court to consider that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person when defendant is convicted of first degree arson. State v. Waters, 87 N.C. App. 502, 361 S.E.2d 416 (1987).

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of res gestae. State v. Smith, 225 N.C. 78, 33 S.E.2d 472 (1945).

Evidence Sufficient to Defeat Motion to Dismiss. — Trial court properly denied defendant's motion to dismiss a charge of first-degree arson; evidence which indicated that defendant had threatened to burn the victims, was in the vicinity of the scene when he made another threatening call, and that a fire was deliberately set was sufficient evidence that defendant was the perpetrator. State v. Curmon, 171 N.C. App. 697, 615 S.E.2d 417, 2005 N.C. App. LEXIS 1362 (2005).

Evidence Sufficient to Go to Jury. — Where the defendant set fire to his own apartment, but there were three other occupied apartments in the building, the evidence was sufficient to go to the jury on the charge of common-law arson. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

In a prosecution for first degree arson, the evidence permitted the jury to find that a victim of gunshot wounds was alive when the fire was set but died before he inhaled any fumes or soot; the fact that a pathologist found no sooty material in the victim's airway was not conclusive proof that the victim died before the fire was set. State v. Eason, 328 N.C. 409, 402 S.E.2d 809 (1991).

Voluntary intoxication is not a defense to a charge of arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Instructions. — In a prosecution of defendant for burning an apartment, it was immaterial which person occupied which apartment in view of the court's ruling that Building 9 of the apartments, with all its individual apartments, constituted a single dwelling house, and defendant therefore was not prejudiced by the trial court's instructions which placed people in the wrong apartment. State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

A trial court is not obligated ex mero motu to make a distinction between a partial burning or slight charring of some portion of the building and a mere scorching or discoloration thereof, not constituting arson, for the jury, where no serious question concerning the nature of the damage caused by the fire is ever raised during trial. State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982).

For discussion of victim's age as aggravation of arson conviction, see State v.

Allen, 322 N.C. 176, 367 S.E.2d 626 (1988).

Curtilage. — Defendant, who allegedly set fire to a garage about 30 feet from an inhabited house, was properly charged with first-degree arson under G.S. 14-58 and not with burning an outbuilding under G.S. 14-62 because the garage was located within the curtilage of an inhabited house; although tension existed between caselaw applying G.S. 14-62 to outbuildings within the curtilage of dwelling houses and the common-law definition of arson, the appellate court was bound by precedent to find that defendant's motion to dismiss the arson charge was properly denied. State v. Nipper, 177 N.C. App. 794, 629 S.E.2d 883, 2006 N.C. App. LEXIS 1181 (2006).

Applied in State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285, 2002 N.C. App. LEXIS 576 (2002); State v. Norris, 360 N.C. 507, 630 S.E.2d 915, 2006 N.C. LEXIS 592 (2006).

Cited in State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Freeman, 307 N.C. 445, 298 S.E.2d 331 (1983); State v. Riggs, 62 N.C. App. 111, 302 S.E.2d 315 (1983); State v. Pigott, 331 N.C. 199, 415 S.E.2d 555 (1992); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-58.1. Definition of "house" and "building."

As used in this Article, the terms "house" and "building" shall be defined to include mobile and manufactured-type housing and recreational trailers. (1973, c. 1374.)

CASE NOTES

Legislative Intent. — The intent of the Legislature in enacting this section and G.S. 14-58.2 was to extend protection against wilful and malicious burning to mobile and manufactured housing, it did not intend to remove that protection when, in 1979, it amended G.S. 14-58 and 14-58.2 to classify the crime of arson in separate degrees for sentencing purposes. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Mobile Homes and Manufactured Housing. — It is certainly common knowledge that many of our citizens inhabit mobile homes and manufactured housing and we hold the words "dwelling" and "dwelling house" apply to those structures as surely as those made of lumber and brick. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Unoccupied Mobile Home. — The malicious and willful burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second degree arson. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

§ 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

If any person shall willfully and maliciously burn any mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is occupied at the time of the burning, the same shall constitute the crime of arson in the first degree. (1973, c. 1374; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Legislative Intent. — The intent of the Legislature in enacting G.S. 14-58.1 and this section was to extend protection against wilful and malicious burning to mobile and manufactured housing, it did not intend to remove that protection when, in 1979, it amended G.S. 14-58 and this section to classify the crime of arson in separate degrees for sentencing purposes. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Dwelling and Dwelling House. — It is certainly common knowledge that many of our citizens inhabit mobile homes and manufactured housing and we hold the words "dwelling" and "dwelling house" apply to those structures as surely as those made of lumber and brick. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Unoccupied Mobile Home. — The malicious and willful burning of a mobile home which is used as a dwelling and which is unoccupied at the time of the burning constitutes second degree arson. State v. Hodge, 121 N.C. App. 209, 465 S.E.2d 14 (1995).

Sufficiency of Evidence. — Fact that vinyl siding on a mobile home melted as a result of a fire set by defendant was sufficient to constitute the "charring" necessary to find that the mobile home had burned and it supported defendant's conviction under G.S. 14-58.2. State v. Norris, 172 N.C. App. 722, 617 S.E.2d 298, 2005 N.C. App. LEXIS 1787 (2005), rev'd, on other grounds, 360 N.C. 507, 630 S.E.2d 915 (2006).

Jury Instruction on Malice. — Where the trial court's jury instruction referred to both express and implied malice and was in accordance with the pattern jury instructions for arson and homicide, the trial court's instruction was proper. State v. Sexton, 357 N.C. 235, 581 S.E.2d 57, 2003 N.C. LEXIS 608 (2003).

Cited in State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993).

§ 14-59. Burning of certain public buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, he shall be punished as a Class F felon. (1830, c. 41, s. 1; R.C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C.S., s. 4239; 1965, c. 14; 1971, c. 816, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 115; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Intent Necessary. — If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape. State v. Mitchell, 27 N.C. 350 (1845).

Uninhabited Dwelling House. — Uninhabited dwelling house which defendant was convicted of burning did not constitute a public building as defined by this section. State v. Smith, 74 N.C. App. 514, 328 S.E.2d 877 (1985).

Where the indictment, the evidence, the jury instructions and the verdict were for burning an uninhabited dwelling house, which constitutes a violation of G.S. 14-67.1, a Class H felony carrying a presumptive term of three years, judgment stating that the offense was in violation of this section, a Class E felony, and sentencing defendant to a nine year term, the presumptive term for violation of this section, would be vacated and the case remanded for entry of a proper judgment consistent with a conviction for violation of G.S. 14-67.1. State v. Smith, 74 N.C. App. 514, 328 S.E.2d 877 (1985).

Construction with Other Statutes. — The burning of personal property in violation of G.S. 14-66 was not a lesser included offense of burning a public building in violation of this section. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

Applied in State v. DeGraffenreidt, 17 N.C. App. 550, 195 S.E.2d 84 (1973).

Cited in State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

§ 14-60. Burning of schoolhouses or buildings of educational institutions.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, he shall be punished as a Class F felon. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C.S., s. 4240; 1965, c. 870; 1971, c. 816, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1158; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Kelly, 5 N.C. App. 209, 167 S.E.2d 881 (1969); In re Coleman, 55 N.C. App. 673, 286 S.E.2d 621 (1982); In re Khork, 71 N.C. App. 151, 321 S.E.2d 487 (1984).

§ 14-61. Burning of certain bridges and buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, he shall be punished as a Class F felon. (1825, c. 1278, P.R.; R.C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C.S., s. 4241; 1971, c. 816, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1159; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

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City Market House. — A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. Town of Washington v. Hammond, 76 N.C. 33 (1877).

§ 14-62. Burning of certain buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class F felon. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C.S., s. 4242; 1927, c. 11, s. 1; 1953, c. 815; 1959, c. 1298, s. 1; 1971, c. 816, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1160; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 751, s. 2.)

Cross References. — As to burning of ginhouses and tobacco houses, see G.S. 14-64. As to setting fire to grass and brushlands and woodlands, see G.S. 14-136. As to burning crops in fields, see G.S. 14-141. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For comment on the 1953 amendment, see 31 N.C.L. Rev. 403 (1953).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
III. Willfulness and Wantonness.
IV. Buildings.
V. Indictments.
VI. Evidence.
VII. Questions For Jury.
VIII. Instructions.

I. GENERAL CONSIDERATION.

Constitutionality. — This section is not unconstitutional as violative of U.S. Const., Amend. XIV. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

The imposition of a sentence of 12 years in prison for violation of this section is not cruel and unusual punishment under U.S. Const., Amends. VII and XIV. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

This section clearly and specifically defines the prohibited conduct and sets out the possible punishment. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

This section cannot be extended to cover structures not intended by the legislature. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Crime Fixed Herein Is Separate from That in § 14-66. — A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under G.S. 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N.C. 47, 179 S.E. 8 (1935).

"Trade". — The word "trade" as used in this section means more than traffic in goods, and the like. It is used in its broader sense, and as such is synonymous with "occupation" or "calling." Thus the word "trade" as here used embraces any ordinary occupation or business, whether manual or mercantile. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Prosecution for Procuring Burning Charges Complicity. — When an individual is prosecuted for procuring felonious burning under this section he is being charged with complicity in the burning and not with mere solicitation. State v. Sargent, 22 N.C. App. 148, 205 S.E.2d 768 (1974).

Inquiry into Defendant's Character Desirable. — Inquiry into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced is a procedure particularly desirable in respect to this section, which covers the wanton and willful burning of a wide variety of structures. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

Search by Firemen Without Warrant Reasonable While Present at Fire. — While firemen are present at a fire and engaged in any continuing activity to bring under control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises. The fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Applied in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975); State v. Moorefield, 33 N.C. App. 37, 234 S.E.2d 25 (1977); State v. Brooks, 58 N.C. App. 407, 293 S.E.2d 653 (1982).

Cited in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); Moorefield v. Garrison, 464 F. Supp. 892 (W.D.N.C. 1979); State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982); State v. Jeffries, 55 N.C. App. 269, 285 S.E.2d 307 (1982); State v. Tew, 62 N.C. App. 190, 302 S.E.2d 633 (1983); State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985); Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986).

II. ELEMENTS OF OFFENSE.

In General. — Defendant's plea of not guilty in a prosecution under this section places the burden upon the State to prove: (1) the fire, (2) that it was of incendiary origin, and (3) that defendant was connected with the crime. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Where a plea of not guilty is entered in a prosecution for common-law arson or for the statutory felony of burning a building contrary to this section it is incumbent on the State to prove both the fire and cause of the fire and the connection of the accused with the crime. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

Burning of Uninhabited Dwelling. — The essential elements of the crime of feloniously burning an uninhabited dwelling house are: (i) the house was uninhabited, (ii) a fire occurred in it, (iii) the fire was of incendiary origin, and (iv) the defendant unlawfully and willfully started it. State v. Smith, 74 N.C. App. 514, 328 S.E.2d 877 (1985).

Not Lesser Included Offense of Arson. — Burning an uninhabited house was not a lesser included offense of arson; thus, the defendant could not be convicted of burning an uninhabited house where he was indicted for arson, and the proof showed that the house was inhabited by the murder victim at the time of the murder and fire. State v. Britt, 132 N.C. App. 173, 510 S.E.2d 683 (1999).

Nature and Use of Structure. — Under an indictment charging that the defendant willfully and feloniously procured the burning of a certain building used in carrying on a trade, the burden rests on the State to prove that the defendant unlawfully procured the burning of (1) a structure that answered to the description of a "building" within the meaning of this section, and also (2) that the structure was "used in carrying on a trade," within the purview of the section. Findings by the jury concerning these two elements of the statutory offense charged are quite as essential to a conviction as proof of the fact of procuring the burning of the structure. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

State Must Prove That Building Was in Fact Burned. — To establish guilt in procuring arson, it is necessary for the State to prove not only that defendant instructed someone to burn the building, but also that the building was in fact burned. State v. Sargent, 22 N.C. App. 148, 205 S.E.2d 768 (1974).

Proof of Title. — Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy. State v. Gailor, 71 N.C. 88 (1874); State v. Jaynes, 78 N.C. 504 (1878); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887); State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897); State v. Sprouse, 150 N.C. 860, 64 S.E. 900 (1909).

This section was copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply "of" A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification. State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

Motive or Intent. — It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. State v. King, 86 N.C. 603 (1882); State v. Voight, 90 N.C. 741 (1884); State v. Smith, 93 N.C. 516 (1885); State v. McBrayer, 98 N.C. 619, 2 S.E. 755 (1887); State v. McLean, 121 N.C. 589, 28 S.E. 140, 42 L.R.A. 721 (1897). But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent. State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

III. WILLFULNESS AND WANTONNESS.

"Willfulness" and "Wantonness" Defined. — "Willfulness" means the wrongful doing of an act without justification or excuse. "Wantonness" means the doing of an act in conscious and intentional disregard of an indifference to the rights and safety of others. State v. Oxendine, 64 N.C. App. 559, 307 S.E.2d 583 (1983), cert. denied, 310 N.C. 628, 315 S.E.2d 695 (1984).

Attempt to draw a sharp line between a "wilful" act and a "wanton" act would be futile. The elements of each are substantially the same. State v. Oxendine, 64 N.C. App. 559, 307 S.E.2d 583 (1983), cert. denied, 310 N.C. 628, 315 S.E.2d 695 (1984).

Requirement of Willfulness and Wantonness Satisfied. — In a case involving the burning of a food market defendant's use of a highly flammable and volatile substance such as kerosene coupled with the proximity of the other buildings placed the interests and safety of others in jeopardy. These facts meet the requirements of the (1982) test for "willful and wanton" under this section and the state adduced sufficient evidence to make out its case against defendant. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

IV. BUILDINGS.

Farm Buildings. — This section is intended to encompass, inter alia, all farm buildings that do not fall within the common law definition of arson. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Outhouse. — Uninhabited storage house which the defendant burned fell within the statutory definition of "outhouse" even though it did not contain an outdoor toilet. State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993).

Closing of a shopping center's doors to the public after being damaged by a fire does not in and of itself take a business premises outside the operation of this section. It was proper to charge arson under this section for a fire occurring one week later, although all of the businesses in the shopping center remained closed after the first fire, where they nevertheless remained as businesses through the date of the second fire and the building in which they were located was "a building . . . used" in carrying on a business on the date of the second fire. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Garage. — Defendant, who allegedly set fire to a garage about 30 feet from an inhabited house, was properly charged with first-degree arson under G.S. 14-58 and not with burning an outbuilding under G.S. 14-62 because the garage was located within the curtilage of an inhabited house; although tension existed between caselaw applying G.S. 14-62 to outbuildings within the curtilage of dwelling houses and the common-law definition of arson, the appellate court was bound by precedent to find that defendant's motion to dismiss the arson charge was properly denied. State v. Nipper, 177 N.C. App. 794, 629 S.E.2d 883, 2006 N.C. App. LEXIS 1181 (2006).

V. INDICTMENTS.

Indictment in Language of Section Insufficient. — Where a bill of indictment merely charges the offense in the language of this section, it fails to meet the minimum requirements as to identity of the offense attempted to be charged and is fatally defective. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

"Wantonly and Willfully" Must Be Charged. — An indictment charged that the defendant "did unlawfully, willfully and feloniously set fire to and burn a certain ginhouse, belonging to B. and in the possession of one G." Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, c. 66) by striking out the words "unlawfully and maliciously" and "willfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Morgan, 98 N.C. 641, 3 S.E. 927 (1887). But it is a valid indictment under § 14-64, as was held in State v. Thorne, 81 N.C. 555 (1879), cited and followed by State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

It seems to be the rule that "unlawfully and willfully" do not answer the requirements under this section but under G.S. 14-64 it is sufficient in the indictment. State v. Pierce, 123 N.C. 745, 31 S.E. 847 (1898).

Allegation of Ownership Unnecessary. — In the indictment it is not necessary to set out that the burned property "was the property of" or "was in the possession of" anyone. The constituent element is "willful and wanton." State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

Allegation of ownership or of possession suffices to meet requirements of identity under this section. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

Charge of Particular Intent. — It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. And an indictment for such offense at common law had to charge that the barn contained hay or grain, or was a parcel of the dwelling house. State v. Porter, 90 N.C. 719 (1884).

Same — Not Necessary. — An indictment for burning a mill, under this section, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. State v. Rogers, 94 N.C. 860 (1886).

Indictment for Burning Tobacco Barn or Storage Building. — Since a "tobacco house" does not have a generally accepted connotation or definition, an indictment under this section for burning a tobacco barn or a tobacco storage building is proper; hence, defendant's contention that he should have been charged under G.S. 14-64 was without merit. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

VI. EVIDENCE.

Threats. — The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, was relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 34 N.C. 382 (1851); State v. Gailor, 71 N.C. 88 (1874); State v. Green, 92 N.C. 779 (1885); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Bad Feeling. — It was entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reasons for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should have been excluded and the jury carefully cautioned not to regard it as it put the character of the defendant in issue. State v. Barrett, 151 N.C. 665, 65 S.E. 894 (1909).

Ill will toward an agent of the owner of a building was not sufficient to show motive for setting fire to the building, as such evidence was too remote. State v. Battle, 126 N.C. 1036, 35 S.E. 624 (1900).

Admissibility of Evidence of Bad Blood, Footprints, etc. — Under an indictment for burning a barn, evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire was admissible and was sufficient to sustain a verdict of guilty. State v. Allen, 149 N.C. 458, 62 S.E. 597 (1908).

Opinion Evidence as to Origin of Fire. — In a prosecution under this section it was reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion were so simply and readily understood that it was for the jury to draw the conclusion from testimony as to the facts, and since the conclusion is not a proper subject of opinion testimony. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

An expert in arson investigation may properly give his opinion that a fire was of incendiary origin where his opinion is based on the expert's own examination of the premises and based on a proper hypothetical question supported by the evidence. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Previous Fires. — On trial under indictment under this section for burning a barn to collect fire insurance thereon, evidence that the defendant at another place, at some indefinite time in the past, had another barn burn was incompetent and did not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, nor were they a part of the same transaction. State v. Deadmon, 195 N.C. 705, 143 S.E. 514 (1928).

In a prosecution for procuring another to burn a building used for trade, evidence of unrelated previous fires, absent a showing that they had been deliberately set, that they were criminal in nature, and that charges were ever brought or convictions entered against either defendant or defendant's wife for any of the previous burnings was prejudicial and reversible error. State v. Alley, 54 N.C. App. 647, 284 S.E.2d 215 (1981).

Evidence of prior noncriminal unrelated fire held inadmissible because of its prejudicial character since such evidence was irrelevant in that it neither confirmed nor suggested a relationship between two defendants charged with burning down a food market. Moreover, the State failed to show defendants had any connection with the previous fire. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

Subsequent Attempt to Fire Another Building. — Where the defendant was indicted for setting fire to an outhouse, evidence was competent to show that at the same time an attempt was made to fire a dwelling house near it, the evidence directly connecting the defendant with the latter attempt. State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Effect of Evidence That Dwelling Was Inhabited. — Defendant who was charged with the unlawful burning of an uninhabited dwelling pursuant to this section was entitled to have his motion for nonsuit granted, since the evidence tended to show that the mobile home burned was used by three people as their place of residence. Their temporary absence at the time of the fire did not make the dwelling an uninhabited house within the meaning of this section. State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

Evidence Held Sufficient. — Evidence that defendant's sister and her husband had an interest in house located primarily on land owned by defendant and her husband but partly on the property of her sister and her husband, that the Bank of North Carolina had an interest in the house because it had been pledged as security for a loan, and that defendant was aware of these interests, but nevertheless proceeded to procure the burning because of problems which had arisen in connection with the interest of her sister and her sister's husband in the house, was sufficient to permit the jury to find that defendant conspired to burn and procured the burning of the house in conscious and intentional disregard of and indifference to the right of her sister, her sister's husband and the bank, and thus that she did so wantonly. State v. White, 74 N.C. App. 504, 328 S.E.2d 902, cert. denied, 314 N.C. 547, 335 S.E.2d 26 (1985).

Evidence held sufficient to sustain conviction of burning a horse barn, in violation of this section, and of burning personal property, in violation of G.S. 14-66. State v. Graves, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

There was substantial circumstantial evidence for the jury to have found defendant guilty of violating this section where the defendant was the only person seen in close proximity to the fire after it started and he also failed to warn nearby residents, lied about his identity, and attempted to flee the scene in a stolen car. State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993).

Circumstantial Evidence Held Sufficient. — While the evidence was entirely circumstantial, it was held to be sufficiently substantial to connect defendant with the burning of the store when it tended to show the following: Defendant had been handling and had access to kerosene the day of the fire; the fire was believed to have been ignited by a petroleum product and he was one of the last persons in the store before the fire; he closed the store much earlier than usual; unlike all other times defendant had closed, he failed to lock the front door which activated the alarm system; he hurriedly left the store after closing; smoke was seen seeping out under the soda machine just as defendant was leaving; and the fire was deliberately set. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

Evidence Held Insufficient. — The evidence against the defendant on a charge of malicious burning of a dwelling house was held insufficient to survive a motion to dismiss. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

Evidence that defendant had known co-defendant for 29 years, that defendant worked for co-defendant and that she was seen with him exiting the store just before the fire was insufficient evidence to connect her with the perpetration of the fire. State v. Clark, 90 N.C. App. 489, 369 S.E.2d 607 (1988).

VII. QUESTIONS FOR JURY.

Must Be Sufficient Evidence. — The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the judge should say so, and, in a criminal case, direct an acquittal. In State v. Vinson, 63 N.C. 335 (1869), it was said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. State v. Rhodes, 111 N.C. 647, 15 S.E. 1038 (1892).

Nature and Use of Structure. — It is for the jury to find and declare by their verdict, among other things, (1) whether the structure alleged to have been burned had arrived at such a stage of completion as to be usable for some useful purpose so as to make it a building within the meaning of the statute, and, if so, (2) whether it had been put to use in the occupation or business of the lessee prior to the fire. The action of the trial court in assuming the existence of these disputed facts was prejudicial error. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Intent. — It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. State v. Phifer, 90 N.C. 721 (1884).

Alibi. — The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the State. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. State v. Jaynes, 78 N.C. 504 (1878).

Evidence Sufficient to Submit to Jury. — On the trial of defendant of burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, was sufficient evidence of guilt to take the case to the jury. State v. Thompson, 192 N.C. 704, 135 S.E. 775 (1926).

On trial for willfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit was sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in presence of officers, under circumstances calling for a reply. State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933).

For circumstantial evidence sufficient for jury, see State v. Moore, 262 N.C. 431, 137 S.E.2d 812 (1964).

Evidence Insufficient to Submit to Jury. — Where the only evidence against a person accused of burning a barn was threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should have withdrawn the case from the jury. State v. Freeman, 131 N.C. 725, 42 S.E. 575 (1902).

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. State v. Church, 202 N.C. 692, 163 S.E. 874 (1932).

VIII. INSTRUCTIONS.

Duty of Trial Court to Define and Explain Words. — The duty rests upon the trial court to define and explain to the jury the meaning of (1) "building" and (2) "used in carrying on any trade" as used in this section. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

§ 14-62.1. Burning of building or structure in process of construction.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class H felon. (1957, c. 792; 1971, c. 816, s. 5; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1161; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-62.2. Burning of churches and certain other religious buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of any church, chapel, or meetinghouse, the person shall be punished as a Class E felon. (1995 (Reg. Sess., 1996), c. 751, s. 3.)

§ 14-63. Burning of boats and barges.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any boat, barge, ferry or float, without the consent of the owner thereof, he shall be punished as a Class H felon. In the event the consent of the owner is given for an unlawful or fraudulent purpose, however, the penalty provisions of this section shall remain in full force and effect. (1909, c. 854; C.S., s. 4243; 1971, c. 816, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-64. Burning of ginhouses and tobacco houses.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall be punished as a Class H felon. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C.S., s. 4244; 1971, c. 816, s. 7; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — As to setting fire to churches and certain other buildings, see G.S. 14-62. As to setting fire to grass and brushlands and woodlands, see G.S. 14-136 and 14-137. As to burning crops in the field, see G.S. 14-141. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Indictment in General. — That any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see G.S. 15-153. That judgments will not be vitiated for failure to aver certain unnecessary matter, see G.S. 15-155. State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914).

Indictment Under § 14-62 for Burning Tobacco Barn. — Since a "tobacco house" does not have a generally accepted connotation or definition, an indictment under G.S. 14-62 for burning a tobacco barn or a tobacco storage building is proper; hence, defendant's contention that he should have been charged under this section was without merit. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Necessity of Alleging "Willful Burning". — In the case of State v. Thorne, 81 N.C. 555 (1879), there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been willfully done. The court held that the word maliciously was more comprehensive and included willfully. State v. Green, 92 N.C. 779 (1885).

Necessity of Showing Motive. — It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. State v. Green, 92 N.C. 779 (1885).

Cited in State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251 (1989).

§ 14-65. Fraudulently setting fire to dwelling houses.

If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be punished as a Class H felon. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C.S., s. 4245; 1927, c. 11, s. 2; 1971, c. 816, s. 8; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

The main import of this section is protection of the property itself, whereas the gravamen of the offense of common-law arson is the danger that results to persons who are or might be in the dwelling. State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975), vacated on other grounds, 291 N.C. 118, 229 S.E.2d 152 (1976).

Essential Element of Crime. — Burning or procuring to be burned the dwelling house occupied by defendant to constitute a criminal offense must have been done willfully and wantonly, or for a fraudulent purpose. To convict the defendant something more must be found than the fact that the house was burned, and that it was done at the instance and request of the defendant. By the terms of this section an essential element of the crime charged was that it be done willfully and wantonly or for a fraudulent purpose. State v. Cash, 234 N.C. 292, 67 S.E.2d 50 (1951).

For a burning of a dwelling to be criminal under this section as a willful and wanton burning, it must be shown to have been done intentionally, without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered. State v. Brackett, 306 N.C. 138, 291 S.E.2d 660 (1982).

Where the indictment upon which defendant was tried charged her with wanton and willful burning and not with burning for a fraudulent purpose, in order to prove that defendant's conduct violated this section the State was required to prove (1) that she was the owner or occupier (2) of a dwelling house (3) that she burned or set on fire (4) wantonly and willfully. State v. Brackett, 306 N.C. 138, 291 S.E.2d 660 (1982).

The essential elements of the crime of fraudulently setting fire to dwelling houses are (1) that the accused was the owner or occupier (2) of a building used as a dwelling house (3) which he set fire to or burned or caused to be burned (4) for a fraudulent purpose. State v. James, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Public Interest Does Not Make Burning Wanton. — The public's interest in not having the building destroyed is not the sort of right which would make defendant's conduct in setting fire to his dwelling wanton. State v. Brackett, 306 N.C. 138, 291 S.E.2d 660 (1982).

Nor Does Burning so as to Collect Insurance. — Intent to set fire to home for the purpose of collecting insurance proceeds worth more than home is not wanton. State v. Brackett, 306 N.C. 138, 291 S.E.2d 660 (1982).

Burning a dwelling for the purpose of frightening the occupant and keeping him from testifying for the State would clearly be a willful and malicious burning, but it would not be a burning "for a fraudulent purpose." State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975), vacated on other grounds, 291 N.C. 118, 229 S.E.2d 152 (1976).

Indictment Need Not Specify Particular Fraudulent Purpose. — Where in a prosecution under this section the indictment charges that the defendant burned his dwelling house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. State v. Morrison, 202 N.C. 60, 161 S.E. 725 (1932).

Indictment which charges in one count that accused burned and/or procured to be burned the building in question is not improper. Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986).

State Not Required to Elect Theory of Crime. — Petitioner's rights were not violated by trial court's failure in arson trial to require the State to elect its theory of the crime, that is, whether petitioner burned the dwelling or procured another to do so. Both the indictment and the instructions were consistent with the statute in that petitioner could be found guilty if the jury found beyond a reasonable doubt that he caused his dwelling house to be burned, whether he set the fire himself or procured another to do so. Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986).

Evidence of Solicitation Not Improper. — In arson trial, petitioner's rights were not violated by the trial court's admitting into evidence testimony that petitioner had solicited a named individual to burn his dwelling house, as the admission of such testimony was relevant toward petitioner's intent and motive for the offense charged. Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986).

Sufficiency of Evidence. — Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. State v. Moses, 207 N.C. 139, 176 S.E. 267 (1934).

Evidence showing that a week before fire petitioner solicited another to burn his house for $2,000.00, that he was within a mile to a mile and a quarter from his house at the time of the fire, that the fire was started with gasoline, and that petitioner had quit his job three days before the fire and on the date of the fire had unsuccessfully tried to sell his house was sufficient to support a conviction under this section. Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986).

Evidence that defendant was delinquent in his mortgage payments and that the proceeds from his homeowner's insurance policy would have been sufficient to cover his mortgage debt, along with evidence contradicting his accounts of his whereabouts the day of the fire, and evidence that there had been no forcible entry to the house, that the fire was intentionally started inside the house, that items had been cleared from defendant's yard immediately preceding the fire, and that items defendant claimed were lost in the fire being found in his new house were sufficient to sustain a charge of fraudulently burning a dwelling. State v. Payne, 149 N.C. App. 421, 561 S.E.2d 507, 2002 N.C. App. LEXIS 218 (2002).

Expert opinion of a fire investigator that the fire to defendant's house trailer, which occurred after the disappearance of the murdered victim, was intentionally set through the use of an accelerant and not accidentally caused by a grease fire as defendant claimed was sufficient to establish that defendant set the fire with the fraudulent purpose to destroy possible evidence regarding the murder of the victim. State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003), cert. denied, 357 N.C. 660, 590 S.E.2d 853 (2003).

When Evidence of Willfulness and Wantonness Insufficient. — Viewed in the light most favorable to the State, there was no substantial evidence of willfulness and wantonness where there was no evidence that defendant set fire to her dwelling house with reckless disregard of the rights or safety of others, where her house was located on a large lot and the fire did not endanger other homes, defendant herself reported the fire, and she was alone at her home when the fire started. State v. Brackett, 306 N.C. 138, 291 S.E.2d 660 (1982).

Aggravation of Sentence. — Fact that fraudulently burning a dwelling involved property of great monetary value was not an element of the offense, so it could be used to aggravate defendant's sentence. State v. Payne, 149 N.C. App. 421, 561 S.E.2d 507, 2002 N.C. App. LEXIS 218 (2002).

Applied in State v. Hicks, 70 N.C. App. 611, 320 S.E.2d 697 (1984).

Cited in State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Knight, 65 N.C. App. 595, 310 S.E.2d 70 (1983); State v. White, 74 N.C. App. 504, 328 S.E.2d 902 (1985).

§ 14-66. Burning of personal property.

If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares, merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be punished as a Class H felon. (1921, c. 119; C.S., s. 4245(a); 1971, c. 816, s. 9; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

Crime Fixed Herein Is Separate from That in § 14-62. — A verdict of not guilty on a count brought under G.S. 14-62 does not necessarily carry a verdict of not guilty on a second count brought under this section, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N.C. 47, 179 S.E. 8 (1935).

Intent to Injure or Prejudice Owner. — A violation of this section requires, in addition to the willful and wanton burning of personal property, that the defendant have the specific intent to injure or prejudice the owner of the property. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

The legislature chose to add the element of intent to injure or prejudice and, until this section is amended, the State must prove beyond a reasonable doubt such intent. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

The holding in State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), that an intent to injure or prejudice the owner of the burned property must be shown by evidence other than the act of burning itself, is overruled. State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

In a prosecution for the unlawful burning of personal property, a stolen automobile, in violation of this section, the jury could properly find an intent to injure or prejudice the owner or some other person by the burning from the nature of the act — the willful burning of an automobile stolen from a stranger, evidence that defendant poured paint thinner over the interior of the car and set it on fire, and defendant's alleged statement that the automobile should be burned because it was nothing but trash. State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

Intent to Injure or Prejudice May Be Inferred. — The specific intent to injure or prejudice the owner of the property may be proven by circumstances from which it may be inferred, such as the nature of the act and the manner in which it was done. State v. Jordan, 59 N.C. App. 527, 296 S.E.2d 823 (1982).

"Willful" means the wrongful doing of an act without justification or excuse, or purposely and deliberately in violation of the law. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

Construction with Other Statutes. — The burning of personal property in violation of this section was not a lesser included offense of burning a public building in violation of G.S. 14-59. In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (1994).

Evidence Held Sufficient. — Evidence held sufficient to sustain conviction of burning a horse barn, in violation of G.S. 14-62, and of burning personal property, in violation of this section. State v. Graves, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

Evidence Held Insufficient. — Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under this section, although there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him. State v. Simms, 208 N.C. 459, 181 S.E. 269 (1935).

Defendant, a juvenile, was improperly adjudicated a delinquent because there was insufficient evidence to prove that defendant had committed the crime of burning personal property where the only admissible evidence was a witness's observation of defendant at the scene of a fire. In re Rhyne, 154 N.C. App. 477, 571 S.E.2d 879, 2002 N.C. App. LEXIS 1454 (2002), cert. denied, 356 N.C. 672, 577 S.E.2d 637 (2003), cert. dismissed, 356 N.C. 672, 577 S.E.2d 637 (2003).

Search by Firemen Without Warrant Reasonable While Present at Fire. — While firemen are present at a fire and engaged in any continuing activity to bring under or control or extinguish a fire, or prevent reignition, a search for the possible presence of accelerants on the premises may reasonably be conducted without a search warrant and without regard to how or why any accelerants may have been placed or stored on the premises. The fruits of such a search are admissible in evidence against any person charged with an unlawful burning of or upon the premises. State v. Langley, 64 N.C. App. 674, 308 S.E.2d 445 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Instruction on Parole Ineligibility in Capital Case. — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Cited in State v. Lassiter, 160 N.C. App. 443, 586 S.E.2d 488, 2003 N.C. App. LEXIS 1828 (2003).

§ 14-67: Repealed by Session Laws 1993, c. 539, s. 1358.2.

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-67.1. Burning other buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of any building or other structure of any type not otherwise covered by the provisions of this Article, he shall be punished as a Class H felon. (1971, c. 816, s. 11; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1192.1; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Validity of Trial Not Affected by Improper Statutory Reference. — Although indictments charging attempted first-degree arson recited that the charges were brought pursuant to G.S. 14-58, they actually charged a violation of this section which prohibits attempted arson; this mistake in the citation of the statute did not affect the validity of the trial. State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993), cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 336 (1993).

A conviction under this section does not require that the State prove a "burning" as is required under the arson statute and the common law. It requires that a defendant willfully and wantonly attempt to set fire to or burn any building or structure. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Evidence Held Sufficient. — Evidence that defendant ignited a fire bomb in building, which caused some blackening of the floor tile, a steel cabinet and an office partition, and that some burned matches were also found in the building, was sufficient to support a conviction for attempting to set fire to or burn a building under this section. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Felony Murder. — Evidence held sufficient to establish that defendant killed victim in the perpetration of the felony set forth in this section of attempting to burn a building used for trade, a felony committed with the use of a deadly weapon, a fire bomb. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Erroneous Sentence. — Where the indictment, the evidence, the jury instructions and the verdict were for burning an uninhabited dwelling house, which constitutes violation of this section, a Class H felony carrying a presumptive term of three years, judgment stating that the offense was in violation of G.S. 14-59, a Class E felony, and sentencing defendant to a nine year term, the presumptive term for violation of G.S. 14-59, would be vacated and the case remanded for entry of a proper judgment consistent with a conviction for violation of this section. State v. Smith, 74 N.C. App. 514, 328 S.E.2d 877 (1985).

Cited in State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993).

§ 14-68. Failure of owner of property to comply with orders of public authorities.

If the owner or occupant of any building or premises shall fail to comply with the duly authorized orders of the chief of the fire department, or of the Commissioner of Insurance, or of any municipal or county inspector of buildings or of particular features, facilities, or installations of buildings, he shall be guilty of a Class 3 misdemeanor, and punished only by a fine of not less than ten ($10.00) nor more than fifty dollars ($50.00) for each day's neglect, failure, or refusal to obey such orders. (1899, c. 58, s. 4; Rev., s. 3343; C.S., s. 4247; 1969, c. 1063, s. 1; 1993, c. 539, s. 30; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-69. Failure of officers to investigate incendiary fires.

If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a Class 3 misdemeanor and shall only be punished by a fine not less than twenty-five ($25.00) nor more than two hundred dollars ($200.00). (1899, c. 58, s. 5; Rev., s. 3342; C.S., s. 4248; 1993, c. 539, s. 3; 1994, Ex. Sess., c. 24, s. 14(c); 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-69.1. Making a false report concerning destructive device.

(a) Except as provided in subsection (c) of this section, any person who, by any means of communication to any person or group of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any building, house or other structure whatsoever or any vehicle, aircraft, vessel or boat any device designed to destroy or damage the building, house or structure or vehicle, aircraft, vessel or boat by explosion, blasting or burning, is guilty of a Class H felony.

(b) Repealed by S.L. 1997-443, s. 19.25(cc).

(c) Any person who, by any means of communication to any person or groups of persons, makes a report, knowing or having reason to know the report is false, that there is located in or in sufficient proximity to cause damage to any public building any device designed to destroy or damage the public building by explosion, blasting, or burning, is guilty of a Class H felony. Any person who receives a second conviction for a violation of this subsection within five years of the first conviction for violation of this subsection is guilty of a Class G felony. For purposes of this subsection, "public building" means educational property as defined in G.S. 14-269.2(a)(1), a hospital as defined in G.S.

131E-76(3), a building housing only State, federal, or local government offices, or the offices of State, federal, or local government located in a building that is not exclusively occupied by the State, federal, or local government.

(d) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from the disruption of the normal activity that would have otherwise occurred on the premises but for the false report, pursuant to Article 81C of Chapter 15A of the General Statutes.

(e) For purposes of this section, the term "report" shall include making accessible to another person by computer. (1959, c. 555, s. 1; 1991, c. 648, s. 1; 1993, c. 539, ss. 32, 116; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(cc); 1999-257, s. 1; 2005-311, s. 1.)

Editor's Note. — Session Laws 2005-311, s. 1, which inserted "or in sufficient proximity to cause damage to" in subsection (a) and in the first sentence of subsection (c), was effective December 1, 2005, and applicable to offenses committed on or after that date.

Legal Periodicals. — For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Defendant Juvenile Convicted Under Proper Subsection. — Defendant juvenile's claim that defendant was charged, tried, and convicted under the wrong statute for an offense involving a school was rejected as "any building" under G.S. 14-69.1(a) included a school; defendant did not have to be charged and convicted under G.S. 14-69.1(c). In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007).

Plain Error Rule Inapplicable. — Defendant juvenile's claim that a trial court committed plain error by denying defendant's motion to dismiss because defendant was improperly convicted under G.S. 14-69.1(a) and should have been charged under G.S. 14-69.1(c) was rejected as respondent did not challenge the jury instructions or the admissibility of evidence. In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007).

Evidence Supported Denial of Motion to Dismiss. — There was sufficient evidence to support the denial of defendant juvenile's motion to dismiss a juvenile delinquency petition charging defendant with violating G.S. 14-69.1(a) as: (1) defendant was the last student to use a calculator prior to another student finding a message "Bomb at Lunch" on it; (2) a student testified that the student heard defendant say that defendant meant it all as a prank; and (3) another student testified that the student heard defendant tell a third student that the reason defendant made the bomb threat was because defendant thought it would be fun to get out of school. In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007).

Cited in State v. Smith, 267 N.C. 755, 148 S.E.2d 844 (1966).

§ 14-69.2. Perpetrating hoax by use of false bomb or other device.

(a) Except as provided in subsection (c) of this section, any person who, with intent to perpetrate a hoax, conceals, places, or displays any device, machine, instrument or artifact, so as to cause any person reasonably to believe the same to be a bomb or other device capable of causing injury to persons or property is guilty of a Class H felony.

(b) Repealed by S.L. 1997-443, s. 19.25(dd).

(c) Any person who, with intent to perpetrate a hoax, conceals, places, or displays in or at a public building any device, machine, instrument, or artifact, so as to cause any person reasonably to believe the same to be a bomb or other device capable of causing injury to persons or property is guilty of a Class H felony. Any person who receives a second conviction for a violation of this subsection within five years of the first conviction for violation of this subsection is guilty of a Class G felony. For purposes of this subsection "public building" means educational property as defined in G.S. 14-269.2(a)(1), a hospital as defined in G.S. 131E-76(3), a building housing only State, federal, or local government offices, or the offices of State, federal, or local government located in a building that is not exclusively occupied by the State, federal, or local government.

(d) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from the disruption of the normal activity that would have otherwise occurred on the premises but for the hoax, pursuant to Article 81C of Chapter 15A of the General Statutes. (1959, c. 555, s. 1; 1991, c. 648, s. 2; 1993, c. 539, s. 33; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(dd); 1999-257, s. 2.)

Legal Periodicals. — For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Applied in State v. Peek, 22 N.C. App. 350, 206 S.E.2d 386 (1974).

§ 14-69.3. Arson or other unlawful burning that results in serious injury to a firefighter or emergency medical technician.

A person is guilty of a Class E felony if the person commits a felony under Article 15 of Chapter 14 of the General Statutes and a firefighter or emergency medical technician suffers serious bodily injury while discharging or attempting to discharge the firefighter's or emergency medical technician's duties on the property, or proximate to the property, that is the subject of the firefighter's or emergency medical technician's discharge or attempt to discharge his or her respective duties. As used in this section, the term "emergency medical technician" includes an emergency medical technician, an emergency medical technician-intermediate, and an emergency medical technician-paramedic, as those terms are defined in G.S. 131E-155. (2003-392, s. 3(a).)

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

Article 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

All distinctions between petit and grand larceny are abolished. Unless otherwise provided by statute, larceny is a Class H felony and is subject to the same rules of criminal procedure and principles of law as to accessories before and after the fact as other felonies. (R.C., c. 34, s. 26; Code, s. 1075; Rev., s. 3500; C.S., s. 4249; 1969, c. 522, s. 1; 1993, c. 539, s. 1163; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to larceny from dwelling by breaking and entering, see G.S. 14-51 et seq. As to larceny of property and receipt of stolen goods, see G.S. 14-72. As to robbery, see G.S. 14-87. As to obtaining property by false pretense, see G.S. 14-100 et. seq. As to taking away or injuring exhibits at fairs, see G.S. 14-164. As to theft of property from public libraries, museums, etc., see G.S. 14-398. As to restitution of stolen property to its owner, see G.S. 15-8. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to stealing of aircraft, see G.S. 63-25.

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Larceny is a common-law offense. But common-law larceny does not include every wrongful taking and carrying away of the personal property of another. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

At common law both grand and petit larceny were felonies. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

Indictment Must State Ownership. — The defendant's conviction for larceny of a blue suitcase was vacated where the indictment should have named either the child as general owner, or his mother, as special owner but, instead, named his grandmother who was not standing in loco parentis and thus, had no special interest in the child's belongings. State v. Salters, 137 N.C. App. 553, 528 S.E.2d 386, 2000 N.C. App. LEXIS 410 (2000).

At common law the stealing of property of any value was a felony, and both grand larceny and petit larceny were felonies. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Accessories Abolished. — There are no accessories to larceny. All that counsel and aid are guilty of the offenses as principals. State v. Gaston, 73 N.C. 93 (1875); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953).

Larceny conviction was valid where the evidence showed that defendant procured the commission of the larceny, because the distinction that formerly existed between principals and accessories before the fact has been abolished. State v. Cartwright, 81 N.C. App. 144, 343 S.E.2d 557 (1986).

Larceny upon Two Persons at One Time. — A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offenses. State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895); State v. Bynum, 117 N.C. 752, 23 S.E. 219 (1895).

Larceny of Several Items at Same Time and Place. — A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. In such instances the constitutional guarantee against double jeopardy prohibits multiple convictions. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Casually Lost Property as Subject of Larceny. — Notwithstanding what was said in some of the earlier cases, the modern view in this jurisdiction as well as others is that casually lost property may be the subject of larceny as well as that which is mislaid. No distinction is now made between property "lost" and property "mislaid." State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Same — If at the time of finding, the finder knows or has reasonable means of knowing or ascertaining the owner, he is deemed guilty of larceny if he keeps the property with the intent to deprive the owner thereof. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Same — Where a closed receptacle, container or pocketbook is found and the contents are not known until later, a finder may be guilty of larceny if a felonious intent is formed as soon as the contents are discovered. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Mitigation of Charge. — An indictment for larceny charges a felony, and it is a matter of defense to mitigate the charge to a misdemeanor by showing that the property taken was a value of less than the amount prescribed by statute, and that it was neither taken from the person nor from a dwelling house. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

Applied in State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Bines, 263 N.C. 48, 138 S.E.2d 797 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Dye, 268 N.C. 362, 150 S.E.2d 507 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); State v. Breeze, 26 N.C. App. 48, 214 S.E.2d 802 (1975); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993).

Cited in State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Johnson, 7 N.C.

App. 53, 171 S.E.2d 106 (1969); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971); State v. Boone, 33 N.C. App. 378, 235 S.E.2d 74 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979); In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

II. ELEMENTS OF THE OFFENSE.

"Larceny". — Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965); State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Larceny is a wrongful taking and carrying away of the personal property of another without his consent, which is done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

The essential elements of larceny are that defendant (1) took the property of another and (2) carried it away (3) without the owner's consent (4) with the intent to deprive the owner of the property permanently; each of these element must be established by sufficient, competent evidence. State v. Lively, 83 N.C. App. 639, 351 S.E.2d 111 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 10 (1987) See State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004).

Larceny Under Former § 14-80 and § 14-148 Distinguished. — Where there was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to the land that they could not be the subject of common-law larceny or that they were affixed to the soil as tombstones or markers but rather they were movable objects of a decorative nature that were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under former G.S. 14-80 or G.S. 14-148. State v. Schultz, 34 N.C. App. 120, 237 S.E.2d 349 (1977), aff'd, 294 N.C. 281, 240 S.E.2d 451 (1978).

Larceny a Lesser-Included Offense of Robbery With a Dangerous Weapon. — Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

Intent Is Necessary. — To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. State v. Arkle, 116 N.C. 1017, 21 S.E. 408 (1895); State v. Holder, 188 N.C. 561, 125 S.E. 113 (1924).

Felonious intent is an essential element of the crime of larceny. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

But "Intent to appropriate the goods to his own use" has been eliminated and is not now an essential element of the crime of larceny. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

And Intent Need Only Be To Deprive Owner of Property. — To constitute larceny it is not required that the purpose of the taking be to convert the stolen property to the pecuniary advantage or convenience of the taker but it is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Owner's Possession Must Be Severed. — Even if only for an instant, there must be a complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it. State v. Carswell, 36 N.C. App. 377, 243 S.E.2d 911, aff'd, 296 N.C. 101, 249 S.E.2d 427 (1978).

Lack of Consent. — Evidence showing that the owners of a burglarized residence were out of town at the time of the crime, that their daughter periodically checked the house to make sure it was secure, that when she checked the house on the day before the burglary all doors and windows were locked, and that when she checked the house on the day after the burglary, the house had been forcibly entered through the basement door, drawers were standing open, rugs turned over, jewelry cases emptied, silver items disarranged, and jewelry and shotguns were missing, coupled with the owner's testimony that she had feared a robbery would occur and had taken most of her valuables out of the house and left a note for the robbers to please go away, was sufficient to support a finding of lack of consent. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

An indictment for larceny that fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective; if a bill of indictment does not allege that an incorporated legal entity is a corporation or the name of the legal entity does not import that it is a corporation, the indictment is fatally defective. Thus, an indictment that alleged larceny, but failed to name the corporation that owned the property defendant supposedly stole was fatally defective and a conviction for larceny was reversed. State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408, 2004 N.C. App. LEXIS 128 (2004).

Indictments alleging that the city transit and parking services owned the parking meters allegedly broken into by defendant, were insufficient to allege injury to personal property in violation of G.S. 14-160 and larceny because the city transit and parking services was not a natural person, and the indictments did not allege that the city transit and parking services was capable of owning property. State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Indictment charging defendant with larceny was fatally defective as it did not state that a church from which the items were taken was a legal entity capable of owning property. State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

III. PRACTICE AND PROCEDURE.

Indictment — Ownership of Property Must Be Alleged. — The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

Where the indictments alleging larceny in violation of G.S. 14-70 failed to allege that the retailer that was the victim in the case was a legal entity capable of owning property, the indictments were flawed and had to be vacated. State v. Phillips, 162 N.C. App. 719, 592 S.E.2d 272, 2004 N.C. App. LEXIS 258 (2004).

Felony larceny count in an indictment was not saved by any language in the second count under G.S. 15A-924(a)(2) because the larceny count, which failed to state that a store was a legal entity capable of owning the stolen cartons of cigarettes, did not incorporate by reference language of the second count, which was properly worded; thus, the indictment was fatally defective. State v. Brown, 184 N.C. App. 539, 646 S.E.2d 590, 2007 N.C. App. LEXIS 1469 (2007).

Same — Description of Property. — There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense. State v. Clark, 30 N.C. 226 (1848); State v. Horan, 61 N.C. 571 (1868); State v. Bragg, 86 N.C. 687 (1882).

In a prosecution for larceny, the property alleged to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979).

Indictment charging that defendant "unlawfully and willfully did feloniously steal, take and carry away" seven dollars, in violation of this section and G.S. 14-72(a), failed to allege felonious larceny, and charged only misdemeanor larceny. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Where indictment for larceny failed to properly allege felonious larceny, a conviction for felonious larceny could not stand; however, since the indictment clearly charged misdemeanor larceny, the jury verdict would be considered a verdict of guilty of misdemeanor larceny, and the cause would be remanded for a proper sentence. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Same — It is not necessary for an indictment to allege that a larceny was from the person for it to be shown. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

Same — Larceny and Malicious Mischief Distinguished. — An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. State v. Butler, 65 N.C. 309 (1871). See § 14-85.

Conviction for Larceny, Receiving and Possession of Same Property. — Where defendant was convicted of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses, and the trial court erred in failing to arrest judgment for defendant's conviction of felonious possession of stolen goods. State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (1993).

Convictions for felonious possession of stolen property were arrested, as defendant could not be convicted of larceny and possession of the same stolen property. State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Inference Arising from Possession of Recently Stolen Property. — The defendant's possession of the fruits of the crime recently after its commission justifies the inference of guilt on his trial for larceny. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

The doctrine of possession of recently stolen property is a factual presumption whereby a person found in the unexplained possession of recently stolen property is presumed to be the thief. State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

A defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

Same — Burden of Proof. — Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by Mullaney. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977).

Same — Instruction. — Where no evidence was presented which tended to show that codefendant was ever in possession, actual or constructive, of the recently stolen property, the instruction to apply the doctrine of possession of recently stolen property was prejudicial error as to him. State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

Trial judge correctly instructed the jury regarding the elements of larceny, and a misstatement in the mandate portion of the charge, which was not brought to the attention of the trial judge when made or before the jury retired to consider its verdict, was not error; the jury was fully instructed as to all six elements of larceny, and the instructions were only, at most, incomplete at one important point. State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876, 2004 N.C. App. LEXIS 177 (2004).

Inference from Pawning on Different Occasions. — The fact that defendant pawned silver stolen from his mother's house, where he also lived, on different occasions, standing alone, was insufficient to support an inference that he took it on separate occasions. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Exclusive possession, for purposes of the recent possession doctrine, does not necessarily mean sole possession; it means possession to the exclusion of all persons not party to the crime. State v. Lytton, 88 N.C. App. 758, 365 S.E.2d 6 (1988).

What Is Recent Depends on Circumstances. — For purposes of the recent possession doctrine, what period after a larceny is recent depends upon the circumstances. State v. Lytton, 88 N.C. App. 758, 365 S.E.2d 6 (1988).

Convictions Upheld Under Recent Possession Doctrine. — Larceny and burglary convictions upheld under the doctrine of recent possession. State v. Walker, 86 N.C. App. 336, 357 S.E.2d 384 (1987), aff'd, 321 N.C. 593, 364 S.E.2d 141 (1988).

Evidence held sufficient to withstand motion for nonsuit in prosecution for larceny. See State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Where the evidence shows (1) that a breaking and entering occurred; (2) that prior thereto the accused had possession of an instrument used to effect it; (3) that such possession occurred within a short time prior to the breaking and entering; and (4) that the instrument was found at the scene of the crime immediately after the crime was committed, a jury would be justified in finding that the instrument had been brought there by the person who had been shown to have previously possessed it and that such person used it to effect the breaking and entering. If the evidence is also sufficient to show that the crime of larceny was committed pursuant to the breaking and entering, then the jury may infer that the accused is guilty of larceny as well as breaking and entering. State v. McNair, 36 N.C. App. 196, 243 S.E.2d 805 (1978).

Evidence of orange paint on the defendant's van identical or similar to paint used on the stolen tractor and mowing deck, where the defendant's witnesses presented a plausible explanation for the presence of the paint, was insufficient to find the defendant guilty of larceny. State v. Lively, 83 N.C. App. 639, 351 S.E.2d 111 (1986); 319 N.C. 461, 356 S.E.2d 10 (1987).

Evidence (1) that when the victim, a 76-year-old widow who was living alone, walked into her house, defendant struck her in the head seven or eight times, and left, (2) that when a neighbor discovered the victim that evening, her pocketbook was moved and there was no money in it, (3) that police officers followed footsteps in the snow to a house where defendant was, and (4) that the victim identified defendant as her attacker, was sufficient to support the conviction for felonious larceny. State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876, 2004 N.C. App. LEXIS 177 (2004).

Evidence Insufficient. — A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. State v. Moore, 33 N.C. 70 (1850); State v. Bragg, 86 N.C. 687 (1882).

Evidence of orange paint on the defendant's van identical or similar to paint used on the stolen tractor and mowing deck, where the defendant's witnesses presented a plausible explanation for the presence of the paint, was insufficient to find the defendant guilty of larceny. State v. Lively, 83 N.C. App. 639, 351 S.E.2d 111 (1986), cert. denied, 319 N.C. 461, 356 S.E.2d 10 (1987).

Instructions — Intent. — The trial court, in charging the jury where the factual situation raises a question as to the intent to deprive permanently, should instruct on this element and add that while temporary deprivation will not suffice, if the defendant did not ever intend to return the property and was totally indifferent as to whether the owner ever recovered it, then that would constitute an "intent to permanently deprive." State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Same — Felonious Intent. — What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Same — Felonious Larceny of Automobile. — The trial court properly charged the jury that to find defendant guilty of the felonious larceny of an automobile, they must find from the evidence and beyond a reasonable doubt not only that defendant took and carried away the automobile without the owner's consent, knowing that he was not entitled to take it and intending at the time to deprive the owner of its use permanently, but also that the automobile was worth more than $200.00 (now $400.00). State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Same — Failure to Charge Lesser Included Offense. — Where all of the evidence indicated that the value of the stolen property exceeded $200.00 (now $400.00), the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Since all the evidence indicated that the value of the stolen property exceeded $200.00 (now $400.00), the trial court did not err by failing to instruct as to the lesser included offense of misdemeanor larceny. State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

Verdict of Guilty of "Grand Larceny". — While there is no longer a crime in this State designated as "grand larceny" the verdict of the jury must be considered as tantamount to a verdict finding the defendant guilty as charged in the bill of indictment. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

§ 14-71. Receiving stolen goods; receiving or possessing goods represented as stolen.

(a) If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

(b) If a person knowingly receives or possesses property in the custody of a law enforcement agency that was explicitly represented to the person by an agent of the law enforcement agency or a person authorized to act on behalf of a law enforcement agency as stolen, the person is guilty of a Class H felony and may be indicted, tried, and punished in any county in which the person received or possessed the property. (1797, c. 485, s. 2; R.C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C.S., s. 4250; 1949, c. 145, s. 1; 1975, c. 163, s. 1; 1993, c. 539, s. 1164; 1994, Ex. Sess., c. 24, s. 14(c); 2007-373, s. 1; 2008-187, s. 34(a).)

Cross References. — As to seizure and forfeiture of conveyance used in committing a crime under this section, see G.S. 14-86.1.

Editor's Note. — This section, as amended by Session Laws 2007-373, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-187, s. 34(a), effective August 7, 2008, inserted "or a person authorized to act on behalf of a law enforcement agency" in subsection (b).

Legal Periodicals. — As to elements of crime of receiving stolen goods, see 26 N.C.L. Rev. 192 (1948).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
III. Lesser Offenses.
IV. Practice and Procedure.
  A. Venue.
  B. Indictment.
  C. Presumption from Recent Possession of Stolen Goods.
  D. Evidence.
  E. Instructions.
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I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases below were decided under this section as it stood prior to the 1975 amendment, which added the language concerning "reasonable grounds to believe" that property is stolen with respect to the degree of knowledge required to support a conviction.*

Possession of stolen goods is a statutory crime created by the legislature and is of recent vintage. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983), aff'd in part and rev'd in part, 311 N.C. 380, 317 S.E.2d 369 (1984).

Purpose. — The possession statutes were passed to provide protection for society in those instances where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving stolen property. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983), aff'd in part and rev'd in part on other grounds, 311 N.C. 380, 317 S.E.2d 369 (1984).

Effect of the 1975 amendment to this section was to alter the standard of proof established in prosecutions thereunder. State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981).

The inclusion in this section in 1975 of language concerning a defendant's reasonable grounds to believe the items were stolen signifies a clear intent by the legislature to equate a defendant's reasonable belief with implied guilty knowledge. State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986).

Crimes of larceny and of receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses. However, receiving stolen property is a sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore, the elements of larceny are not elements of the crime of receiving. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956).

Receiving stolen goods and possession of stolen goods are separate and independent statutory offenses under this section and G.S. 14-71.1, neither of which is a lesser-included offense of the other. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Crime of receiving stolen goods is a sort of secondary crime based upon a prior commission of the primary crime of larceny. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

Person cannot be guilty both of stealing property and receiving the same property knowing it to have been stolen by someone else. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

A defendant may not be convicted and punished for both receiving and possession of the same stolen property. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

A person cannot be guilty of both larceny and receiving the same goods. Thus, one who steals property and one who receives it afterward from him knowing it to have been stolen, are guilty of separate offenses, and neither is the accomplice of the other. State v. Whitaker, 40 N.C. App. 251, 252 S.E.2d 242 (1979).

Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Receiver of Stolen Goods Punished as Principal. — By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. State v. Tyler, 85 N.C. 569 (1881).

Receiving Stolen Property Is Not Accessorial to Larceny. — This section, defining the offense of receiving stolen property, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

Accepting part of the proceeds of a crime does not make one an accessory after the fact; rather, it constitutes the crime of receiving stolen goods. State v. Lewis, 58 N.C. App. 348, 293 S.E.2d 638 (1982), cert. denied, 311 N.C. 766, 321 S.E.2d 152 (1984).

Section Applies Only to Receiving, Not Possession or Offering for Sale. — The possession or offering for sale of goods, known to have been stolen, is not a statutory crime under this section, which applies only to receiving the stolen goods. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

Plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200 (now $400). State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

Applied in State v. Whitley, 208 N.C. 661, 182 S.E. 338 (1935); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935); State v. Law, 228 N.C. 443, 45 S.E.2d 374 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950); State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Brown, 1 N.C. App. 145, 160 S.E.2d 508 (1968); State v. Burchfield, 30 N.C. App. 128, 226 S.E.2d 384 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Bowden, 37 N.C. App. 191, 245 S.E.2d 552 (1978); State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979); State v. Leggett, 61 N.C. App. 295, 300 S.E.2d 823 (1983).

Cited in State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 315 (1933); State v. Ray, 209 N.C. 772, 184 S.E. 836 (1936); State v. Conner, 212 N.C. 668, 194 S.E. 291 (1937); State v. Law, 227 N.C. 103, 40 S.E.2d 699 (1946); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Wilson, 251 N.C. 174, 110 S.E.2d 813 (1959); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Haywood, 39 N.C. App. 639, 251 S.E.2d 620 (1979); State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225 (1987).

II. ELEMENTS OF OFFENSE.

In General. — The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947).

The essential elements of the crime of receiving stolen goods which must be proven, are stated as follows: (a) The stealing of the goods by someone other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (c) continued such possession or concealment with a dishonest purpose. State v. Brady, 237 N.C. 675, 75

S.E.2d 791 (1953); State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972); State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972); State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563, appeal dismissed, 285 N.C. 593, 206 S.E.2d 865 (1974); State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974), decided under this section as it stood before the 1975 amendment; State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971).

The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968).

In a prosecution for receiving stolen goods, having established the theft of goods by someone other than the accused, the State had further to establish that the accused, knowing or having reasons to know the goods were stolen, received or aided in concealing the goods and continued such possession with a dishonest purpose. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

The elements of receiving stolen goods are: (1) The receipt or concealment of property, (2) stolen by another, (3) knowing, or with reasonable grounds to believe, that it was stolen, and (4) with a dishonest purpose. State v. Gardner, 84 N.C. App. 616, 353 S.E.2d 662, aff'd, 320 N.C. 789, 360 S.E.2d 695 (1987).

Elements of attempted receipt of stolen property are: (1) guilty knowledge at the time that the property had been stolen; and (2) the commission of some overt act with the intent to commit the major offense; and (3) a reasonable belief, at the time the property was received, that the property was stolen. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Predisposition is not an element included in the definition of attempted receipt of stolen property. Rather, it relates to defendant's propensity in general to attempt to receive stolen property. The State was required to prove that defendant received the property with a dishonest purpose, to wit, the intent to deprive the true owner of her property. While evidence of this intent may tend to show defendant's predisposition, such evidence does not make predisposition an element of the crime. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Nor are Secrecy, Malice, Deceit, or Intent to Defraud. — Attempting to receive stolen property is a crime of the same degree as attempted robbery, attempted burglary and an attempt to commit a crime against nature. The crime of attempted receipt of stolen property includes secrecy, malice, deceit or intent to defraud as necessary elements. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Guilty Knowledge Essential. — This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received are sufficient to lead the party charged to believe they were stolen. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935); State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972).

Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods. State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971).

Guilty knowledge is one of the essential elements of the crime of receiving stolen goods. State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

The test of guilty knowledge is whether defendant knew, or must have known, that the goods were stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Guilty knowledge may be inferred from incriminating circumstances. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972); State v. Allen, 45 N.C. App. 417, 263 S.E.2d 630 (1980).

Purchase from Public Business. — Where a defendant, charged with a violation of this section, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in violation of a felony statute, such as G.S. 14-74, and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property and had no authority to transact the sale. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935).

Property Must Be Stolen. — If there was no theft, the buying of the property is not criminal, even if the buyer believes the property to have been stolen. State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954).

If property was not stolen or taken from the owner in violation of this section, as where the original taking was without felonious intent, or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property. State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954).

Or Taken In Violation of Other Felony Statute. — Under this section the property knowingly received or concealed could include not only stolen property but trust property converted in violation of G.S. 14-74 or property taken in violation of any other felony statute. But if the property knowingly received was not stolen but was taken in violation of some felony statute, the indictment should so allege. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Same — Receiving Embezzled Property. — This section makes it an offense knowingly to receive embezzled property in violation of a felony embezzlement statute, but such offense is distinct from that of receiving stolen goods, and a charge of receiving stolen goods is not sustained by proof that the goods were merely embezzled. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Upon Recovery by Owner, Character as Stolen Property Lost. — When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property. State v. Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982).

Constructive receipt is sufficient to constitute "receiving" within the meaning of this section. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Goods Received Through Agent. — If stolen goods are received by an agent of the accused, at his instance, that is sufficient to sustain a conviction if he knew that they were stolen goods. State v. Stroud, 95 N.C. 626 (1886).

It would certainly make the accused a receiver in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Self-Interest Not Necessary for Conviction. — It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act, he is nevertheless guilty. State v. Rushing, 69 N.C. 29 (1873).

Time Not of the Essence. — The crime of receiving stolen goods is not one of the offenses in which time is of the essence. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Value of Goods Received Must Exceed $400.00. — That the value of stolen goods received with knowledge by defendant exceeded $100.00 (now $400.00) is an essential element of the offense prescribed by this section. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961); State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

In order for the defendant to be found guilty of a felony under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200 (now $400). This is an essential element of the crime because G.S. 14-72 specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars (now $400), is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

III. LESSER OFFENSES.

Receiving stolen goods is not a lesser included offense of larceny, and jeopardy has not attached as to a proper larceny indictment. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

The crimes of larceny and receiving stolen goods, knowing them to have been stolen, are separate offenses and not degrees of the same offense. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

Or of Breaking and Entering. — Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v. Miller, 18 N.C. App. 489, 197 S.E.2d 46, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Receiving or Transferring Stolen Vehicle Is Separate Offense. — The two offenses under G.S. 20-106 and this section are separate offenses. The latter is not a lesser included offense under the former. State v. Carlin, 37 N.C. App. 228, 245 S.E.2d 586 (1978).

Possessing stolen property in violation of § 14-71.1 is not a lesser included offense of receiving stolen property in violation of this section. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981), aff'd, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

IV. PRACTICE AND PROCEDURE.

A. Venue.

Section Supersedes General Venue Provisions. — For purposes of determining venue for the offense of feloniously receiving stolen property, this section supersedes the general venue provisions. State v. Gardner, 84 N.C. App. 616, 353 S.E.2d 662, aff'd, 320 N.C. 789, 360 S.E.2d 695 (1987).

County Where Defendant in Possession. — Under this section, venue is proper in any county in which a defendant was in possession of the stolen goods. State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979).

County Where Thief May Be Tried. — The legislature has empowered grand juries to indict persons for receiving stolen goods in any county in which the thief may be tried. State v. Gardner, 84 N.C. App. 616, 353 S.E.2d 662, aff'd, 320 N.C. 789, 360 S.E.2d 695 (1987).

B. Indictment.

The words "receive" and "possess" are material words which must be used in indictments to distinguish between the two offenses of receiving stolen goods under this section and possessing stolen goods under G.S. 14-71.1. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Defendant cannot be convicted of possession of stolen goods on an indictment charging him with receiving stolen goods. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Indictment Need Not Name Owner of Property. — It is not necessary that the warrant or indictment in a prosecution for receiving stolen goods state the names of those from whom the goods were stolen. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972); State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

Amendment of Indictment. — The court did not err in allowing the State's motion to amend warrants for receiving stolen goods since the original warrants charged all the essential elements of the offense of receiving stolen goods, and the amendment describing ownership of the property in more detail did not change the offense with which defendants were charged. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972).

Sufficiency of Indictment. — The indictment was held sufficient in Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Variance Not Fatal. — The location of the receipt of stolen goods is not an element of the offense and as such, a variance between the allegations in the indictment and proof at trial will not be fatal. State v. Gardner, 84 N.C. App. 616, 353 S.E.2d 662, aff'd, 320 N.C. 789, 360 S.E.2d 695 (1987).

Fatal Variance. — Where an indictment sufficiently alleged feloniously receiving stolen goods knowing them to have been stolen (taken by common-law larceny) in violation of this section, but the State's evidence tended to show that defendant received property which was taken by a shop foreman, in violation of the felony statute, G.S. 14-74, there was a fatal variance in the charge and the proof, a failure by the State to show that the goods were stolen. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

C. Presumption from Recent Possession of Stolen Goods.

Presumption from Recent Possession of Stolen Property Does Not Apply. — The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said property knowing it to have been feloniously stolen or taken. State v. Best, 202 N.C. 9, 161 S.E. 535 (1931); State v. Lowe, 204 N.C. 572, 169 S.E. 180 (1933); State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947); State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956); State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972); State v. St. Clair, 17 N.C. App. 22, 193 S.E.2d 404 (1972).

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948).

D. Evidence.

Testimony of Owner on Value Admissible. — In a prosecution for receiving stolen goods, the owner who has knowledge of value gained from experience, information and observation, may give his opinion of the value of personal property; however, the approved procedure requires that he first be qualified to give the evidence. State v. Whitaker, 40 N.C. App. 251, 252 S.E.2d 242 (1979).

Failure to Prove Ownership of Property. — In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit should be allowed. State v. Pugh, 196 N.C. 725, 147 S.E. 7 (1929).

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948); State v. Chambers, 239 N.C. 114, 79 S.E.2d 262 (1953); State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563, appeal dismissed, 285 N.C. 593, 206 S.E.2d 865 (1974).

Evidence of receiving stolen goods held amply sufficient to overrule motion for nonsuit. State v. Myers, 240 N.C. 462, 82 S.E.2d 213 (1954).

Upon appeal from a conviction under an indictment for feloniously receiving property of a value of $602, knowing it to have been feloniously stolen, it was held that, considering the evidence in the light most favorable to the State, it was amply sufficient to carry the State's case to the jury, and to support the verdict, and defendant's motions for judgment of compulsory nonsuit were properly overruled by the trial judge. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Evidence Held Insufficient. — See State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952).

There was no evidence to support the verdict, and the defendant's motion for nonsuit on the charge of feloniously receiving stolen goods should have been allowed, where all the evidence, including the defendant's possession of the goods soon after they were stolen, tended to show that the defendant, and no one else, was the thief. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

E. Instructions.

Failure to Instruct on Felonious Intent. — Where the indictment charges the defendant with "feloniously" receiving stolen goods, knowing them to have been stolen, but the charge fails to instruct the jury that it must find that the receiving was with the felonious intent, this is error and entitles the defendant to a new trial. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953).

Instructions Held Sufficient. — Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 or less (now $400 or less), then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 or less (now $400 or less), a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962). State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Where the judge charged the jury: "Now, the offense charged here has at least four distinct elements that the State must satisfy you beyond a reasonable doubt about," and the court then instructed the jury as to the essential elements of the crime of receiving stolen goods, quoting from 1 Wharton's Criminal Evidence, 10th Ed., G.S. 325b, p. 643, with the exception that Wharton states there are three elements, and the second element is ". . . (b) that the accused, knowing them to be stolen, received or aided in concealing the goods," and the trial judge charged: " . . . second, that the defendant received the goods that were stolen; third, that at the time of receiving the goods the defendant knew that they had been stolen," an assignment of error to the charge was overruled. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Instruction Where Presumption as to Recently Stolen Goods Not Relied upon. — Where the State in a prosecution for receiving stolen goods did not rely upon the presumption arising from the possession of recently stolen goods, the trial court was not required to charge that the jury must find that the goods allegedly received by defendant were the same goods that were stolen. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

Failure to Instruct as to Stealing of Goods by One Other Than Accused. — An essential element of the crime of receiving stolen goods in violation of this section is the stealing of the goods by someone other than the accused. Therefore, failure to properly instruct the jury with regard to this element would constitute reversible error requiring a new trial. State v. Slate, 38 N.C. App. 209, 247 S.E.2d 430 (1978).

Instruction Defining Intent. — A charge to the jury in a prosecution for felonious receiving of stolen property defining the necessary intent as the intent to convert property to the defendant's own use or deprive the owner of its use permanently was correct and sufficient. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, cert. denied and appeal dismissed, 297 N.C. 615, 257 S.E.2d 438 (1979).

Reasonableness of Defendant's Belief Under Circumstances. — In a prosecution for feloniously receiving stolen goods, where the trial court instructed the jury that they should return a verdict of guilty if they found from the evidence beyond a reasonable doubt that the defendant, with a dishonest purpose, received goods which he knew "or had reasonable grounds to believe" someone had stolen, it was not error for the court to fail to go further and charge the jury that they should judge the reasonableness of defendant's belief from the circumstances as they appeared to him at the time he received the stolen goods. State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

F. Verdict and Sentence.

Verdict Need Not Specify Value of Goods. — In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935); State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953).

Defective Verdict. — Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. State v. Shaw, 194 N.C. 690, 140 S.E. 621 (1927); State v. Cannon, 218 N.C. 466, 11 S.E.2d 301 (1940).

A judgment upon a general verdict of guilty upon an indictment containing two counts — one for horse stealing, under G.S. 14-81, and the other for receiving, under this section, is erroneous — the offenses not being of the same grade and the punishment being different. State v. Goings, 98 N.C. 766, 4 S.E. 121 (1887).

Failure to Charge and Find Guilty Knowledge. — Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. State v. Barbee, 197 N.C. 248, 148 S.E. 249 (1929).

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving. — Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. State v. Holbrook, 223 N.C. 622, 27 S.E.2d 725 (1943).

When Acquittal of Larceny Bars Prosecution for Receiving. — Defendants acquitted of larceny, despite evidence that they had stolen the items, could not, over their motion for nonsuit, be convicted of receiving stolen goods, where no evidence indicated that others might have stolen the items and then transferred them to defendants. State v. Strickland, 20 N.C. App. 470, 201 S.E.2d 501 (1974).

Sentence. — An exception to a judgment of imprisonment in the State's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was untenable, in that the judgment was within this section. State v. Reddick, 222 N.C. 520, 23 S.E.2d 909 (1943).

§ 14-71.1. Possessing stolen goods.

If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such possessor may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such possessor may be dealt with, indicted, tried and punished in the county where he actually possessed such chattel, money, security, or other thing; and such possessor shall be punished as one convicted of larceny. (1977, c. 978, s. 1; 1993, c. 539, s. 1165; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

CASE NOTES

Possession of stolen goods is a statutory crime created by the legislature and is of recent vintage. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983), aff'd in part and rev'd in part, 311 N.C. 380, 317 S.E.2d 369 (1984).

Purpose. — This section was apparently passed to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978); State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

The legislature's intent was to provide for the State a position to which to recede when it cannot establish the elements of breaking and entering or larceny but can effect proof of possession of the stolen goods. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

The legislative purpose set forth with regard to this section is to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983), aff'd in part and rev'd in part on other grounds, 311 N.C. 380, 319 S.E.2d 369 (1984).

This section is useful where the State has no evidence as to who committed the larceny and has, by the passage of time, lost the probative benefit of the doctrine of possession of recently stolen property. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982).

The possession statutes were enacted to plug a loophole in the law as it then existed when one was found in possession of stolen goods and the State was unable to prove either the larceny or receiving. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

This section was designed to extend society's protection against theft by allowing prosecution where the State could not prove who committed the larceny and could not prove the elements of receiving stolen goods. However, this does not mean that where the evidence established who committed the larceny, the defendant could not be charged with possession. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

A fair and reasonable reading of this section together with G.S. 14-72 leads inescapably to the conclusion that the General Assembly intended to make the possession of any stolen firearm, by anyone knowing or having reasonable grounds to believe the firearm to be stolen, a felony, regardless of the value of the firearm. State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984).

This section was enacted to protect the State in cases when, at trial, it could not establish the elements of larceny or breaking and entering but could prove the defendant's possession of the stolen property. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

Possession is a sort of secondary crime based upon a prior commission of the primary crime of larceny. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Elements of Felonious Possession of Stolen Property. — The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985); State v. Parker, 76 N.C. App. 508, 333 S.E.2d 551, modified on other grounds, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986); State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

The essential elements which must be proved under this section and G.S. 14-72 on a charge of felonious possession of stolen property are: (1) possession of personal property; (2) having a value in excess of $400.00; (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Defendant charged with possession of stolen property under this section or possession of a stolen vehicle under G.S. 20-106 could be convicted if the State produced sufficient evidence that defendant possessed stolen property (i.e. a vehicle), which he knew or had reason to believe had been stolen or taken. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Respondent, a juvenile, was erroneously found delinquent for the felonious possession of his mother's stolen car; he should have been adjudicated delinquent for misdemeanor possession of stolen goods. The State did not introduce evidence of the car's condition or its value; thus, the State did not satisfy G.S. 14-71.1, which required a stolen item to have a value of more than $1,000. In re J.H., 177 N.C. App. 776, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

The words "dishonest purpose" do not appear in this section and thus are not considered "material words of the statute" which must be used in an indictment thereunder. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

The name of the person from whom goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictment's allegations of ownership of the property and the proof of ownership fatal. State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987).

State Does Not Have to Prove Who Committed the Larceny. — To require the State to prove who committed the larceny as an element of this offense would defeat the obvious intent of the legislature. On a charge of possession of stolen property, it is not necessary that the State prove someone other than the defendant stole the property. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

"Dishonest purpose" element of the crime of possession of stolen property can be met by a showing that the possessor acted with an intent to aid the thief, receiver, or possessor of stolen property. The fact that the defendant does not intend to profit personally by his action is immaterial. It is sufficient if he intends to assist another wrongdoer in permanently depriving the true owner of his property. State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986).

"Reasonable Man Standard" Applies. — Since this section includes language concerning a defendant's reasonable grounds to believe that property was stolen, it is obvious that the legislature also intended for the "reasonable man standard" to apply to the offense of possession of stolen property. State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986).

The fact that a defendant is willing to sell property for a fraction of its value is sufficient to give rise to an inference that he knew, or had reasonable grounds to believe, that the property was stolen. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

Value of Goods Possessed Must Exceed $400 at Some Point in Time. — The element of felonious possession requiring the property to be valued at more than $400 implicitly includes the requirement that there be at least one single point in time when the defendant possessed an amount of goods valued at more than $400. State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

Possession of stolen property is a continuing offense, beginning at the time of receipt, and ending at the time of divestment. State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985); State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986); State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987), aff'd in part, rev'd in part, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

Separate Offenses Shown. — Where the evidence showed that defendant burglarized several different residences over a three-month period and kept the stolen property until it was seized by police, his acts constituted separate offenses of possession of stolen property beginning on the dates he stole the property. State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987), aff'd in part, rev'd in part, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

Separate Offenses Not Shown. — Trial court erred by sentencing defendant on five, rather than one, counts of felony possession of stolen goods, as defendant and his companions stole five all-terrain vehicles (ATVs) from the same victim during one break-in, occurring on the same night, and there was no interruption in the events once the transaction began such that defendant was divested of possession and then came back into possession; the ATVs were stolen at approximately the same time, and defendant's actions were part of a single, continuous transaction. State v. Phillips, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

Lesser Included Offenses. — Defendant was entitled to an instruction on the misdemeanor charge of possession of stolen goods, where evidence was presented that she possessed personal property with a value of less than $1,000, as she took a total amount of $14,800 over a period of two months, but never possessed more than $1,000 at one time. State v. Brantley, 129 N.C. App. 725, 501 S.E.2d 676 (1998).

One has possession of stolen property when one has both the power and intent to control its disposition or use. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985).

There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert. State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985).

Charging of Other Offenses as to Same Property. — Although possession is a charge for the State to fall back on when lacking evidence of other offenses, a defendant may be indicted and tried for larceny, receiving, and possession of the same property as long as he is punished for only one of those offenses. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

Defendant's conviction and sentencing for possession of a stolen vehicle, in violation of G.S. 20-106, and possession of stolen property, in violation of this section, for possession of the vehicle, violated double jeopardy because the legislature did not intend to punish a defendant for possession of the same property twice. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Larceny and possession of property stolen in the larceny are separate crimes. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

And Legislature May Constitutionally Punish a Defendant for Both. — Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the legislature from punishing a defendant for both larceny and possession of property stolen in the larceny. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses of larceny and possession, since each crime requires proof of an additional fact which the other does not. State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

Defendant Can Be Convicted of Possessing Property Which He Has Stolen. — While it is true that a defendant cannot be convicted of receiving stolen property which he has stolen himself, such is not the case in a charge of possession of stolen property. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978).

But Legislature Did Not Intend to Punish Both Larceny and Possession. — The legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

In enacting this section and G.S. 14-72 the legislature did not intend that an individual be punishable for possession of the same goods that he stole. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

But Legislature Did Not Intend to Punish Both Larceny and Possession. — Convictions for felonious possession of stolen property were arrested, as defendant could not be convicted of larceny and possession of the same stolen property. State v. Spencer, 187 N.C. App. 605, 654 S.E.2d 69, 2007 N.C. App. LEXIS 2555 (2007).

Nor May One Be Punished for Being Accessory to Both. — The legislature did not intend that a defendant be punished for both larceny and possession of the same property. The same logic compels the holding that a defendant may not be punished for both accessory before the fact of larceny and possession. State v. Maynard, 65 N.C. App. 612, 309 S.E.2d 581 (1983).

Similarly, Receiving and Possession of Same Stolen Property are Separate Crimes. — The unlawful receipt of stolen property is a single, specific act occurring at a specific time; possession, however, is a continuing offense beginning at the time of receipt and continuing until divestment; therefore, the legislature intended possession and receiving of stolen goods to be distinct, separate crimes of equal degree rather than the former to be a lesser included offense of the latter. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981), aff'd, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

Possessing stolen property in violation of this section is not a lesser included offense of receiving stolen property in violation of G.S. 14-71. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

Possession of stolen goods is not a lesser included offense of receiving stolen goods because the elements of receiving and possessing involved separate and distinct acts, the one not present in the other. State v. Taylor, 64 N.C. App. 165, 307 S.E.2d 173 (1983), aff'd in part and rev'd in part on other grounds, 311 N.C. 380, 317 S.E.2d 369 (1984).

Receiving stolen goods and possession of stolen goods are separate and independent statutory offenses under G.S. 14-71 and this section, neither of which is a lesser-included offense of the other. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

And Legislature Did Not Intend Punishment for Both Receiving and Possession. — While receiving and possession are distinct and separate crimes for which the legislature could have provided punishment for the same individual, this was not intended by the enactment of the possession statutes. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Thus, Conviction May Be of Only One of Offenses of Larceny, Receipt, or Possession. — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

A defendant may not be convicted and punished for both receiving and possession of the same stolen property. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Defendant cannot be convicted of possession of stolen goods on an indictment charging him with receiving stolen goods. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Conviction for Uncharged Offense Was Error. — Trial court erred in entering judgment on the possession of stolen property related to the truck defendant was driving, as that was not an offense with which defendant was charged. State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Separate Offenses Shown. — Where the evidence showed that defendant burglarized several different residences over a three-month period and kept the stolen property until it was seized by police, his acts constituted separate offenses of possession of stolen property beginning on the dates he stole the property. State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987), aff'd in part, rev'd in part, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

The words "receive" and "possess" are material words which must be used in indictments to distinguish between the two offenses of receiving stolen goods under G.S. 14-71 and possessing stolen goods under this section. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Use of the word "have" in indictments was not sufficient to charge defendants with possession of stolen goods in violation of this section. State v. Blythe, 85 N.C. App. 341, 354 S.E.2d 889 (1987).

Jurisdiction and Venue. — While the legislature did not intend to convict and punish a defendant for both larceny and possession of stolen property, it did intend to allow indictment and trial on both charges. This section thus confers jurisdiction and venue on the county where defendant possessed the property or where it was stolen. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

Trial judge did not err in denying defendant's motion to dismiss the charges of first degree burglary, felonious larceny, and felonious possession of stolen goods; the presence of defendant's fingerprints on both sides of a window to a room in which there was no apparent reason for his presence and from which a television had recently been taken, was evidence sufficient to support a conclusion with respect to the charges against the defendant. State v. Williams, 95 N.C. App. 627, 383 S.E.2d 456 (1989).

Instruction on Dishonest Purpose. — Instruction that possessing stolen property for the purpose of selling it and keeping the proceeds would be a dishonest purpose did not relieve the State of its burden of showing that defendant acted with a dishonest purpose, and thus was not an improper peremptory instruction on the question of intent. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

Defendant Held Not Unconstitutionally Subjected to Multiple Punishments for the Same Crime. — In prosecution for six counts of felonious possession of stolen property and two counts of misdemeanor possession of stolen property, the defendant was not unconstitutionally subjected to multiple punishments for the same crime, where each separate count of which defendant was convicted grew out of a possession begun at different times of receipt following break-ins over a six-week period; this section individuates crimes of possession by the time at which the stolen goods came into the criminal's possession rather than homogenizing all simultaneously possessed stolen items into one possessor offense. State v. White, 322 N.C. 770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

Elements. — Defendant charged with possession of stolen property under G.S. 14-71.1 or possession of a stolen vehicle under G.S. 20-106 could be convicted if the State produced sufficient evidence that defendant possessed stolen property (i.e. a vehicle), which he knew or had reason to believe had been stolen or taken. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Evidence Held Sufficient. — Evidence held sufficient to establish that saws seen in defendant's possession were stolen, and to permit the question of defendant's knowledge that the property was stolen to go to the jury. State v. Brown, 85 N.C. App. 583, 355 S.E.2d 225, cert. denied, 320 N.C. 172, 358 S.E.2d 56, 358 S.E.2d 57 (1987).

Where the state presented the evidence of the property recovered from defendant's home and the testimony of the break-in victims identifying the stolen property taken from their residences, a co-defendant testified that he and defendant had together committed six to eight of the area break-ins, and defendant admitted that he took the stolen property in pawn, the evidence showed that defendant knew or had reasonable grounds to believe that the stolen property was stolen. State v. White, 322 N.C.

770, 370 S.E.2d 390, cert. denied, 488 U.S. 958, 109 S. Ct. 399, 102 L. Ed. 2d 387 (1988).

Evidence held sufficient to sustain a conviction under this section. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

The evidence was sufficient to support a finding that the defendant knew or had reasonable grounds to believe that the car he was in was stolen, where he was found asleep in the car, the car had a key in the ignition, the defendant lied to arresting officers about his name and falsely stated that the car belonged to a friend, and the car was strewn with items not belonging to the car's owner. State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998), aff'd, 350 N.C. 88, 511 S.E.2d 638 (1999).

Evidence which showed that police stopped defendant while he was driving a vehicle that was reported stolen, that the vehicle was worth $1,995, and that the person who owned the vehicle and reported it stolen told a police officer that the vehicle defendant was driving was her vehicle was sufficient to sustain defendant's conviction for feloniously possessing stolen property, and the trial court properly denied defendant's motion to dismiss that charge. State v. Murray, 154 N.C. App. 631, 572 S.E.2d 845, 2002 N.C. App. LEXIS 1532 (2002), cert. denied, 357 N.C. 467, 586 S.E.2d 778 (2003).

Evidence that defendant knew or had reason to know the car he was driving was stolen was sufficient as: (1) he was driving the car several hours after it was stolen; (2) he said the vehicle belonged to a "friend" whose name he would not give; (3) the car's owner said he gave no one permission to drive it on the day in question; and (4) defendant had the owner's keys. State v. Bailey, 157 N.C. App. 80, 577 S.E.2d 683, 2003 N.C. App. LEXIS 377 (2003).

Evidence which showed that defendant approached a stolen car and placed his hand on the door handle and that the car was worth more than $1,000 was sufficient to sustain defendant's conviction for felonious possession of stolen goods. State v. King, 158 N.C. App. 60, 580 S.E.2d 89, 2003 N.C. App. LEXIS 939 (2003), cert. denied, 357 N.C. 509, 588 S.E.2d 376 (2003).

Substantial evidence existed to show that respondent, a juvenile, had possession of his mother's stolen car; the car was found in the driveway of a house in another city nine days after the car was stolen, respondent was found in the house, he had access to the car on the day that it was stolen, and he confessed to his mother that he had taken the car. In re J.H., 177 N.C. App. 776, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

There was insufficient evidence to support defendant's conviction for possession of a stolen firearm even though an accomplice testified that defendant asked the accomplice to tell the officers a story about finding a bag of guns after a man threw it into the area near the apartment building, as: (1) defendant's testimony exactly contradicted the accomplice's testimony; (2) there was no evidence that defendant had any knowledge about from where the guns came, much less that one of the eight guns in the apartment was stolen; and (3) there was no evidence that defendant should have had reason to believe that one of the guns was stolen. State v. Brown, 182 N.C. App. 277, 641 S.E.2d 850, 2007 N.C. App. LEXIS 574 (2007).

There was sufficient evidence to support the denial of defendant's motion to dismiss and the jury's finding that defendant possessed stolen goods under G.S. 14-71.1 and burglary tools under G.S. 14-55 as: (1) the camera and camcorder were stolen and both items were identified at trial; (2) the items were seized from a trailer, and defendant claimed the items belonged to defendant; and (3) a break-in had occurred at the victim's office, and that the tools found with the camera and camcorder in the trailer were consistent with the tools typically used to break and enter locked properties. State v. Patterson, 185 N.C. App. 67, 648 S.E.2d 250, 2007 N.C. App. LEXIS 1733 (2007).

Evidence was sufficient to support conviction for possession of stolen goods as to the tools inside a truck, as the tools were visible to casual passers-by and were reported stolen only a few hours before the officer stopped defendant in the truck; thus, the trial court properly denied defendant's motion to dismiss that charge. State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Evidence was sufficient to support defendant's possession of stolen property conviction because (1) the testimony showed that he had possession of the truck where the stolen tools were found for at least three days prior to being stopped by the police, (2) defendant testified that he did not trust the person who gave him the tools nor was he surprised that the tolls were stolen, and (3) that evidence was sufficient to allow the question of whether defendant knew or had reasonable grounds to believe that the tools were stolen to go to the jury. State v. Southards, 189 N.C. App. 152, 657 S.E.2d 419, 2008 N.C. App. LEXIS 403 (2008).

Trial court did not err in denying defendant's motion to dismiss the charge of felonious possession of stolen property for insufficient evidence because the State's evidence was sufficient to satisfy the $1,000 fair market value statutory minimum and to support a felonious possession of stolen goods conviction when the "reasonable selling price" of a DVD player at the time it was stolen, and in like-new condition, was over $1,300; the jury did not speculate as to the value of the DVD player but merely reached a different conclusion than that advanced by defendant because the jury could have reasonably concluded that the DVD player was worth $1,300 and was merely missing a necessary component, State v. Davis, — N.C. App. —, 678 S.E.2d 709, 2009 N.C. App. LEXIS 1158 (July 7, 2009).

Evidence Held Insufficient. — In a proceeding in which juvenile was charged with being a delinquent child in that she unlawfully, willfully, and feloniously possessed a Volkswagon van, knowing and having reasonable grounds to believe it to have been feloniously stolen, evidence which tended to show that juvenile was a passenger in the stolen vehicle, having accepted a ride to Florida with some friends, and that at some point while en route she learned that the vehicle was stolen, was not sufficient to withstand a motion to dismiss, as there was no evidence linking juvenile to the theft or tending to show that she had control or could have exercised control over the vehicle. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985).

Defendant's unexplained presence in a stolen vehicle, as a passenger, in such an intoxicated state that he had earlier passed out, was not sufficient to sustain a conviction for felonious possession of stolen property, where the State's evidence was not sufficient to show that defendant had control or could have exercised control over the vehicle, and the evidence as to defendant's knowledge that the vehicle was stolen was unclear. State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985).

Evidence held insufficient to establish felonious possession of stolen goods. State v. Allen, 79 N.C. App. 280, 339 S.E.2d 76 (1986).

Since the State's only evidence showing defendant knew that items he possessed were stolen was from the erroneous admission of a hearsay statement that violated defendant's confrontation rights, the admission of that hearsay was not harmless error, and defendant was entitled to a new trial on charges of possession of stolen goods in violation of G.S. 14-17.1. State v. Morton, 166 N.C. App. 477, 601 S.E.2d 873, 2004 N.C. App. LEXIS 1739 (2004).

Because substantial evidence of each element of an offense charged had to be shown to exist when a court ruled on a motion to dismiss, an adjudication finding that respondent, a juvenile, was delinquent for having the felonious possession of his mother's stolen car had to be reversed; the State introduced substantial evidence that he had possession of the stolen car, but the State failed to introduce any evidence as to the car's condition or that it was worth more than $1,000, as G.S. 14-71.1 required. Thus, a trial court erroneously denied respondent's motion to dismiss the charge against him. In re J.H., 177 N.C. App. 776, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

Evidence was insufficient to support defendant's conviction for possession of property stolen pursuant to a breaking or entering because the number and type of items found, the fact that the items were found in plain view, and the fact that defendant gave a false name when first questioned only raised a mere suspicion or conjecture that defendant possessed the requisite knowledge and were insufficient to prove knowledge. State v. Webb, — N.C. App. —, 666 S.E.2d 212, 2008 N.C. App. LEXIS 1652 (2008).

Evidence Supported Conviction for Misdemeanor, Not Felony. — Conviction for felony possession of stolen goods was reduced to misdemeanor possession of stolen goods because there was no evidence of the value of the goods stolen. State v. Tanner, — N.C. App. —, 666 S.E.2d 845, 2008 N.C. App. LEXIS 1759 (2008).

Applied in State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Bizzell, 53 N.C. App. 450, 281 S.E.2d 57 (1981); State v. Craver, 70 N.C. App. 555, 320 S.E.2d 431 (1984); State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002).

Cited in State v. Boltinhouse, 49 N.C. App. 665, 272 S.E.2d 148 (1980); State v. Andrews, 56 N.C. App. 91, 286 S.E.2d 850 (1982); State v. Haskins, 60 N.C. App. 199, 298 S.E.2d 188 (1982); State v. Malloy, 60 N.C. App. 218, 298 S.E.2d 735 (1983); State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985); State v. Alston, 82 N.C. App. 372, 346 S.E.2d 184 (1986); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Davis, 130 N.C. App. 675, 505 S.E.2d 138 (1998); State v. Ezell, 159 N.C. App. 103, 582 S.E.2d 679, 2003 N.C. App. LEXIS 1418 (2003); State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods.

(a) Larceny of goods of the value of more than one thousand dollars ($1,000) is a Class H felony. The receiving or possessing of stolen goods of the value of more than one thousand dollars ($1,000) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class

H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than one thousand dollars ($1,000), is a Class 1 misdemeanor. In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:

(1) From the person.

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54, 14-54.1, or 14-57.

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and G.S. 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question.

(d) Where the larceny or receiving or possession of stolen goods as described in subsection (a) of this section involves the merchandise of any store, a merchant, a merchant's agent, a merchant's employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, when such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, the merchant's agent, the merchant's employee, or the peace officer had, at the time of the detention or arrest, probable cause to believe that the person committed an offense under subsection (a) of this section. If the person being detained by the merchant, the merchant's agent, or the merchant's employee, is a minor under the age of 18 years, the merchant, the merchant's agent, or the merchant's employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, a merchant's agent, or a merchant's employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1;

C.S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4; 1977, c. 978, ss. 2, 3; 1979, c. 408, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 11, 47; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 523, s. 2; 1993, c. 539, s. 34; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 185, s. 2; 2006-259, s. 4(a).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Editor's Note. — Subsection (b), as amended by Session Laws 2006-259, s. 4, effective December 1, 2006, is applicable to acts committed on or after that date.

Legal Periodicals. — For case law survey as to punishment for larceny, see 45 N.C.L. Rev. 910 (1967).

For comment on alleging and proving elements of offense under this section and G.S. 14-54, see 3 Wake Forest Intra. L. Rev. 1 (1967).

For survey of 1981 law on criminal procedure, see 60 N.C.L. Rev. 1302 (1982).

For note discussing the evolution of the law governing double jeopardy and multiple punishments in a single prosecution context, particularly with regard to larceny and breaking and entering, in light of State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986), see 65 N.C.L. Rev. 1267 (1987).

CASE NOTES

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I. GENERAL CONSIDERATION.

Constitutionality. — Section 14-54 and this section do not violate the equal protection or due process provisions of either the State or federal Constitutions. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Section 14-54 and this section are reasonably related to valid legislative goals. The legislature has determined that breaking or entering with intent to commit larceny is a more serious crime than breaking or entering without the intent to commit larceny or any felony, and that larceny committed pursuant to breaking or entering is more serious than simple larceny. The legislature was acting within its authority in designating these crimes as felonies and in fixing punishment commensurate with their serious nature. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Section 14-54 and this section meet the test of equal protection because all persons who fall under the terms of the statutes are subject to the same sentence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Purpose. — A fair and reasonable reading of this section together with G.S. 14-71.1 leads inescapably to the conclusion that the General Assembly intended to make the possession of any stolen firearm, by anyone knowing or having reasonable grounds to believe the firearm to be stolen, a felony, regardless of the value of the firearm. State v. Taylor, 311 N.C. 380, 317 S.E.2d 369 (1984).

The purpose of this section is to establish levels of punishment for larceny based on the value of the goods stolen, the nature of the goods stolen or the method by which stolen, not to create new offenses. State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

Purpose of Subdivision (b)(4). — The legislature, by enacting subdivision (b)(4) of this section, did not intend to create a separate unit of prosecution for each firearm stolen, nor to allow multiple punishment for the theft of multiple firearms. State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

Purpose of Amendments. — It seems probable the General Assembly, in enacting the amendments to this section, was not motivated by a disposition to protect thieves from the adverse effects of inflation, but to reduce the number of cases (involving felony charges) in the exclusive jurisdiction of the superior court. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

This section relates solely to punishment for the separate crime of larceny. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

Breaking or Entering. — This section applies where there is no charge of breaking and entering or breaking or entering involved. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Section 14-54 concerns only the crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in this section. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Section Does Not Apply to Burglary. — A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20 is no defense to the capital charge, this section dividing larceny into two degrees having no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

The offenses of larceny and receiving are separate and distinct. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

Receiving Is Not Accessorial to Larceny. — This section, defining the offense of receiving, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

Larceny and possession of the property stolen in the larceny are separate and distinct offenses. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Where defendant was charged with both larceny and possession of stolen goods relating to the same property, the trial court improperly entered judgment on a jury verdict convicting him of both charges because in such cases a conviction could only be entered on one of the charges. State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

And therefore double jeopardy considerations do not prohibit punishment of the same person for both offenses. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Nothing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses of larceny and possession, since each crime requires proof of an additional fact which the other does not. State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

But Legislature Did Not Intend Punishment for Both Larceny and Possession. — The legislature did not intend to punish an individual for larceny of property and the possession of the same property which he stole. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982); State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Although it could have done so, the legislature, by creation of the statutory offense of possession of stolen property, did not intend to punish an individual for both larceny and possession. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

And Conviction May Be of Only One of Offenses of Larceny, Receiving, or Possession. — Although a defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he may be convicted of only one of those offenses. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

While a defendant may be indicted and tried both for larceny and possession of the same stolen goods, he may not be convicted of both offenses. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983), cert. denied, 310 N.C. 480, 312 S.E.2d 890 (1984).

A defendant may be found guilty of larceny or receiving but not both. State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

Although defendant may be indicted and tried on charges of larceny, receiving, and possession of the same property, he can be convicted of and sentenced for only one of these offenses. State v. Little, 121 N.C. App. 619, 468 S.E.2d 423 (1996).

Convictions of Both Breaking or Entering and Larceny Permissible. — A defendant may be tried for, convicted of, and punished separately for the crime of breaking or entering and the crime of felony larceny following that breaking or entering when the cases are jointly tried. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

The prohibitions in the United States and

North Carolina Constitutions against placing a person twice in jeopardy does not prohibit, in a single trial, convictions and punishment for both breaking or entering and felony larceny based upon that breaking or entering. State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986).

Conviction and punishment for both felony breaking or entering and felonious larceny based upon the same breaking or entering in a single trial is not prohibited by the provisions of either the Constitution of the United States or the Constitution of North Carolina. State v. Edmondson, 316 N.C. 187, 340 S.E.2d 110 (1986).

Breaking or entering with the intention to commit larceny under G.S. 14-54 and larceny following a break-in under this section are separate offenses for which punishment can be imposed without violating the constitutional restriction against double jeopardy. State v. Hall, 81 N.C. App. 650, 344 S.E.2d 811, petition for cert. dismissed as moot, 318 N.C. 510, 349 S.E.2d 868 (1986).

Conviction of Larceny Not Precluded by Acquittal of Breaking or Entering. — It was proper to convict defendant of felonious larceny even though he had been acquitted of felonious breaking or entering when the trial court had instructed the jury on guilt based upon the acting in concert theory. State v. Weaver, 79 N.C. App. 244, 339 S.E.2d 40, rev'd on other grounds, 318 N.C. 400, 348 S.E.2d 791 (1986).

Only difference between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

Offenses of breaking or entering and larceny are separate and distinct crimes, neither one a lesser included offense of the other. State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), aff'd, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Edmondson, 70 N.C. App. 426, 320 S.E.2d 315 (1984), aff'd, 316 N.C. 187, 340 S.E.2d 110 (1986).

Prosecution Under § 14-74 Not Barred by Dismissal Under This Section. — Since the element of trespass required in this section is not required for prosecution under G.S. 14-74, and the element of trust required under G.S. 14-74 is not required in this section, the dismissal in district court of a charge under this section cannot be considered a prior adjudication which would bar prosecution under G.S. 14-74. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. In such instances the constitutional guarantee against double jeopardy prohibits multiple convictions. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Separate Acts of Larceny Shown. — Evidence that defendant broke into car dealer's building and took a number of car keys, property of value, and then selected a car to drive away from lot, showed two separate acts of larceny, separated in time and space, involving separate property. State v. Spruill, 89 N.C. App. 580, 366 S.E.2d 547, cert. denied, 323 N.C. 368, 373 S.E.2d 554 (1988).

Trial court properly denied a defendant's motion to dismiss one of the larceny counts where substantial evidence showed that he stole a shotgun that was locked behind the seats of a truck, after stealing the shotgun he stole a different automobile, and he then used that automobile to leave the scene; as a result, the case involved two distinct statutory provisions with each larceny predicated on separate and unrelated property. State v. West, 180 N.C. App. 664, 638 S.E.2d 508, 2006 N.C. App. LEXIS 2498 (2006), appeal dismissed, cert. denied, 361 N.C. 368, 644 S.E.2d 562 (2007).

Defendant was improperly convicted and sentenced for both larceny of a firearm and felonious larceny of that same firearm pursuant to a breaking or entering; therefore, his felonious larceny pursuant to a breaking or entering charge was reversed and his sentence on that charge was vacated. State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992).

Larceny Conviction for Procurement of Larceny. — Larceny conviction was valid where the evidence showed that defendant procured the commission of the larceny, because the distinction that formerly existed between principals and accessories before the fact has been abolished. State v. Cartwright, 81 N.C. App. 144, 343 S.E.2d 557 (1986).

Felonious Larceny and Safecracking Are Separate Offenses. — Upon amending G.S. 14-89.1 in 1977, the Legislature clearly intended felonious larceny and safecracking to remain separately punishable offenses; thus a defendant, at a single trial, may be convicted of both crimes as charged in indictments. State v. Strohauer, 84 N.C. App. 68, 351 S.E.2d 823 (1987).

Conviction of Only One Conspiracy Held Permissible Where There Was Only One Agreement. — Convictions of both felonious conspiracy to commit felonious breaking and entering and felonious conspiracy to commit felonious larceny could not both be allowed to stand where there was evidence of only one agreement. State v. Hicks, 86 N.C. App. 36, 356 S.E.2d 595 (1987).

Applied in State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953); State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v.

Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Martin, 270 N.C. 286, 153 S.E.2d 96 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Sharpless, 13 N.C. App. 202, 184 S.E.2d 921 (1971); State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Crowe, 25 N.C. App. 420, 213 S.E.2d 360 (1975); State v. Morrow, 31 N.C. App. 592, 230 S.E.2d 182 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977); State v. Perry, 38 N.C. App. 735, 248 S.E.2d 755 (1978); State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979); State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979); State v. Herman, 45 N.C. App. 711, 264 S.E.2d 122 (1980); State v. Lowe, 60 N.C. App. 549, 299 S.E.2d 466 (1983); State v. Smith, 65 N.C. App. 770, 310 S.E.2d 115 (1984); State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984); State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986); State v. Bunn, 79 N.C. App. 480, 339 S.E.2d 673 (1986); State v. Mobley, 86 N.C. App. 528, 358 S.E.2d 689 (1987); In re Cousin, 93 N.C. App. 224, 377 S.E.2d 275 (1989); State v. Lawson, 105 N.C. App. 329, 412 S.E.2d 685 (1992); State v. Sluka, 107 N.C. App. 200, 419 S.E.2d 200 (1992); State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112, 2002 N.C. App. LEXIS 745 (2002); State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275, 2004 N.C. App. LEXIS 958 (2004); In re J.H., 177 N.C. App. 776, 630 S.E.2d 457, 2006 N.C. App. LEXIS 1223 (2006).

Cited in State v. Corpening, 207 N.C. 805, 178 S.E. 564 (1934); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Jones, 227 N.C. 47, 40 S.E.2d 458 (1946); State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953); State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968); State v. Hemphill, 273 N.C. 388, 160 S.E.2d 53 (1968); State v. Stafford, 274 N.C. 519, 164 S.E.2d 371 (1968); State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Monk, 36 N.C. App. 337, 244 S.E.2d 186 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Boltinhouse, 49 N.C. App. 665, 272 S.E.2d 148 (1980); State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980); State v. Harper, 51 N.C. App. 493, 277 S.E.2d 72 (1981); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); State v. Cornell, 51 N.C. App. 108, 275 S.E.2d 857 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Coward, 54 N.C. App. 488, 283 S.E.2d 536 (1981); State v. Young, 305 N.C. 391, 289 S.E.2d 374 (1982); State v. Locklear, 60 N.C. App. 428, 298 S.E.2d 766 (1983); State v. Downing, 66 N.C. App. 686, 311 S.E.2d 702 (1984); State v. Green, 310 N.C. 466, 312 S.E.2d 434 (1984); State v. Greene, 67 N.C. App. 703, 314 S.E.2d 262 (1984); State v. Reid, 66 N.C. App. 698, 311 S.E.2d 675 (1984); State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751 (1984); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Tate, 73 N.C. App. 573, 327 S.E.2d 27 (1985); In re Baxley, 74 N.C. App. 527, 328 S.E.2d 831 (1985); State v. Aldridge, 76 N.C. App. 638, 334 S.E.2d 107 (1985); State v. Glover, 77 N.C. App. 418, 335 S.E.2d 86 (1985); State v. Brewer, 80 N.C. App. 195, 341 S.E.2d 354 (1986); State v. Humphries, 82 N.C. App. 749, 348 S.E.2d 167 (1986); State v. Thompkins, 83 N.C. App. 42, 348 S.E.2d 605 (1986); In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986); State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987); State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987); State v. McNeill, 90 N.C. App. 257, 368 S.E.2d 206 (1988); State v. Liles, 324 N.C. 529, 379 S.E.2d 821 (1989); State v. Wilson, 98 N.C. App. 86, 389 S.E.2d 626 (1990); State v. Odom, 99 N.C. App. 265, 393 S.E.2d 146 (1990); State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (1993); State v. Withers, 111 N.C. App. 340, 432 S.E.2d 692 (1993); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Carter, 122 N.C. App. 332, 470 S.E.2d 74 (1996); State v. Coria, 131 N.C. App. 449, 508 S.E.2d 1 (1998); State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865, 2000 N.C. App. LEXIS 988 (2000); State v. Pickard, 143 N.C. App. 485, 547 S.E.2d 102, 2001 N.C. App. LEXIS 303 (2001); In re Powers, 144 N.C. App. 140, 546 S.E.2d 186, 2001 N.C. App. LEXIS 319 (2001); State v. Hinton, 155 N.C. App. 561, 573 S.E.2d 609, 2002 N.C. App. LEXIS 1578 (2002); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003); State v. Ayscue, 169 N.C. App. 548, 610 S.E.2d 389, 2005 N.C. App. LEXIS 677 (2005); State v. Flemming, 171 N.C. App. 413, 615 S.E.2d 310, 2005 N.C. App. LEXIS 1260 (2005); State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005); State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006); State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007); In re D.C., 191 N.C. App. 246, 662 S.E.2d 570, 2008 N.C. App. LEXIS 1189 (2008); State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008); State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

II. LARCENY.

A. In General.

Elements of Offense. — To constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Larceny is the felonious taking and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974); State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

To establish the offense of larceny, the State must show that defendant took and carried away the goods of another with the intent to deprive the owner thereof permanently. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981), modified and aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), cert. denied and appeal dismissed, 307 N.C. 582, 299 S.E.2d 650 (1983); State v. Lamson, 75 N.C. App. 132, 330 S.E.2d 68, cert. denied, 314 N.C. 545, 335 S.E.2d 318 (1985); Street v. Moffitt, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

The essential elements of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Coats, 74 N.C. App. 110, 327 S.E.2d 298, cert. denied, 314 N.C. 118, 332 S.E.2d 492 (1985); In re Bass, 77 N.C. App. 110, 334 S.E.2d 779 (1985); Street v. Moffitt, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

To convict a defendant of larceny, it must be shown that he (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently. State v. Reeves, 62 N.C. App. 219, 302 S.E.2d 658 (1983).

The crime of larceny has an element not present in the crime of felonious breaking or entering, to wit, a wrongful taking and carrying away of the personal property of another. As a result it was not inconsistent for the jury to determine that the defendant entered a mobile home with the intent to commit larceny yet find that no larceny was in fact committed. State v. Brown, 308 N.C. 181, 301 S.E.2d 89 (1983), overruled on other grounds, 315 N.C. 222, 337 S.E.2d 487 (1985).

Trespass was not a necessary element of larceny when possession of property was obtained by trick or artifice; the State did not need to allege how the stolen property was taken and carried away, and the words "by trick" did not need be in an indictment charging larceny. State v. Barbour, 153 N.C. App. 500, 570 S.E.2d 126, 2002 N.C. App. LEXIS 1172 (2002).

Where defendant's co-conspirator testified that he and defendant planned to break into and rob a convenience store of cigarettes and he saw defendant take a large white bag and break into the store and take the cigarettes, and another witness saw defendant with a large white bag of cigarettes the following day, and where cigarettes valued at $3,500 were missing after the break-in, the trial court properly denied defendant's motion to dismiss the felony charge because the State had proved all of the essential elements of the crime under G.S. 14-72(a). State v. Owens, 160 N.C. App. 494, 586 S.E.2d 519, 2003 N.C. App. LEXIS 1820 (2003).

The three types of takings prohibited by Md. Code Ann., Crim. Law § 7-104 are similar to the North Carolina common law regarding taking and asportation because in both states, the law is focused on the perpetrator placing the property under his control and depriving the owner of control over it; defendant's Maryland conviction for theft was substantially similar to the North Carolina offense of misdemeanor larceny for sentencing purposes under G.S. 15A-1340.14. State v. Key, 180 N.C. App. 286, 636 S.E.2d 816, 2006 N.C. App. LEXIS 2291 (2006).

Elements are Different for Possession of Stolen Goods and Larceny. — Different elements are involved to establish the crimes of possession of stolen goods and larceny. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Person Cannot be Guilty of Possession of Stolen Property and Larceny of the Same Property. — A review of the legislative history and case law background against which North Carolina's possession statutes were enacted and an analysis of its internal provisions leads to the conclusion that, by its enactment, the legislature does not intend to punish an individual for larceny of property and the possession of the same property which he stole. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Statutory provision upgrading misdemeanor larceny to felony larceny does not change the nature of the crime; the elements of proof remain the same. State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

"Felonious intent" is an essential element of the crime of larceny without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

To constitute larceny the taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Where the evidence tended to show that a defendant charged with larceny took or obtained possession of the property by trick or fraud, the burden was on the State to prove that defendant had a felonious intent at the time he took or got possession by trick or fraud. State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

"Felonious Intent" Defined. — For definitions of "felonious intent," an element of the crime of larceny, see State v. Powell, 103 N.C. 424, 9 S.E. 627 (1889); State v. Kirkland, 178 N.C. 810, 101 S.E. 560 (1919); State v. Booker, 250 N.C. 272, 108 S.E.2d 426 (1959); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

The "felonious intent" as applied to the crime of larceny is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973); State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

Felonious Intent Essential to Robbery and Larceny. — In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

Larceny involves a trespass either actual or constructive. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968); In re Glenn, 73 N.C. App. 302, 326 S.E.2d 646 (1985).

An act of trespass is an essential element in the crime of larceny. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

Every larceny includes a trespass, and if there is no trespass in taking the goods, there can be no felony committed in carrying them away. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

A conviction under this section requires that either an actual or constructive trespass be shown. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

One who lawfully acquires possession of goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

But actual trespass is not a necessary element of larceny when possession of property is fraudulently obtained by some trick or artifice. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

There must be a taking and carrying away of personal property of another to complete the crime of larceny; otherwise there is only an attempt to commit the offense. State v. Wilfong, 101 N.C. App. 221, 398 S.E.2d 668 (1990).

"From the Person" Defined by Common Law. — With regard to larceny from the person, as no statute defines the phrase "from the person" as it relates to larceny, the common law definition controls. At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear. Larceny from the person forms a middle ground in the common law between the "private" stealing most commonly associated with larceny, and the taking by force and violence commonly associated with robbery. State v. Buckom, 328 N.C. 313, 401 S.E.2d 362 (1991).

Taking and Carrying Away. — While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation.

State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Severance from Owner's Possession. — Even if only for an instant, there must be a complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it. State v. Carswell, 36 N.C. App. 377, 243 S.E.2d 911, rev'd on other grounds, 296 N.C. 101, 249 S.E.2d 427 (1978).

Length of Possession Immaterial. — The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the property from its original status was such as would constitute a complete severance from the possession of the owner. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Exclusive Control. — It is not always necessary that the stolen property should have been actually in the hands or on the person of the accused and it is sufficient if such property was under his exclusive personal control. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

Single Larceny Offense. — Single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place; trial court erred in denying defendant's motion to dismiss a larceny charge where he took tools from multiple vans, but the vans were parked inside the same locked fence in close proximity as the larcenies were part of a single, continuous transaction. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Each Item Taken In Single Criminal Incident is Not Separate Offense. — Nothing in the statutory language of this section suggests that to charge a person with a separate offense for each item stolen in a single criminal incident is intended. State v. Hargett, 157 N.C. App. 90, 577 S.E.2d 703, 2003 N.C. App. LEXIS 383 (2003).

Custody is not a bar to the elements of trespass or intent to deprive. In re Glenn, 73 N.C. App. 302, 326 S.E.2d 646 (1985).

One with custody may commit larceny where she subsequently forms the intent to, and does, convert such property. In re Glenn, 73 N.C. App. 302, 326 S.E.2d 646 (1985).

Obtaining Title Through Fraud. — When, in addition to possession, the owner voluntarily passes title as well to the alleged thief, not expecting the property to be returned to him or to be disposed of in accordance with his directions, trespass is involved and the taker is not guilty of larceny, even where the owner is induced to part with the title through the fraud and misrepresentation of the alleged thief. Although the acts of the perpetrator of the fraud may be criminal in such a case, they constitute some other crime than common-law larceny. State v. Robertson, 55 N.C. App. 659, 286 S.E.2d 612 (1982).

Property Must Belong to Another. — An essential element of larceny is that the property taken must belong to another person. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

Knowing the Identity of Owner. — Taking money with intent to deprive the owner when the identity of the owner is known constitutes misdemeanor larceny. Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994).

Where police officer saw victim drop money, saw detainee pick it up and keep it and it appeared to officer that detainee knew the identity of the owner of the money when he took it, officer had ample reason to believe that detainee was committing the crime of misdemeanor larceny. Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994).

Title to Property Taken. — It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

In the prosecution for feloniously breaking and entering it was incumbent upon the State to establish, at the time the defendant broke and entered, that he intended to steal something. However, it was not incumbent upon the State to establish ownership of the property which he intended to steal, the particular ownership being immaterial. State v. Young, 60 N.C. App. 705, 299 S.E.2d 834 (1983).

Ownership Need Not Be Laid In Particular Person. — As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery. State v. Pratt, 306 N.C. 673, 295 S.E.2d 462 (1982).

Entry Prohibited by Separation Agreement. — Bill of indictment charging defendant with felonious breaking and entering and felonious larceny of antique guns was not subject to being quashed on grounds that defendant was married to the occupier of the premises, where defendant's entry of the premises was expressly prohibited by a marital separation agreement. State v. Lindley, 81 N.C. App. 490, 344 S.E.2d 291 (1986).

No Trespass. — Absent a trespass, there was no felonious larceny under G.S. 14-72; a trial court should have dismissed a larceny charge which was based on defendant's admission that she dug up and spent money buried by the victim in land defendant was renting, even though the money was buried before defendant's lease. No trespassory taking occurred since the lease granted defendant lawful possession of the land where the money was buried. State v. Jones, 177 N.C. App. 269, 628 S.E.2d 436, 2006 N.C. App. LEXIS 842 (2006).

Trial court properly assigned one prior conviction point in sentencing because attempted felonious larceny, which was the present offense, was a lesser included offense of felonious larceny, which was a prior conviction, and thus all of the elements of the present offense were included in the prior conviction for G.S. 15A-1340.14(b)(6) purposes; further, G.S. 14-72 related solely to punishment for the separate crime of larceny, did not change the nature of the crime, and the elements remained the same. Thus, for purposes of G.S. 15A-1340.14(b)(6), it did not matter under what provision of G.S. 14-72 the prior larceny convictions were established. State v. Ford, — N.C. App. —, 672 S.E.2d 689, 2009 N.C. App. LEXIS 113 (2009).

B. Degree of Offense.

This section divides larceny into two degrees, one a misdemeanor, the other a felony. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957); State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Degree of Offense Depends Solely on Value of Property Taken. — Whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends solely upon the value of the property taken. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Dividing line between felonious and nonfelonious larceny, not perpetrated by breaking and entering, is $200 (now $1,000). Anders v. Turner, 379 F.2d 46 (4th Cir. 1967).

State Must Prove Value Exceeds $400 for Felony. — In cases under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the property stolen had a value in excess of $200 (now $1,000) in order for the punishment to be that provided for a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

In order for the defendant to be found guilty of a felony under G.S. 14-71, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200 (now $1,000). This is an essential element of the crime because this section specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

State Must Prove That Value of Property Exceeded $1,000. — Except in those instances where this section does not apply, to convict of the felony of larceny, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $1,000); and, this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Holloway, 265 N.C. 581, 144 S.E.2d 634 (1965); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Except in those cases where this section is inapplicable, the State must prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $1,000) in order to convict of felony-larceny, and the trial judge must so instruct the jury even though no request is made for such instruction. The reason for this requirement is that the defendant's plea of not guilty places in issue every essential element of the offense, including the element of value of the property stolen, and the credibility of the testimony must be passed upon by the jury. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The burden of proof as to value in excess of $200 (now $1,000) is upon the State as an essential element of the crime of felonious larceny where defendant is not charged with or found guilty of felonious breaking or entering as a part of the same occurrence. State v. Lilly, 25 N.C. App. 453, 213 S.E.2d 418 (1975).

Jury Must Find Beyond Reasonable Doubt That Value Exceeded $1,000. — Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200 (now $1,000), the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

It is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $1,000); and, value in excess of $200 (now $1,000) being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. The basis for this requirement is the elementary proposition that the credibility of the testimony, even though unequivocal and uncontradicted, must be passed upon by the jury. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

Insufficient Evidence for Felony Larceny Charge. — Defendant's conviction of felonious larceny, G.S. 14-72, was reversed and remanded for resentencing because the trial court failed to find that the value of the property he took was more than $1,000.00 or that he committed the larceny in the course of a felonious breaking and entering, as required by the statute. State v. Matthews, 175 N.C. App. 550,

623 S.E.2d 815, 2006 N.C. App. LEXIS 138 (2006).

Fair Market Value Versus Replacement Cost. — Where stolen property is not commonly traded and has no ascertainable market value, a jury may infer the market value of the stolen property from evidence of the replacement cost. State v. Helms, 107 N.C. App. 237, 418 S.E.2d 832 (1992).

Effect of Plea of Not Guilty. — A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than $200 (now $1,000). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Larceny Where Value Is $400 or Less Is Only a Misdemeanor. — If the value of the stolen property is found to be of the value of not more than $200 (now $1,000) or less, such larceny is only a misdemeanor and punishable as such. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Nothing else appearing, larceny of goods of the value of not more than $200 (now $1,000) is a misdemeanor. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

III. RECEIVING STOLEN PROPERTY.

Elements of Offense. — The essential elements of feloniously receiving stolen property are (1) receiving or aiding in the concealment of personal property, (2) valued at more than $400.00 (now $1,000), (3) which has been stolen, (4) by someone else, (5) the receiver knowing or having reasonable grounds to believe the property to have been stolen, and (6) the receiver acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981).

Same — Knowledge. — Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. State v. Saulding, 211 N.C. 63, 188 S.E. 647 (1936).

IV. POSSESSION OF STOLEN PROPERTY.

"Possession" Defined. — One has possession of stolen property when one has both the power and intent to control its disposition or use. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985); State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985).

Elements of Offense. — The essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than $400.00 (now $1,000), (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. State v. Davis, 302 N.C. 370, 275 S.E.2d 491 (1981); In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985); State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985); State v. Parker, 316 N.C. 295, 341 S.E.2d 555 (1986).

The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982); State v. Brown, 81 N.C. App. 622, 344 S.E.2d 817, cert. denied, 318 N.C. 509, 349 S.E.2d 867 (1986).

The essential elements which must be proved under G.S. 14-71.1 and this section on a charge of felonious possession of stolen property are: (1) possession of personal property; (2) having a value in excess of $400.00 (now $1,000); (3) which has been stolen; (4) the possessor knowing or having reasonable grounds to believe the property was stolen; and (5) the possessor acting with a dishonest purpose. State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Indictment charging defendant with possession of stolen goods was not fatally defective as the indictment for that crime did not have to signify that an entity that was allegedly wronged was capable of owning property. State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

Reasonable Grounds to Know Property Stolen. — The state's evidence that the defendant was in a tavern with a person who made a call to a pawn shop, the defendant left the tavern with this person, the property was taken from a truck at approximately this time and the defendant then had possession of the property a short time later, which property he pawned, was substantial evidence from which a jury could conclude the defendant knew or had reasonable grounds to know the property was stolen. State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

Taking and Carrying Away Not Essential. — The elements of taking and carrying away of the property are not essential to the offense of possession of stolen property. State v. Andrews, 52 N.C. App. 26, 277 S.E.2d 857 (1981), aff'd, 306 N.C. 144, 291 S.E.2d 581, cert. denied, 459 U.S. 946, 103 S. Ct. 263, 74 L. Ed. 2d 205 (1982).

Joint Possession. — There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert, the possession of one participant being the possession of all. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Exclusive possession of stolen property may be joint possession if persons are shown to have acted in concert or to have been particeps criminis. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert. State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985).

Trial court erred by sentencing defendant on five, rather than one, counts of felony possession of stolen goods, as defendant and his companions stole five all-terrain vehicles (ATVs) from the same victim during one break-in, occurring on the same night, and there was no interruption in the events once the transaction began such that defendant was divested of possession and then came back into possession; the ATVs were stolen at approximately the same time, and defendant's actions were part of a single, continuous transaction. State v. Phillips, 172 N.C. App. 143, 615 S.E.2d 880, 2005 N.C. App. LEXIS 1426 (2005).

Recent Possession. — To invoke the doctrine of recent possession, the State must prove: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others; and (3) the possession was discovered recently after the larceny. State v. Mitchell, 109 N.C. App. 222, 426 S.E.2d 443 (1993).

Possession of stolen goods conviction vacated where defendant was acquitted on the underlying charge; the trial court erred in accepting the jury's guilty verdict on a charge of felony possession of stolen goods when the jury found defendant not guilty of the underlying breaking and entering charge. State v. Goblet, 173 N.C. App. 112, 618 S.E.2d 257, 2005 N.C. App. LEXIS 1929 (2005).

Relevant Evidence. — Denial of defendant's motion in limine was not plain error as there was no G.S. 8C-1, N.C. R. Evid. 404(b) violation in a witness's testimony that a digital camera was stolen during a breaking and entering from the witness's employer, and that the digital camera found in defendant's camper was that camera as the testimony only tended to show that defendant possessed stolen items, not that defendant was acting in conformity with a propensity to steal, and the fact that defendant had multiple stolen items in the camper was relevant to the felonious possession of stolen goods charge under G.S. 14-72(c). State v. Patterson, — N.C. App. —, 671 S.E.2d 357, 2009 N.C. App. LEXIS 24 (2009).

Evidence Supported Conviction for Misdemeanor, Not Felony. — Jury's verdict only supported a conviction for misdemeanor possession of stolen property because the jury found defendant not guilty of breaking and entering and the jury was not charged on whether the value of the truck was over $1,000. State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744, 2007 N.C. App. LEXIS 2357 (2007).

Conviction for felony possession of stolen goods was reduced to misdemeanor possession of stolen goods because there was no evidence of the value of the goods stolen. State v. Tanner, — N.C. App. —, 666 S.E.2d 845, 2008 N.C. App. LEXIS 1759 (2008).

Pawning of Property Held Possession for Dishonest Purpose. — Where the defendant had possession of the property and rather than attempting to return it to its rightful owner he pawned it, this would be possession for a dishonest purpose. State v. Davis, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

V. VALUE OF PROPERTY.

"Value" as used in this section means fair market value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The "market value" of the stolen item is used in determining whether the crime is felonious or nonfelonious. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

"Market value" of a stolen item is the criterion used to determine the worth of personal property which was the subject of a larceny. State v. Hall, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 762, 293 S.E.2d 593 (1982).

The proper method for determining value under this section is the price that the stolen goods would bring in the open market in the condition they were in at the time they were stolen, not their replacement value. State v. Morris, 79 N.C. App. 659, 339 S.E.2d 834, rev'd on other grounds, 318 N.C. 643, 350 S.E.2d 91 (1986).

In the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market — its "market value" or its "reasonable selling price," at the time and place of the theft and in the condition in which it was when the thief commenced the acts culminating in the larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

For determining whether the crime is a felony or a misdemeanor under this section, the word "value" means the fair market value of the stolen item at the time of the theft. State v. Shaw, 26 N.C. App. 154, 215 S.E.2d 390 (1975).

The word "value" as used in this section does not mean the price at which the owner would sell, but means fair market value. State v. Haney, 28 N.C. App. 222, 220 S.E.2d 371 (1975).

"Value" in subsection (a) of this section refers to fair market value, not replacement cost. State v. Morris, 318 N.C. 643, 350 S.E.2d 91 (1986).

Money is the standard of value. If the amount is known there can be no disagreement as to value. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Price Received for Stolen Goods Is Irrelevant. — The price received for stolen tools had no relevance to the "market value." State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

Actual Value of Property, Not Taker's Intent, Is Determinative. — The actual value of the thing wrongfully appropriated, rather than the intention of the taker with respect to value, determines the grade of larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

Value of Property Taken, Not Property Possessed, Is Determinative. — This section requires the State to prove the value of the property taken, not the property possessed by the accused, to be in excess of $200 (now $1,000). State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Fire Insurance Coverage Immaterial to Value After Fire. — The extent of fire insurance obtained prior to fire was immaterial to the issue of whether personal property stolen after the fire had any value. State v. Hall, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 762, 293 S.E.2d 593 (1982).

Opinion as to Value. — It is not necessary that a witness be an expert in order to give his opinion as to value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The witness's testimony as to his opinion the "value" of the stolen automobile was properly admitted and was sufficient to require submission to the jury of an issue as to defendant's guilt of felonious larceny under this section where defendant did not object to the form of the question or move to strike the answer. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

In a prosecution under this section, the testimony of a security officer, based on her observations as an employee of a store, relating to the "approximate" number of different items she observed being stolen and the retail value of each item, was competent to establish the value of the goods stolen. State v. Austin, 75 N.C. App. 338, 330 S.E.2d 661 (1985).

Despite initially stating that he did not know what fair market value of stolen items was, once witness understood the meaning of the term he was able to give clear, cogent testimony as to the "fair market value" of his tools at the time they were taken, and his testimony was credible. State v. Haire, 96 N.C. App. 209, 385 S.E.2d 178 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 117 (1990).

Estimate has been held to be some evidence of value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

Retail Price as Proof of Value. — Where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983), cert. denied, 310 N.C. 480, 312 S.E.2d 890 (1984).

Evidence of Value Held Sufficient. — Absent direct evidence of value, evidence was sufficient to support the jury's finding that the value of a 1975 Chrysler Cordoba at the time of the theft exceeded $400.00. State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986), overruled on other grounds, State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987).

VI. OFFENSES WHICH ARE FELONIES REGARDLESS OF VALUE OF PROPERTY.

Where this section does not apply, the larceny is a felony, as at common law, without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

Larceny is a felony regardless of the value of property stolen, if committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57. State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222, cert. denied, 310 N.C. 747, 315 S.E.2d 708 (1984).

Larceny from Building. — Larceny from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57 is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Same — Larceny by Breaking and Entering. — Under the amendment of this section, larceny by breaking and entering any building referred to therein is a felony without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Wilson, 264 N.C. 595, 142 S.E.2d 180 (1965); State v. McKoy, 265 N.C. 380, 144 S.E.2d 46 (1965); State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds sub nom. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Wright, 22 N.C. App. 428, 206 S.E.2d 787 (1974).

Larceny is a felony, without regard to the value of the property taken, when committed pursuant to a burglary or a breaking or entering. State v. Helton, 79 N.C. App. 566, 339 S.E.2d 814 (1986).

Evidence was legally sufficient to support defendant's conviction for felonious larceny under G.S. 14-72(a) because although the value of the items taken was less than $1,000, the crime was elevated to a felony when it was committed pursuant to a breaking and entering under G.S. 14-54. State v. Jones, 188 N.C. App. 562, 655 S.E.2d 915, 2008 N.C. App. LEXIS 200 (2008).

Occupancy is not an element of § 14-54 and this section. State v. Young, 60 N.C. App. 705, 299 S.E.2d 834 (1983).

Larceny Following Breaking and Entering by Stranger. — This section cannot reasonably be interpreted to permit defendant's conviction of felonious larceny merely because he committed the larceny pursuant to or after a breaking or entering by some stranger. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

It is improper, absent the jury's finding that the property stolen exceeded the diacritical amount set forth in the statute, for the trial judge to accept a verdict of guilty of felonious larceny where the jury has failed to find the defendant guilty of the felonious breaking or entering pursuant to which the larceny occurred. State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

Larceny from a person is a felony. State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964), overruled on other grounds sub nom. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

Without Regard to Value of Property Stolen. — Larceny from the person as at common law is a felony without regard to the value of the property stolen. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Taking Required. — In larceny from the person there must be a taking, though the value of the property is immaterial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

Evidence that defendant stole shoulder bag from an unattended grocery cart would not support a conviction of larceny from the person, but would support a conviction of misdemeanor larceny. State v. Lee, 88 N.C. App. 478, 363 S.E.2d 656 (1988).

Larceny of any explosive or incendiary device or substance is a felony. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Larceny of a firearm is a felony regardless of the value of the weapon stolen and without regard to whether the larceny was accomplished by means of a felonious breaking or entering. State v. Robinson, 51 N.C. App. 567, 277 S.E.2d 79 (1981); State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

Larceny of Firearms and Other Property. — Where three firearms, in addition to other property having a value greater than $400.00 (now $1,000), were allegedly stolen in a single transaction, and defendant was properly charged with one count of felonious larceny, the court erred in not dismissing three larceny of firearms charges. State v. Boykin, 78 N.C. App. 572, 337 S.E.2d 678 (1985).

Receiving Stolen Goods. — In order for the crime of receiving stolen property to be rendered a felony by subsection (c) without regard to the value of the property, the defendant must have known not only that the property was stolen, but also that the theft was accomplished under circumstances enumerated in subsection (b). State v. Scott, 11 N.C. App. 642, 182 S.E.2d 256 (1971), decided under this section as it stood before the 1975 amendment.

VII. LESSER OFFENSES.

Misdemeanor of larceny is a lesser degree of the felony of larceny within the meaning of G.S. 15-170. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Misdemeanor larceny is a lesser included offense of felony larceny, which lacks the essential elements of larceny that the property have a value of over $400.00, or that the larceny was from the person. State v. Henry, 57 N.C. App. 168, 290 S.E.2d 775, cert. denied, 306 N.C. 561, 294 S.E.2d 226 (1982).

Larceny is a lesser included offense of armed robbery. State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988), overruling State v. Hurst, 320 N.C. 589, 359 S.E.2d 776 (1987).

Larceny is a lesser included offense of common-law robbery. State v. Wilfong, 101 N.C. App. 221, 398 S.E.2d 668 (1990).

Larceny from the person is a lesser included offense of common-law robbery, which differs from common-law robbery in that it lacks the essential element that the victim be put in fear. State v. Henry, 57 N.C. App. 168, 290 S.E.2d 775, cert. denied, 306 N.C. 561, 294 S.E.2d 226 (1982).

Felonious Larceny as Included Offense in Felony-Murder. — A separate judgment based on a verdict of guilty of felonious larceny was arrested on the ground that the commission of this crime was an essential of and the basis for the conviction of defendant for felony-murder and therefore no additional punishment could be imposed for it as an independent criminal offense. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Larceny Not Lesser Included Offense of Larceny by Employee. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. App. 556, 259 S.E.2d 396 (1979); State v. Brown, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

Unauthorized Use of Conveyance Is Lesser Included Offense of Larceny. — All of the essential elements of the crime of unauthorized use of a conveyance, G.S. 14-72.2(a), are included in larceny, and it may be a lesser included offense of larceny where there is evidence to support the charge. State v. Ross, 46 N.C. App. 338, 264 S.E.2d 742 (1980).

Unauthorized use of a motor vehicle in violation of G.S. 14-72.2 is considered a lesser included offense of larceny, under this section, where there is evidence to support the charge. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

VIII. PRACTICE AND PROCEDURE.

A. Indictment.

Required Allegations Generally. — To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded $200 (now $1,000), or that the larceny was from the person, or that the larceny was from a building in violation of G.S. 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976), appeal dismissed, 291 N.C. 712, 232 S.E.2d 205 (1977).

Ownership of Property. — The indictment in a larceny case must allege a person who has a property interest in the property stolen. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In a prosecution for larceny the State must prove that the person alleged in the indictment to have a property interest in the property stolen has ownership, meaning title to the property or some special property interest. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The purpose of the requirement that ownership be alleged in an indictment for larceny is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The indictment for larceny must correctly charge the owner or the person in possession of the property stolen. State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

An indictment for larceny of property is fatally defective if it fails to allege the ownership of the property in a natural person or a legal entity capable of owning property. State v. Roberts, 14 N.C. App. 648, 188 S.E.2d 610 (1972); State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

It is sufficient if the person alleged in the indictment to be the owner of the property taken has a special property interest, such as that of a bailee or custodian, or otherwise has possession and control of it. State v. Bost, 55 N.C. App. 612, 286 S.E.2d 632, cert. denied, 305 N.C. 588, 292 S.E.2d 572 (1982).

A bill of indictment is fatally defective where it fails to charge the defendant with the larceny from a legal entity capable of owning property. State v. Strange, 58 N.C. App. 756, 294 S.E.2d 403, cert. denied and appeal dismissed, 307 N.C. 128, 297 S.E.2d 403 (1982).

Where indictment did not allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was a corporation or other legal entity capable of owning property, nor did the name indicate that it was a corporation or a natural person, the larceny count in such indictment was fatally defective. State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982).

Indictment lacking an indication of the victim's legal ownership of the property at issue was insufficient on a larceny charge because the State is required to prove ownership and a proper indictment must identify as victim a legal entity capable of owning property. State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002).

Abbreviation "Inc." identifying the victim in a larceny indictment imported the entity's ability to own property, and thus, the indictment was sufficient; the fact of incorporation did not need to be alleged where the corporate name was correctly set out in the indictment. State v. Cave, 174 N.C. App. 580, 621 S.E.2d 299, 2005 N.C. App. LEXIS 2479 (2005).

Insufficient to Charge Property to be That of Servant. — In an indictment for larceny, it is not sufficient to charge the stolen property to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no property, his possession is the possession of his master. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Description of Property. — The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. State v. Fuller, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

Whether the description of property in a larceny indictment is sufficient or so defective as to be void depends on the certainty educed by the description. The property alleged to have been taken must be described with "reasonable certainty." State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Reasonable certainty is attained when the description reasonably informs the accused of the transaction meant, when it protects the accused in the event of subsequent prosecutions for the same offense, when it enables the court to see that the property described is the subject of larceny, and when it enables the jury to say that the article proved to be stolen is the same as the one described. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Same — Animals. — When describing an animal in an indictment for larceny, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

The general term "hogs" in a larceny indictment sufficiently described the animals taken so as to identify them with reasonable certainty. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Failure to State that Goods Were Stolen. — An indictment charging defendant with felonious possession of stolen goods, which fails to state that the goods were stolen, is not thus fatally defective. State v. Williams, 65 N.C. App. 373, 309 S.E.2d 266 (1983), cert. denied, 310 N.C. 480, 312 S.E.2d 890 (1984).

Value of Property. — Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200 (now $1,000). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Same — Misdemeanor. — Where the indictment charges the larceny of $200 (now $1,000) or less and does not charge that the larceny was from a building by breaking or entering, or by any other means of such nature as to make the larceny a felony, the indictment charges only a misdemeanor, and a sentence on the count in excess of two years must be vacated and the cause remanded for proper judgment. State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

Where an indictment charges larceny of property of the value of $200 (now $1,000) or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Failure to Allege Felonious Larceny. — Where indictment for larceny failed to properly allege felonious larceny, a conviction for felonious larceny could not stand; however, since the indictment clearly charged misdemeanor larceny, the jury verdict would be considered a verdict of guilty of misdemeanor larceny, and the cause would be remanded for a proper sentence. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Indictment charging that defendant "unlawfully and willfully did feloniously steal, take and carry away" seven dollars in violation of G.S. 14-70 and subsection (a) of this section failed to allege felonious larceny, and charged only misdemeanor larceny. State v. Wilson, 315 N.C. 157, 337 S.E.2d 470 (1985).

Felony Irrespective of Value. — In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in subsection (b) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Same — Larceny from the Person. — Solicitors would do well to include in bills of indictment the words "from the person" if and when they intend to prosecute for the felony of larceny from the person. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

A person may not be convicted and punished for the felony of larceny from the person when the indictment on which he is tried fails to allege that the larceny was from the person. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Variance — Value. — Where the offense charged is that of felonious larceny, in order to distinguish the offense of felonious larceny from misdemeanor larceny, it is necessary to show that the value of the property stolen was more than $200 (now $1,000); this having been done, a difference between the value alleged in the bill of indictment and the value shown by the evidence is immaterial. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (1971).

Same — Ownership. — There was no fatal variance between indictment and proof where the indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc.," there being no evidence that any other Piggly Wiggly store existed in the city or county, and there being nothing to indicate that the defendants, witnesses or jurors were confused by the difference in names. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (1971).

There was no fatal variance in a larceny indictment placing ownership of stolen tools in a corporation and evidence that, although the tools were personally owned by individual mechanics working for the corporation, they were left overnight on the corporation's premises and were in the possession of the corporation at the time of the theft. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

There is no fatal variance in an indictment for larceny where the indictment alleges that two persons had a property interest in the stolen property when in fact, one was the bailee or special owner of the property, and the other had legal title to the property, since the property may be laid in either the owner, the special owner or both. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In a prosecution for larceny, if the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Same — Description of Property. — Where a larceny indictment described the stolen property as "a 1970 Plymouth, Serial # PM14360F239110, the personal property of George Edison Biggs," and the evidence showed the taking by defendant of a 1970 Plymouth which was owned by George Edison Biggs but there was no evidence as to the serial number, the variance was not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

A material element in an indictment charging the offense of larceny is the identification of the "personal property" taken and carried away. Thus, a variance in the indictment and proof at trial in this regard is a material variance; further, such is a fatal variance if it hampers defendant's ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense. State v. Simmons, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

Where defendant was charged in larceny count of indictment with taking eight heavy duty freezers, serial numbers of which were listed, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., but the officers' inventory of the property seized described a 21 cubic foot freezer of a different serial number, even though there was evidence that the name brand, general appearance, and serial number of the recovered freezer matched one of those on the company's inventory, absent proof at trial that defendant took any of the freezers identified by the serial numbers in the indictment, there was a fatal variance in the indictment and proof at trial on the larceny count and defendant's motion to dismiss that charge should have been granted. State v. Simmons, 57 N.C. App. 548, 291 S.E.2d 815 (1982).

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

"Steal" Synonymous with "Felonious Intent" in Warrant Charging Misdemeanor Larceny. — The word "steal" as used in a warrant charging misdemeanor larceny encompassed and was synonymous with the required "felonious intent" and was therefore sufficient to withstand the defendant's motion to quash. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

"Larceny by trick" is not a crime separate and distinct from common-law larceny, but the term is often used to describe a larceny when possession was obtained by trick or fraud. It is not necessary that the manner in which the stolen property was taken and carried away be alleged, and the words "by trick" are not required in an indictment charging larceny. State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

Indictment Held Sufficient. — See Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, G.S. 14-54 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970), aff'd, 435 F.2d 1305 (4th Cir. 1971).

While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and G.S. 15-70 (see now 15A-736) provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Indictment charging felonious larceny committed pursuant to burglary and instructions thereon were sufficient to charge the defendant with felonious larceny committed pursuant to breaking or entering. State v. Eldridge, 83 N.C. App. 312, 349 S.E.2d 881 (1986).

An indictment that alleged larceny was committed "pursuant to a violation of G.S. 14-51" was in the language of G.S. 14-72(b) and was sufficient to apprise defendant that he was charged with larceny punishable as a felony because it was committed pursuant to a burglary. State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988).

B. Evidence.

Circumstantial Evidence Admissible. — All of the essential elements of larceny must be established by sufficient, competent evidence; and the essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Inference of Intent to Keep Permanently. — In a prosecution for felonious larceny of a car, the fact that the car had not yet been returned or even located by the police at the time of trial was sufficient to raise an inference in favor of the state that the defendant did in fact intend to keep the car permanently when he took it. State v. Jackson, 75 N.C. App. 294, 330 S.E.2d 668 (1985).

Defendant's taking and subsequent abandonment of vehicle, which put it beyond his power to return and indicated a complete lack of concern as to whether the owner ever recovered the truck, constituted sufficient evidence of an intent to permanently deprive the owner of the property so as to support conviction of larceny. State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986).

Inference from Pawning on Different Occasions. — The fact that defendant pawned silver stolen from his mother's house, where he also lived, on different occasions, standing alone, was insufficient to support an inference that he took it on separate occasions. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Tracing to Defendant of Goods Lost from Store. — It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Evidence Held Admissible. — In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 (now $1,000) to establish a felony under this section. State v. Weinstein, 224 N.C. 645, 31 S.E.2d 920 (1944), cert. denied, 324 U.S. 849, 65 S. Ct. 689, 89 L. Ed. 1410 (1945).

Trial judge did not err in denying defendant's motion to dismiss the charges of first degree burglary, felonious larceny, and felonious possession of stolen goods; the presence of defendant's fingerprints on both sides of a window to a room in which there was no apparent reason for his presence and from which a television had recently been taken, was evidence sufficient to support a conclusion with respect to the charges against the defendant. State v. Williams, 95 N.C. App. 627, 383 S.E.2d 456 (1989).

Evidence was sufficient to deny defendant's motion to dismiss and to present the case to the jury where defendant was a passenger in a car when he and others were detained by police, there were items from several stores in the car but none of the people in the car could produce receipts, one of the co-defendants testified that he told an investigating officer that defendant acted as a lookout while the others were stealing from the stores, and defendant provided contradictory testimony both that he was unaware of his co-defendants taking any items from the store and that he knew his co-defendants were taking merchandise. State v. Cave, 174 N.C. App. 580, 621 S.E.2d 299, 2005 N.C. App. LEXIS 2479 (2005).

Evidence Sufficient. — Evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering in State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Evidence held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Nonsuit was properly denied upon proof of exercise of control over stolen goods by (1) offer of sale, (2) rental of warehouse space for storage of the goods, and (3) borrowing money upon pledge of the stolen goods. State v. Carter, 20 N.C. App. 461, 201 S.E.2d 500, cert. denied, 285 N.C. 87, 203 S.E.2d 60 (1974).

Where defendant was seen leaving victim's apartment with goods resembling those later reported stolen, and the State presented substantial evidence from which the jury could infer that defendant took property belonging to victim, the court properly denied the motion to dismiss charge of felonious larceny on grounds that the State failed to establish that the property in his possession was that stolen from victim. State v. McCoy, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

Evidence held sufficient to establish felonious possession of stolen property. State v. Brown, 81 N.C. App. 622, 344 S.E.2d 817, cert. denied, 318 N.C. 509, 349 S.E.2d 867 (1986).

Where the clerk at a convenience store had just opened the cash register, had her hand in the cash drawer, and was in the process of making change for the defendant when he reached in and grabbed the money, evidence was sufficient to support the defendant's conviction for larceny from the person. State v. Buckom, 328 N.C. 313, 401 S.E.2d 362 (1991).

There was sufficient circumstantial evidence to support convictions of breaking and entering and larceny where defendant's car was seen at a burglary scene with its tailgate open, pulled up to the door of the house, a coffee table from the house was in the car, and a witness placed defendant next door to the crime scene on the day the offenses occurred; however, the trial court improperly entered judgment on possession of stolen property, since defendant was convicted of larceny and possession of the same property which he stole. State v. Ethridge, 168 N.C. App. 359, 607 S.E.2d 325, 2005 N.C. App. LEXIS 253 (2005), aff'd, — N.C. —, 625 S.E.2d 777 (2006).

While defendant entered a law office with implied consent from the firm, that consent was void ab initio when defendant went into areas of the firm that were not open to the public so that defendant could commit theft; thus, defendant's convictions for felonious breaking and entering and felonious larceny were supported by sufficient evidence. State v. Brooks, 178 N.C. App. 211, 631 S.E.2d 54, 2006 N.C. App. LEXIS 1334 (2006).

Evidence that a man matching defendant's description was seen leaning against the company truck, which was known to be in defendant's possession on the date of the larceny; that the truck and the man were seen outside the shed while the shed door was partway open; and that the company truck and at least some of the equipment stolen from the storage building were recovered a few days later at defendant's residence was sufficient to support defendant's convictions for breaking or entering and larceny. State v. Milligan, — N.C. App. —, 666 S.E.2d 183, 2008 N.C. App. LEXIS 1654 (2008).

Evidence that defendant took the victim's vehicle and abandoned it in another state, placing the car beyond defendant's power to return and allowing an inference that defendant intended to permanently deprive the victim of the car, was sufficient to support defendant's conviction or felonious larceny of a motor vehicle. State v. Allen, — N.C. App. —, 667 S.E.2d 295, 2008 N.C. App. LEXIS 1820 (2008).

Trial court did not err in denying defendant's motion to dismiss the charge of felonious possession of stolen property for insufficient evidence because the State's evidence was sufficient to satisfy the $1,000 fair market value statutory minimum and to support a felonious possession of stolen goods conviction when the "reasonable selling price" of a DVD player at the time it was stolen, and in like-new condition, was over $1,300; the jury did not speculate as to the value of the DVD player but merely reached a different conclusion than that advanced by defendant because the jury could have reasonably concluded that the DVD player was worth $1,300 and was merely missing a necessary component, State v. Davis, — N.C. App. —, 678 S.E.2d 709, 2009 N.C. App. LEXIS 1158 (July 7, 2009).

Evidence Insufficient. — Where the State's evidence was that $400 was stolen, and defendant testified that she received $420 by gift, and that she stole nothing, there was no evidence from which the jury could have found the defendant guilty of larceny of a value of $200 (now $1,000) or less. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

There was insufficient evidence from which the jury could find that defendant committed the larceny where no fingerprints were taken linking the defendant to the larceny, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

In a prosecution for larceny of an automobile, owner's testimony that if he had been planning to sell the automobile he would not have sold it for less than $2,000 was incompetent to show value, and where there was no evidence of the value of the stolen automobile, the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. State v. Rick, 54 N.C. App. 104, 282 S.E.2d 497 (1981).

In a proceeding in which juvenile was charged with being a delinquent child in that she unlawfully, willfully, and feloniously possessed a vehicle, knowing and having reasonable grounds to believe it to have been feloniously stolen, evidence which tended to show that juvenile was a passenger in the stolen vehicle, having accepted a ride to Florida with some friends, and that at some point while en route she learned that the vehicle was stolen, was not sufficient to withstand a motion to dismiss, as there was no evidence linking juvenile to the theft or tending to show that she had control or could have exercised control over the vehicle. In re Dulaney, 74 N.C. App. 587, 328 S.E.2d 904 (1985).

Defendant's unexplained presence in a stolen vehicle, as a passenger, in such an intoxicated state that he had earlier passed out, was not sufficient to sustain a conviction for felonious possession of stolen property where the State's evidence was not sufficient to show that defendant had control or could have exercised control over the vehicle, and the evidence as to defendant's knowledge that the vehicle was stolen was unclear. State v. Bartlett, 77 N.C. App. 747, 336 S.E.2d 100 (1985).

Evidence held insufficient to establish felonious possession of stolen goods. State v. Allen, 79 N.C. App. 280, 339 S.E.2d 76, aff'd, 317 N.C. 329, 344 S.E.2d 789 (1986).

C. Presumption from Possession of Recently Stolen Property.

Constitutionality. — Application of the doctrine of possession of recently stolen property is not unconstitutional. State v. McNeill, 54 N.C. App. 675, 284 S.E.2d 206 (1981).

When Presumption Arises. — If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The principle of law known as recent possession of stolen property itself indicates the conditions under which it operates, and to bring it into play there must be proof of three things: (1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634, appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

When goods are stolen and one is found in possession so soon thereafter that he could not have reasonably gotten the possession unless he had stolen them himself, the law presumes he was the thief. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

The presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt that the property described in the indictment was stolen; the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others, though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and the possession was recently after the larceny, mere possession of stolen property being insufficient to raise the presumption of guilt. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981); State v. Joseph, 59 N.C. App. 436, 297 S.E.2d 173 (1982); State v. Hamlet, 316 N.C. 41, 340 S.E.2d 418 (1986).

When there is evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

The doctrine of possession of recently stolen property, a rule of law which allows the jury to presume that the possessor of stolen property is guilty of larceny, can arise only when the State proves three things beyond a reasonable doubt: (1) That the property described in the indictment was stolen; (2) that the defendant was found in possession of the stolen property; and (3) that the defendant's possession was recently after the larceny. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

Where stolen property is of a type not normally or frequently traded through lawful channels, the inference of guilt attendant on its possession will survive a longer time interval, since under those circumstances it is more likely that the defendant acquired the property by his own acts and to the exclusion of the intervening agency of others. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

Commercial Restaurant Equipment. — A period of 11 or 12 days between the larceny of commercial restaurant equipment, which is not a kind of property which is usually or frequently traded through lawful retail channels, and defendant's possession thereof was not so long as to preclude application of the doctrine of possession of recently stolen property. State v. Callahan, 83 N.C. App. 323, 350 S.E.2d 128 (1986), cert. denied, 319 N.C. 225, 353 S.E.2d 409 (1987).

Purpose Is in Locating Thief. — The presumption of recent possession is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Larceny Must Be Established. — Before the presumption of guilt stemming from possession of recently stolen property can attach, the State must show by positive or circumstantial evidence a prima facie larceny of the goods. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Identity of the fruits of the crime must be established before the presumption of recent possession can apply. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Possession of stolen property shortly after the time of theft raises a presumption of the possessor's guilt of larceny of such property but the presumption does not apply until the identity of the property is established. State v. Bembery, 33 N.C. App. 31, 234 S.E.2d 33, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

Control of Stolen Property. — The principle of law known as recent possession of stolen property is usually applied to possession which involves custody about the person, but it is not necessarily so limited. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

Possession of part of recently stolen property under some circumstances warrants the inference that the accused stole all of it. The inference of guilt is not always repelled by the fact that only part of the recently stolen property is found in the possession of the accused. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Strength of Presumption Depends on Lapse of Time and Other Circumstances. — The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker as the possession is nearer to or more distant from the time of the commission of the offense. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The presumption that the possessor is the thief, which arises from the possession of stolen goods, is stong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances — the time between the theft and the possession, the type of property involved and its legitimate availability in the community. State v. Hagler, 32 N.C. App. 444, 232 S.E.2d 712, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

Burden of Proof Not Shifted. — Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

Mullany v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by Mullaney. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977).

Presumption Is Evidential Fact. — The presumption, however, is one of fact only and is to be considered by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The presumption that the possessor is the thief, which arises from the possession of stolen goods, is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

However, recent possession is not evidence of guilt; it just raises an inference that will permit the case to go to the jury under proper instructions from the court. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Inference Insufficient to Support Conviction. — Evidence was insufficient to support the conviction of defendant of felonious breaking and entering and larceny under the doctrine of possession of recently stolen property where it tended to show that defendant was one of four persons in a car which contained stolen goods; the State did not demonstrate a criminal conspiracy among the four; only one of the four claimed a possessory interest in the stolen goods; that person also owned the car; in order to convict defendant, the jury must infer that he possessed the goods from the mere fact of driving with the owner of the car seated beside him, and then infer he was the thief that stole them based on the possession of recently stolen goods, and such a conviction based on stacked inferences could not stand. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

D. Defenses.

Defense of Abandonment. — Property which has been abandoned by the owner cannot be the subject of larceny. State v. Hall, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 761, 293 S.E.2d 593 (1982).

Party relying on defense of abandonment must affirmatively show by clear, unequivocal and decisive evidence the intent of the owner to permanently terminate his ownership of the disputed property. State v. Hall, 57 N.C. App. 544, 291 S.E.2d 873, cert. denied, 305 N.C. 761, 293 S.E.2d 593 (1982).

Entrapment Aspects of "Sting" Operations. — See State v. Luster, 306 N.C. 566, 295 S.E.2d 421 (1982).

E. Instructions.

Larceny — Proof Required as to All Elements. — Trial judges should bear in mind that instructions requiring proof beyond a reasonable doubt and jury findings as to all essential elements thereof are prerequisite to a conviction of felony-larceny. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Same — Value of Property. — Where a defendant is indicted for the larceny of property of the value of more than $200 (now $1,000), except in those instances where this section does not apply, it is incumbent upon the trial judge to instruct the jury, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen property exceeds $200 (now $1,000), the jury should return a verdict of guilty of larceny of property of a value not exceeding $200 (now $1,000). State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

When there is evidence tending to show the value of the stolen goods was more than $200 (now $1,000) and other evidence tending to show the value thereof was $200 (now $1,000) or less, the jury should be instructed that if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny and that the value of the stolen property was more than $200 (now $1,000), it would be their duty to return a verdict of guilty of felony-larceny; however, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen goods was more than $200 (now $1,000), it would be their duty to return a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200 (now $1,000), the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. In such case, there is no basis, and it is inappropriate, for the court to instruct the jury with reference to a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

The court should submit to the jury the issue of defendant's guilt of misdemeanor-larceny, where the evidence of the State does not show the value of the property that was taken. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

As to a possible verdict of misdemeanor-larceny, it is well-established that where there is no evidence from which it can be inferred that the value of the stolen property was less than $200 (now $1,000), defendant is not entitled to an instruction with respect to larceny of property of a value less than $200 (now $1,000). State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

Refusal to Instruct on Misdemeanor Larceny Upheld. — Where all the evidence presented showed that chainsaw was taken pursuant to a breaking or entering, it was not error to refuse to instruct on misdemeanor larceny. State v. Weaver, 79 N.C. App. 244, 339 S.E.2d 40, rev'd on other grounds, 318 N.C. 400, 348 S.E.2d 791 (1986).

The trial court properly refused to give a requested instruction on the lesser charge of misdemeanor larceny because the only evidence of value indicated that the truck stolen was worth more than the threshold amount and there was no evidence which would have supported a jury verdict of misdemeanor larceny. State v. Huggins, 338 N.C. 494, 450 S.E.2d 479 (1994).

Refusal to Instruct on Misdemeanor Larceny — Held Error. — Where the State's only evidence concerning the value of stolen items was provided by the testimony of the owner as to their replacement cost, and the jury could have inferred from the evidence that the fair market value of the items was less than their replacement cost and not more than $400.00 (now $1,000), it was error for the trial judge to refuse to charge on misdemeanor larceny when properly requested so to do. State v. Morris, 318 N.C. 643, 350 S.E.2d 91 (1986).

In prosecution for armed robbery, where all the essential elements of larceny would be proven by proof of the allegations in the indictment, where defendant's own evidence regarding his acquisition of automobile in question would have supported a conviction of larceny, and where although the indictment charged that the value of the stolen property was approximately $1,490, the State introduced no evidence of value, the court's refusal to instruct the jury on misdemeanor larceny was prejudicial error. State v. White, 85 N.C. App. 81, 354 S.E.2d 324, aff'd, 322 N.C. 506, 369 S.E.2d 813 (1988).

Unauthorized Use of Motor Vehicle. — In a prosecution for felonious larceny of a car, the jury could have believed, based on the evidence, that the defendant intended to permanently deprive the victim of the use of her car at the time he took it, or they could have believed, as the defendant contended, that he did not intend to take the victim's car under any circumstances. Therefore, the trial court was not required to instruct the jury on unauthorized use of a motor vehicle and properly refrained from doing so. State v. Jackson, 75 N.C. App. 294, 330 S.E.2d 668 (1985).

Receiving Stolen Property. — Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 (now $1,000) or less, then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 (now $1,000) or less, a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Felonious Intent. — What is meant by "felonious intent" is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

F. Verdict.

Verdict Need Not Fix Precise Value of Stolen Property. — The final sentence of this section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200 (now $1,000). When the jury is properly instructed, the verdict necessarily determines whether the value of the stolen property exceeds $200 (now $1,000). State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

This section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200 (now $1,000). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

In a case where the jury was given a choice of not guilty, guilty of felonious larceny or guilty of nonfelonious larceny, finding the defendant guilty of felonious larceny indicated their belief that the value of the property exceeded $400 (now $1,000), and they were not required to fix the value of the property. State v. Austin, 75 N.C. App. 338, 330 S.E.2d 661 (1985).

Except in Cases of Doubt. — The portion of this section which expressly states, "In all cases of doubt the jury shall in its verdict fix the value of the property stolen," means exactly what it says, and where all the evidence is to the effect that the stolen property had a value many times in excess of $200 (now $1,000), and there is no evidence or contention to the contrary, the trial court is under no legal obligation to require the jury to fix the value of the stolen property. State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966), overruled on other grounds in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

A jury should fix the value of the stolen property only in cases of doubt concerning value. State v. Austin, 75 N.C. App. 338, 330 S.E.2d 661 (1985).

Where the bill upon which the defendant was tried charged the defendant with the larceny of a 1961 Chevrolet automobile of the value of $1200 and the evidence amply supported the charge, and there was no evidence to the contrary, it was unnecessary upon such a factual situation to require the jury to find that a 1961 Chevrolet automobile of the value of $1200 was worth more than $200 (now $1,000). State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966), overruled on other grounds in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Value Need Not Be Established Under § 15A-1237(a). — Section 15A-1237(a) does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Verdict Where Court Failed to Instruct as to Duty to Find Value of Property. — A verdict finding the defendant guilty as charged in the bill of indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 (now $1,000) or less, a misdemeanor, where the trial court failed to instruct the jury as to their duty to fix the value of the property. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Where, absent a finding of guilty of the breaking and entering, a verdict of guilty of larceny of property of a value of more than $200 (now $1,000) (a felony), or of guilty of larceny of property of a value of $200 (now $1,000) or less (a misdemeanor), was permissible under appropriate instructions, but the jury was not instructed as to its duty to fix the value of the property in question, the verdict must be considered as a verdict of guilty of larceny of property of a value of $200 (now $1,000) or less (a misdemeanor). State v. Teel, 20 N.C. App. 398, 201 S.E.2d 733 (1974).

Where a defendant is tried for breaking or entering and felonious larceny and the jury returns a verdict of not guilty of felonious breaking or entering and guilty of felonious larceny, it is improper for the trial judge to accept the verdict of guilty of felonious larceny unless the jury has been instructed as to its duty to fix the value of the property stolen; the jury having to find that the value of the property taken exceeds $400 (now $1,000) for the larceny to be felonious. State v. Perry, 52 N.C. App. 48, 278 S.E.2d 273 (1981), aff'd, 305 N.C. 225, 287 S.E.2d 810 (1982).

If a defendant is found not guilty of breaking or entering and the felonious larceny charge is based upon its having been accomplished by means of a felonious breaking or entering pursuant to subdivision (b)(2) of this section, it is necessary for the judge to submit to the jury the question of the value of the stolen property in order for the jury to return a verdict of guilty of felonious larceny. State v. Robinson, 51 N.C. App. 567, 277 S.E.2d 79 (1981).

Where the court in its charge did not instruct the jury to fix the value of the property taken but told them to find defendant guilty of felonious larceny if they were satisfied beyond a reasonable doubt that the property was taken during burglary or after a breaking or entering, and defendant was found not guilty of the burglary and breaking or entering, the jury could not find him guilty of felonious larceny under these circumstances and the court should have treated the jury's verdict as a finding of guilty of misdemeanor larceny. State v. Hall, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

Finding. — A finding that defendant stole property of the value of more than $50 was not a finding that the property had a value of more than $100 (now $1,000). State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952).

Acquittal of Breaking and Entering Does Not Preclude Conviction of Larceny. — Where trial proceeded on the theory that defendant was guilty, if at all, as an aider and abettor of two other principal perpetrators, a not guilty verdict on a count of breaking and entering is not necessarily a finding by the jury that larceny was not committed by defendant pursuant to a breaking. It could be a finding simply that defendant was not an aider and abettor on the breaking count. The jury could, therefore, consistently with its verdict on the breaking count find that felonious larceny was committed pursuant to a breaking by the principal perpetrators and defendant, by reason of aiding and abetting, was guilty of the felony as a principal in the second degree, provided, of course, this theory of the case was presented to them in the trial judge's instructions. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

Additional Convictions Vacated. — Additional convictions for possession of the automobile and the credit cards were vacated because they violated double jeopardy. State v. Scanlon, 176 N.C. App. 410, 626 S.E.2d 770, 2006 N.C. App. LEXIS 541 (2006).

G. Sentencing.

Larceny from the Person. — The punishment for larceny from the person may include imprisonment for a term of ten years. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Larceny by Breaking and Entering. — The maximum punishment is ten years' imprisonment for the felony of larceny of property from a building referred to in this section by breaking or entering therein with intent to steal. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969).

Misdemeanor. — A plea of guilty to the larceny of a sum less than $200 (now $1,000) does not support a sentence of ten years' imprisonment, and the imposition of such sentence must be vacated. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

The maximum imprisonment for the misdemeanor of larceny is two years. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969); State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where an indictment charges larceny of property of the value of $200 (now $1,000) or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Not Cruel and Unusual Punishment. — A sentence of twenty-five years imprisonment, imposed after a plea of guilty to four indictments charging felonious breaking and entering and larceny in violation of G.S. 14-54 and this section, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

The imposition of a sentence of imprisonment of seven to nine years upon plea of nolo contendere to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

Consolidated Counts. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor-larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

§ 14-72.1. Concealment of merchandise in mercantile establishments.

(a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e). Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

(b) Repealed by Session Laws 1985 (Regular Session, 1986), c. 841, s. 2.

(c) A merchant, or the merchant's agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is upon the premises of the store or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, or the merchant's agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or the merchant's agent or employee, is a minor under the age of 18 years, the merchant or the merchant's agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention. A merchant, or the merchant's agent or employee, who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor.

(d) Whoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided in subsection (e).

Nothing herein shall be construed to provide that the mere possession of goods or the production by shoppers of improperly priced merchandise for checkout shall constitute prima facie evidence of guilt.

(d1) Notwithstanding subsection (e) of this section, any person who violates subsection (a) of this section by using a lead-lined or aluminum-lined bag, a lead-lined or aluminum-lined article of clothing, or a similar device to prevent the activation of any antishoplifting or inventory control device is guilty of a Class H felony.

(e) Punishment. — For a first conviction under subsection (a) or (d), or for a subsequent conviction for which the punishment is not specified by this subsection, the defendant shall be guilty of a Class 3 misdemeanor. The term of imprisonment may be suspended only on condition that the defendant perform community service for a term of at least 24 hours. For a second offense committed within three years after the date the defendant was convicted of an offense under this section, the defendant shall be guilty of a Class 2 misdemeanor. The term of imprisonment may be suspended only on condition that the defendant be imprisoned for a term of at least 72 hours as a condition of special probation, perform community service for a term of at least 72 hours, or both. For a third or subsequent offense committed within five years after the date the defendant was convicted of two other offenses under this section, the defendant shall be guilty of a Class 1 misdemeanor. The term of imprisonment may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 11 days. However, if the sentencing judge finds that the defendant is unable, by reason of mental or physical infirmity, to perform the service required under this section, and the reasons for such findings are set forth in the judgment, the judge may pronounce such other sentence as the judge finds appropriate.

(f) Repealed by Session Laws 2009-372, s. 12, effective December 1, 2009, and applicable to offenses committed on or after that date.

(g) Limitations. — For active terms of imprisonment imposed under this section:

(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial;

(2) The defendant must serve the mandatory minimum period of imprisonment and good or gain time credit may not be used to reduce that mandatory minimum period; and

(3) The defendant may not be released or paroled unless he is otherwise eligible and has served the mandatory minimum period of imprisonment. (1957, c. 301; 1971, c. 238; 1973, c. 457, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 841, ss. 1-3; 1987, c. 660; 1993, c. 539, s. 35; 1994, Ex. Sess., c. 24, s. 14(c); c. 28, s. 1; 1995, c. 185, s. 3; c. 509, s. 9; 1997-80, s. 1; 1997-443, s. 19.25(ff); 2009-372, s. 12.)

Editor's Note. — Session Laws 2009-372, s. 19 is a severability clause.

Effect of Amendments. — Session Laws 2009-372, s. 12, effective December 1, 2009, and applicable to offenses committed on or after that date, deleted subsection (f), regarding community service periods.

Legal Periodicals. — For case law survey on shoplifting, see 41 N.C.L. Rev. 446 (1963).

For note on the 1971 amendment to this section with regard to the powers of the merchant and his immunity from suit for malicious prosecution, see 50 N.C.L. Rev. 188 (1971).

For note on the 1971 amendment to this section, concerning civil actions which may result from enforcement of the criminal sanction, see 7 Wake Forest L. Rev. 683 (1971).

CASE NOTES

This section violates neither N.C. Const., Art. I, § 17, (now N.C. Const., Art. I, § 19) nor the due process clause of the federal Constitution by reason of vagueness and uncertainty and of not informing a person of ordinary intelligence with reasonable precision of the acts it prohibits. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

It Is Sufficiently Definite. — This section is sufficiently definite to guide the judge in its application and the lawyer in defending one charged with its violation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

This section defines with sufficient clarity and definiteness the acts which are penalized, and informs a person of ordinary intelligence with reasonable precision what acts it intends to prohibit so that he may know what acts he should avoid, in order that he may not "cross the line" and bring himself within its penalties. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Omits No Essential Provisions. — This section omits no essential provisions which go to impress the inhibited acts committed as being wrongful and criminal. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Has a Substantial Relation to the End Sought to Be Accomplished. — It is manifest that this section has a rational, real and substantial relation to the end sought to be accomplished, which is the protection of our merchants from shoplifting, and that such was the manifest purpose and design of the legislation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Act May Be Made Criminal Irrespective of Intent. — It is within the power of the legislature to declare an act criminal irrespective of the intent of the doer of the act. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

The statutory offense of shoplifting is very limited in its application, particularly with respect to the owner or possessor of the property covered. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

This section, due to its narrow scope, would not cover property in a residence, bank, school or church, but only "the goods or merchandise of any store." State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

No Protection from Claims of Assault and Battery. — Subsection (c) gives police officers, merchants, their employees and their agents the authority to detain or cause the arrest of persons suspected of shoplifting on the merchant's premises and protects them from civil liability for detention, malicious prosecution, false imprisonment, or false arrest; however, actions for assault and battery are conspicuously omitted from the statute. Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994).

Unless the Assault and Battery Are One with the Detention. — Trial court properly instructed the jury on the shopkeeper's privilege under subsection (c) of this section, where plaintiff's claims for assault and battery could not be separated from plaintiff's detention; plaintiff was injured when, as he tried to leave defendant's store after being accused of shoplifting, defendant store owner and his employee used force to detain him, which resulted in the three men falling to the ground. However, if probable cause was lacking or the detention was not reasonable, subsection (c) of this section would not apply. Redding v. Shelton's Harley Davidson, Inc., 139 N.C. App. 816, 534 S.E.2d 656, 2000 N.C. App. LEXIS 1030 (2000).

Pat Down Searches Not Permitted. — Subsection (c) does not give police officers or merchants the right to conduct "pat down" searches of customers without their counsel. Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994).

Elements of Offense. — The statutory offense created by this section is composed of four essential elements: Whoever (1) without authority, (2) willfully conceals the goods or merchandise of any store, (3) not theretofore purchased by such person, (4) while still upon the premises of the store, shall be guilty of a misdemeanor. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

To be guilty under this section, it must be proven that: (1) A person without authority, (2) willfully concealed store merchandise, (3) not purchased by that person, (4) while still upon the premises. State v. Daye, 83 N.C. App. 444, 350 S.E.2d 514 (1986).

Felonious or Criminal Intent Is Not a Necessary Element. — It is manifest from the language of this section, in view of its manifest purpose and design, that the legislature intended that a felonious intent or a criminal intent should not be a necessary element of the statutory crime of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Willful Concealment. — "Willfully conceals" as used in this section means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in violation of law, and this is an essential element of the statutory offense of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Testimony That Defendant "Concealed" Merchandise. — In a prosecution under subsection (a) of this section for willfully concealing merchandise, testimony of witness who characterized defendant's activities in store as "concealing" merchandise merely described, in a shorthand form, the actions that the witness observed defendant make, and no error was committed. State v. Daye, 83 N.C. App. 444, 350 S.E.2d 514 (1986).

Ownership Need Not Be Alleged. — Although a warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective the rule is not applicable to the shoplifting statute. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

While drafters of warrants charging a violation of this statute would be well advised to allege whether the merchandising firm is a natural person or a corporation, the failure to do so did not here render the warrant fatally defective. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

Subsection (c) Not Applicable Where Persons Detained Without Explanation. — In civil action for false imprisonment, defendant's failure to explain to plaintiffs why they could not leave and his refusal to call the police or to search plaintiffs' pocketbooks when plaintiffs offered to have him do so supported the jury's finding that subsection (c) of this section was not applicable. Ayscue v. Mullen, 78 N.C. App. 145, 336 S.E.2d 863 (1985).

The privilege created under subsection (c) should be regarded as an affirmative defense upon which defendants have the burden of proof; the trial court, therefore, erred in instructing the jury that plaintiff, who was detained on suspicion of shoplifting, had the burden of proof to establish that defendants failed to act in a reasonable manner. Redding v. Shelton's Harley Davidson, Inc., 139 N.C. App. 816, 534 S.E.2d 656, 2000 N.C. App. LEXIS 1030 (2000).

Evidence Sufficient to Convict. — See State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Applied in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); State v. Wilson, 13 N.C. App. 260, 185 S.E.2d 4 (1971); Mullins v. Friend, 116 N.C. App. 676, 449 S.E.2d 227 (1994).

Cited in State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972); Rogers v. T.J.X. Cos., 101 N.C. App. 99, 398 S.E.2d 610 (1990); State v. Woody, 132 N.C. App. 788, 513 S.E.2d 801 (1999).

§ 14-72.2. Unauthorized use of a motor-propelled conveyance.

(a) A person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another.

(b) Unauthorized use of an aircraft is a Class H felony. All other unauthorized use of a motor-propelled conveyance is a Class 1 misdemeanor.

(c) Unauthorized use of a motor-propelled conveyance shall be a lesser-included offense of unauthorized use of an aircraft.

(d) As used in this section, "owner" means any person with a property interest in the motor-propelled conveyance. (1973, c. 1330, s. 38; 1977, c. 919; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 36, 1166; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under former G.S. 20-105.*

Constitutionality. — See State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977), decided prior to the 1977 amendment.

Lesser Included Offense of Larceny. — All of the essential elements of the crime of unauthorized use of a conveyance are included in larceny, G.S. 14-72, and it may be a lesser included offense of larceny where there is evidence to support the charge. State v. Ross, 46 N.C. App. 338, 264 S.E.2d 742 (1980); State v. Coward, 54 N.C. App. 488, 283 S.E.2d 536 (1981).

Unauthorized use of a motor vehicle in violation of this section is considered a lesser included offense of larceny, under G.S. 14-72, where there is evidence to support the charge. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

Inference Arising from Unlawful Possession of Vehicle. — See State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966); State v. Hayes, 273 N.C. 712, 161 S.E.2d 185 (1968).

Possession of One Participant Is the Possession of All. — Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been particeps criminis, the possession of one participant being the possession of all. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Unauthorized use of a motor vehicle is not a lesser included offense of common-law robbery. One of the essential elements of unauthorized use of a motor vehicle is the taking or operating of a motor vehicle without having formed an intent to permanently deprive the owner thereof. Conversely, to be guilty of common-law robbery one must have an intent to permanently deprive a person of the goods taken from such person. All the elements of unauthorized use of a motor vehicle are not present in common-law robbery. State v. McCullough, 76 N.C. App. 516, 333 S.E.2d 537 (1985).

In a prosecution for felonious larceny of a car, the jury could have believed, based on the evidence, that the defendant intended to permanently deprive the victim of the use of her car at the time he took it, or they could have believed, as the defendant contended, that he did not intend to take the victim's car under any circumstances. Therefore, the trial court was not required to instruct the jury on unauthorized use of a motor vehicle and properly refrained from doing so. State v. Jackson, 75 N.C. App. 294, 330 S.E.2d 668 (1985).

Immediate flight of both defendants, without explanation, at mere approach of officers may be considered more than slight corroborative evidence of relation between their then unlawful possession and the unlawful removal of automobile from parking lot. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Where all evidence tends to show that defendant intended to permanently deprive victim of her car, it would be improper for the court to instruct on unauthorized use of a conveyance. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

A person is in lawful possession of a vehicle under an omnibus clause if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation. Belasco v. Nationwide Mut. Ins. Co., 73 N.C. App. 413, 326 S.E.2d 109, cert. denied, 313 N.C. 596, 332 S.E.2d 177 (1985).

Possession of Employer's Vehicle Past Authorized Time Sufficient. — Evidence that defendant was the last person to have possession or control of a truck, that defendant had the truck for nearly a month between the time defendant refused to return the truck to defendant's employer and the subject events, and that the truck was recovered from defendant's residence was sufficient to support a conviction for unauthorized use of a motor vehicle. State v. Milligan, — N.C. App. —, 666 S.E.2d 183, 2008 N.C. App. LEXIS 1654 (2008).

Applied in Ford Marketing Corp. v. National Grange Mut. Ins. Co., 33 N.C. App. 297, 235 S.E.2d 82 (1977); State v. Herman, 45 N.C. App. 711, 264 S.E.2d 122 (1980).

Cited in State v. Kaerner, 28 N.C. App. 223, 220 S.E.2d 397 (1975); State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976); State v. Maynard, 79 N.C. App. 451, 339 S.E.2d 666 (1986); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003); State v. Watson, 179 N.C. App. 228, 634 S.E.2d 231, 2006 N.C. App. LEXIS 1923 (2006).

§ 14-72.3. Removal of shopping cart from shopping premises.

(a) As used in this section:

(1) "Shopping cart" means the type of push cart commonly provided by grocery stores, drugstores, and other retail stores for customers to transport commodities within the store and from the store to their motor vehicles outside the store.

(2) "Premises" includes the motor vehicle parking area set aside for customers of the store.

(b) It is unlawful for any person to remove a shopping cart from the premises of a store without the consent, given at the time of the removal, of the store owner, manager, agent or employee.

(c) Violation of this section is a Class 3 misdemeanor. (1983, c. 705, s. 1; 1994, Ex. Sess., c. 14, s. 3.1.)

CASE NOTES

Cited in State v. Moorman, 82 N.C. App. 594, 347 S.E.2d 857 (1986).

§ 14-72.4. Unauthorized taking or sale of labeled dairy milk cases or milk crates bearing the name or label of owner.

(a) A person is guilty of the unauthorized taking or sale of a dairy milk case or milk crate on or after January 1, 1990, if he:

(1) Takes, buys, sells or disposes of any dairy milk case or milk crate, bearing the name or label of the owner, without the express or implied consent of the owner or his designated agent; or

(2) Refuses upon demand of the owner or his designated agent to return to the owner or his designated agent any dairy milk case or milk crate, bearing the name or label of the owner; or

(3) Defaces, obliterates, erases, covers up, or otherwise removes or conceals any name, label, registered trademark, insignia, or other business identification of an owner of a dairy milk case or milk crate, for the purpose of destroying or removing from the milk case or milk crate evidence of its ownership.

(b) For purposes of this section dairy milk cases or milk crates shall be deemed to bear a name or label of an owner when there is imprinted or attached on the case or crate a name, insignia, mark, business identification or label showing ownership or sufficient information to ascertain ownership. For purposes of this section, the term "dairy case" shall be defined as a wire or plastic container which holds 16 quarts or more of beverage and is used by distributors or retailers, or their agents, as a means to transport, store, or carry dairy products.

(c) A violation of this section is a Class 2 misdemeanor.

(d) Nothing in this section shall preclude the prosecution of any misdemeanor or felony offense that is applicable under any other statute or common law. (1989, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 3.2.)

§ 14-72.5. Larceny of motor fuel.

(a) If any person shall take and carry away motor fuel valued at less than one thousand dollars ($1,000) from an establishment where motor fuel is offered for retail sale with the intent to steal the motor fuel, that person shall be guilty of a Class 1 misdemeanor.

(b) The term "motor fuel" as used in this section shall have the same meaning as found in G.S. 105-449.60(20).

(c) Conviction Report Sent to Division of Motor Vehicles. — The court shall report final convictions of violations of this section to the Division of Motor Vehicles. The Division of Motor Vehicles shall revoke a person's drivers license for a second or subsequent conviction under this section in accordance with G.S. 20-17(a)(16). (2001-352, s. 1.)

§ 14-72.6. Felonious larceny, possession, or receiving of stolen goods from a permitted construction site.

(a) A person is guilty of a Class I felony if he commits any of the following offenses, where the goods are valued in excess of three hundred dollars ($300.00) but less than one thousand dollars ($1,000):

(1) Larceny of goods from a permitted construction site.
(2) Possessing or receiving of stolen goods, with actual knowledge or having reasonable grounds to believe that the goods were stolen from a permitted construction site.

(b) As used in this section, a "permitted construction site" is a site where a permit, license, or other authorization has been issued by the State or a local governmental entity for the placement of new construction or improvements to real property. (2005-208, s. 1.)

§ 14-72.7. Chop shop activity.

(a) A person is guilty of a Class H felony if that person knowingly engages in any of the following activities, without regard to the value of the property in question:

(1) Altering, destroying, disassembling, dismantling, reassembling, or storing any motor vehicle or motor vehicle part the person knows to be illegally obtained by theft, fraud, or other illegal means.
(2) Permitting a place to be used for any activity prohibited by this section, where the person either owns or has legal possession of the place, and knows that the place is being used for any activity prohibited by this section.
(3) Purchasing, disposing of, selling, transferring, receiving, or possessing a motor vehicle or motor vehicle part with the knowledge that the vehicle identification number of the motor vehicle, or vehicle part identification number of the vehicle part, has been altered, counterfeited, defaced, destroyed, disguised, falsified, forged, obliterated, or removed.
(4) Purchasing, disposing of, selling, transferring, receiving, or possessing a motor vehicle or motor vehicle part to or from a person engaged in any activity prohibited by this section, knowing that the person is engaging in that activity.

(b) Innocent Activities. — The provisions of this section shall not apply to either of the following:

(1) Purchasing, disposing of, selling, transferring, receiving, possessing, crushing, or compacting a motor vehicle or motor vehicle part in good faith and without knowledge of previous illegal activity in regard to that vehicle or part, as long as the person engaging in the activity does not remove a vehicle identification number or vehicle part identification number before or during the activity.
(2) Purchasing, disposing of, selling, transferring, receiving, possessing, crushing, or compacting a motor vehicle or motor vehicle part after law enforcement proceedings are completed or as a part of law enforcement proceedings, as long as the activity is not in conflict with law enforcement proceedings.

(c) Civil Penalty. — Any court with jurisdiction of a criminal prosecution under this section may also assess a civil penalty. The clear proceeds of the civil penalties shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. The civil penalty shall not exceed three times the assets obtained by the defendant as a result of violations of this section.

(d) Private Actions. — Any person aggrieved by a violation of this section may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, costs of suit, and any attorneys' fees as may be provided by law.

(e) Seizure and Forfeiture. — Any instrumentality possessed or used to engage in the activities prohibited by this section are subject to the seizure and forfeiture provisions of G.S. 14-86.1. The real property of a place used to engage in the activities prohibited by this section is subject to the abatement and forfeiture provisions of Chapter 19 of the General Statutes.

(f) Definitions. — For the purposes of this section, the following definitions apply:

(1) Instrumentality. — Motor vehicle, motor vehicle part, other conveyance, tool, implement, or equipment possessed or used in the activities prohibited under this section.

(2) Vehicle identification number. — A number, a letter, a character, a datum, a derivative, or a combination thereof, used by the manufacturer or the Division of Motor Vehicles for the purpose of uniquely identifying a motor vehicle.

(3) Vehicle part identification number. — A number, a letter, a character, a datum, a derivative, or a combination thereof, used by the manufacturer for the purpose of uniquely identifying a motor vehicle part. (2007-178, s. 1.)

Editor's Note. — Session Laws 2007-178, s. 6, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2007-178, s. 5, contains a severability clause.

§ 14-72.8. Felony larceny of motor vehicle parts.

Unless the conduct is covered under some other provision of law providing greater punishment, larceny of a motor vehicle part is a Class I felony if the cost of repairing the motor vehicle is one thousand dollars ($1,000) or more.

For purposes of this section, the cost of repairing a motor vehicle means the cost of any replacement part and any additional costs necessary to install the replacement part in the motor vehicle. (2009-379, s. 1.)

Editor's Note. — Session Laws 2009-379, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§§ 14-72.9, 14-72.10: Reserved for future codification purposes.

§ 14-72.11. Larceny from a merchant.

A person is guilty of a Class H felony if the person commits larceny against a merchant under any of the following circumstances:

(1) If the property taken has a value of more than two hundred dollars ($200.00), by using an exit door erected and maintained to comply with the requirements of 29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37 upon which door has been placed a notice, sign, or poster providing information about the felony offense and punishment provided under this subsection, to exit the premises of a store.

(2) By removing, destroying, or deactivating a component of an antishoplifting or inventory control device to prevent the activation of any antishoplifting or inventory control device.

(3) By affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at less than its actual sale price.

(4) When the property is infant formula valued in excess of one hundred dollars ($100.00). As used in this subsection, the term "infant formula," has the same meaning as found in 21 U.S.C. § 321(z). (2007-373, s. 2; 2008-187, s. 34(b).)

Editor's Note. — Session Laws 2007-373, s. 4, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-187, s. 34(b), effective August 7, 2008, substituted "29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37" for "29 C.F.R. § 1910 Subpart E" in subdivision (1).

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.

The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than one thousand dollars ($1,000). (1913, c. 118, s. 2; C.S., s. 4252; 1941, c. 178, s. 2; 1949, c. 145, s. 3; 1961, c. 39, s. 2; 1979, c. 408, s. 2; 1991, c. 523, s. 3.)

CASE NOTES

Applied in State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960); State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

Cited in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

§ 14-73.1. Petty misdemeanors.

The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by Article 16, Subchapter V, Chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors. (1949, c. 145, s. 4; 1973, c. 108, s. 1.)

Legal Periodicals. — For brief comment on section, see 27 N.C.L. Rev. 448 (1949).

§ 14-74. Larceny by servants and other employees.

If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in G.S. 14-75, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be guilty of a felony: Provided, that nothing contained in this section shall extend to apprentices or servants within the age of 16 years. If the value of the money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned in G.S. 14-75, is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the value of the money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned in G.S. 14-75, is less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony. (21 Hen. VIII, c. 7, ss. 1, 2; R.C., c. 34, s. 18; Code, s. 1065; Rev., s. 3499; C.S., s. 4253; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(c); 1998-217, s. 4(a).)

Cross References. — As to embezzlement, see G.S. 14-90 et seq. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

The purpose of this section was to make the conduct described therein a crime because it does not constitute the crime of common-law larceny. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

The defendant's constitutional rights were violated when she was indicted and prosecuted for felony larceny pursuant to this section in superior court after she had previously been convicted in district court of misdemeanor larceny based on the same offense, the alleged theft from her employer of a copy machine; furthermore, the prosecutor was bound to his promise not to pursue the misdemeanor charge on appeal, and the State's election to seek conviction in superior court only on the felony larceny charge required acquittal on the misdemeanor charge. State v. Bissette, 142 N.C. App. 669, 544 S.E.2d 266, 2001 N.C. App. LEXIS 183 (2001).

Larceny Not Lesser Included Offense. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. App. 556, 259 S.E.2d 396 (1979).

Servant Defined. — In a strict sense all employees are servants but the term servant is usually applied, and meant to apply to one of menial rank. State v. Higgins, 1 N.C. 59 (1792).

"Employee". — An inmate performing a mandatory work assignment cannot be convicted of larceny by employee because such an inmate is not an "employee" within the meaning of this section. State v. Frazier, 142 N.C. App. 207, 541 S.E.2d 800 (2001).

Trust Relation Necessary. — A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. State v. Higgins, 1 N.C. 59 (1792).

This section requires by its express terms that the larceny be committed in violation of a trust relationship between the employee and the employer. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Evidence at defendant's trial for larceny by employee did not fail to prove her necessary trust relationship with the victim, her employer, because her position was not managerial, as she was entrusted with receiving payments for the employer, preparing and reconciling daily accounting records, and depositing the payments into the bank. State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

And Must Be Alleged. — In an indictment under this section, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and being so held it was feloniously converted or made way with by the servant or agent. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888); State v. Brown, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

Value Is Immaterial. — This section does not believe its terms require that the property stolen reflect a minimum value in order for a violation thereof to constitute a felony. State v. Monk, 36 N.C. App. 337, 244 S.E.2d 186 (1978).

This section does not require that the value of the stolen property be established. State v. Canipe, 64 N.C. App. 102, 306 S.E.2d 548 (1983).

Age Not Essential Element. — The phrase, "Provided, that nothing contained in this section shall extend to ... servants within the age of 16 years" withdraws a class of defendants from the crime of larceny by an employee, while the language before the phrase completely and definitely defines the offense; hence, age is not an essential element which the indictment must allege and the State initially prove. State v. Brown, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

Burden of Raising Age Exception. — To place the burden on defendant to raise the age exception to this section and to prove that he comes within it is not unconstitutional. State v. Brown, 56 N.C. App. 228, 287 S.E.2d 421 (1982).

Dismissal Under § 14-72 No Bar to Prosecution Under this Section. — Since the element of trespass required in G.S. 14-72 is not required for prosecution under this section, and the element of trust required under this section is not required in G.S. 14-72, the dismissal in district court of a charge under G.S. 14-72 cannot be considered a prior adjudication which would bar prosecution under this section. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Adequate Notice of Charge. — The defendant was adequately notified in the indictment that he would be put on trial for the embezzlement of certain nuts and bolts during a certain period of time where the crime alleged in the bill of indictment was embezzlement but the proof adduced at trial showed that the defendant aided and abetted another in the crime of embezzlement. He could not be misled or prejudiced by being convicted of a lower grade of the principal offense charged. State v. Lancaster, 37 N.C. App. 528, 246 S.E.2d 575, cert. denied, 295 N.C. 650, 248 S.E.2d 255 (1978).

Indictments charging defendant with larceny by employee identified the offense with enough certainty to (1) enable her to prepare her defense, (2) protect her from being twice put in jeopardy for the same offense, and (3) enable the court to know what judgment to announce in the event of a conviction; thus, they were constitutionally sufficient, and they adequately alleged a delivery in trust because they stated the money was delivered to defendant for the use of her employer; it was unnecessary to allege who delivered the money. State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Conspiracy. — Defendant's conviction for conspiracy to commit larceny by an employee did not require that he be an employee of the store as his conviction for conspiracy was a separate crime from the statutory crime of larceny by an employee. State v. Saunders, 126 N.C. App. 524, 485 S.E.2d 853 (1997).

Evidence of Intent. — Evidence at defendant's trial for larceny by employee which showed repeated discrepancies among daily payment summaries and daily bank deposit slips while under defendant's control provided sufficient evidence that defendant intended to manipulate her employer's records and convert the employer's property for her improper use, and this evidence of defendant's intent to defraud conformed to the charges in the indictments. State v. Morris, 156 N.C. App. 335, 576 S.E.2d 391, 2003 N.C. App. LEXIS 113 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Evidence Admissible. — In a prosecution of defendant for embezzlement of merchandise from his employer, the trial court did not err in admitting testimony concerning certain state's exhibits and in admitting the exhibits consisting of cigarettes, matches, soup, soap and hams, since the items and the circumstances under which they were found were sufficiently identified and described by the officer who retrieved them, and since the evidence was relevant to show that the crime of embezzlement was committed. State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

Applied in State v. Hauser, 257 N.C. 158, 125 S.E.2d 389 (1962); State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

§ 14-75. Larceny of chose in action.

If any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), that person is guilty of a Class H felony. (1811, c. 814, s. 1; R.C., c. 34, s. 20; Code, s. 1064; Rev., s. 3498; C.S., s. 4254; 1945, c. 635; 1993, c. 539, s. 1167; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to description of stolen money in indictment, see G.S. 15-149.

CASE NOTES

Treasury Notes. — Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. State v. Thompson, 71 N.C. 146 (1874).

Due Bills. — While a "due bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of such a paper is indictable. State v. Campbell, 103 N.C. 344, 9 S.E. 410 (1889).

A pension check on the United States Treasury comes under this section. State v. Bishop, 98 N.C. 773, 4 S.E. 357 (1887).

Charter of Bank Issuing Immaterial. — If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there cannot be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derives its existence from an act of Congress or from the legislature of New York. State v. Banks, 61 N.C. 577 (1868).

Larceny of the Instrument and Paper Distinguished. — When a person is indicted for stealing a promissory note or any other chose in action, it is upon the State to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. State v. Campbell, 103 N.C. 344, 9 S.E. 410 (1889).

Sufficient Description. — An indictment for larceny which describes the thing stolen, as "one promissory note issued by the Treasury Department of the government of the United States for the payment of one dollar," is in that respect sufficient. State v. Fulford, 61 N.C. 563 (1868).

Amount Must Be Set Out. — An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. State v. Rout, 10 N.C. 618 (1825).

Cited in State v. Freeman, 89 N.C. 469 (1883).

§ 14-75.1. Larceny of secret technical processes.

Any person who steals property consisting of a sample, culture, microorganism, specimen, record, recording, document, drawing, or any other article, material, device, or substance which constitutes, represents, evidences, reflects, or records a secret scientific or technical process, invention, formula, or any phase or part thereof shall be punished as a Class H felon. A process, invention, or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes with his consent, and when it accords or may accord the owner an advantage over competitors or other persons who do not have knowledge or the benefit thereof. (1967, c. 1175; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-76. Larceny, mutilation, or destruction of public records and papers.

If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a Class 1 misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a Class 1 misdemeanor. (8 Hen. VI, c. 12, s. 3; R.C., c. 34, s. 31; 1881, c. 17; Code, s. 1071; Rev., s. 3508; C.S., s. 4255; 1993, c. 539, s. 37; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

History of Section. — See State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976), aff'd, 293 N.C. 18, 235 S.E.2d 150 (1977).

Offense Is a Felony. — Nomenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with G.S. 14-3 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Injury to Tax Books. — An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. State v. Gouge, 157 N.C. 602, 72 S.E. 994 (1911).

Evidence Insufficient. — On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing was shown, it was required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, was insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N.C. 100, 144 S.E. 555 (1928).

Cited in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives.

If any person shall willfully or maliciously obliterate, injure, deface, or alter any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8), he shall be guilty of a Class 1 misdemeanor. The provisions of this section do not apply to employees of the Department of Cultural Resources who may destroy any accessioned records or papers that are approved for destruction by the North Carolina Historical Commission pursuant to the authority contained in G.S. 121-4(12). (1975, c. 696, s. 3; 1993, c. 539, s. 38; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-77. Larceny, concealment or destruction of wills.

If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a Class 1 misdemeanor. (R.C., c. 34, s. 32; Code, s. 1072; Rev., s. 3510; C.S., s. 4256; 1993, c. 539, s. 39; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to clerk's power to compel production of will when one in whose custody it is refuses to produce it, see G.S. 31-15.

CASE NOTES

Purpose of Section. — Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. Wells v. Odum, 207 N.C. 226, 176 S.E. 563 (1934).

Cited in In re Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); In re Will of Covington, 252 N.C. 546, 114 S.E.2d 257 (1960).

§ 14-78. Larceny of ungathered crops.

If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, that person is guilty of a Class H felony. (1811, c. 816, P.R.; R.C., c. 34, s. 21; 1868-9, c. 251; Code, s. 1069; Rev., s. 3503; C.S., s. 4257; 1975, c. 697; 1993, c. 539, s. 1168; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

At Common Law. — By the common law, larceny cannot be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. State v. Foy, 82 N.C. 679 (1880); State v. Thompson, 93 N.C. 537 (1885).

What Indictment Must Allege. — On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, was not admissible. To render such evidence competent, the indictment should have been framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. State v. Bragg, 86 N.C. 687 (1882).

In the case of State v. Liles, 78 N.C. 496 (1878), the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc. and the words "cultivated for food or market," were omitted and it was held that the indictment, for that reason, was fatally defective. State v. Thompson, 93 N.C. 537 (1885).

Indictment Must Conclude Against the Statute. — An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offense at common law was not larceny but only a civil trespass, there can be no judgment. State v. Foy, 82 N.C. 679 (1880).

Applies to All Crops. — This section applies to any growing crops cultivated for food or market, and is not restricted to several articles specifically named. State v. Ballard, 97 N.C. 443, 1 S.E. 685 (1887).

§ 14-78.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(1).

§ 14-79. Larceny of ginseng.

If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be punished as a Class H felon. (1905, c. 211; Rev., s. 3502; C.S., s. 4258; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1169; 1994, Ex. Sess., c. 24, s. 14(c); 1999-107, s. 1.)

Cross References. — For taking of certain wild plants from land of another, generally, see G.S. 14-129. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to digging ginseng out of season on the lands of another, see G.S. 16-202.19.

§ 14-79.1. Larceny of pine needles or pine straw.

If any person shall take and carry away, or shall aid in taking or carrying away, any pine needles or pine straw being produced on the land of another person upon which land notices, signs, or posters prohibiting the raking or removal of pine needles or pine straw have been placed in accordance with the provisions of G.S. 14-159.7, or upon which posted notices have been placed in accordance with the provisions of G.S. 14-159.7, with the intent to steal the pine needles or pine straw, that person shall be guilty of a Class H felony. (1997-443, s. 19.25(aa).)

§ 14-80: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(2).

§ 14-81. Larceny of horses, mules, swine, cattle, or dogs.

(a) Larceny of horses, mules, swine, or cattle is a Class H felony.

(a1) Larceny of a dog is a Class I felony.

(b) In sentencing a person convicted of violating this section, the judge shall, as a minimum punishment, place a person on probation subject to the following conditions:

(1) A person must make restitution for the damage or loss caused by the larceny of the livestock or dogs, and

(2) A person must pay a fine of not less than the amount of the damages or loss caused by the larceny of the livestock or dogs.

(c) No provision in this section shall limit the authority of the judge to sentence the person convicted of violating this section to an active sentence. (1866-7, c. 62; 1868, c. 37, s. 1; 1879, c. 234, s. 2; Code, s. 1066; Rev., s. 3505; 1917, c. 162, s. 2; C.S., s. 4260; 1965, c. 621, s. 6; 1981, c. 664, s. 2; 1989, c. 773, s. 2; 1993, c. 539, s. 1171; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Taking with Belief of Interest. — One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. State v. Thompson, 95 N.C. 596 (1886).

Same — Question for Jury. — One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. State v. Thompson, 95 N.C. 596 (1886).

Joinder with Charge of Receiving Stolen Goods. — An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. State v. Lawrence, 81 N.C. 522 (1879).

Cited in Altman v. City of High Point, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26412 (M.D.N.C. Jan. 17, 2002).

§ 14-82. Taking horses, mules, or dogs for temporary purposes.

If any person shall unlawfully take and carry away any horse, gelding, mare, mule, or dog, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a Class 2 misdemeanor. (1879, c. 234, s. 1; Code, s. 1067; Rev., s. 3509; 1913, c. 11; C.S., s. 4261; 1969, c. 1224, s. 3; 1989, c. 773, s. 3; 1994, Ex. Sess., c. 14, s. 3.3.)

CASE NOTES

Indictment. — An indictment for stealing the temporary use of a horse in violation of this section was not defective because it charged the stealing of the temporary use of a buggy also. State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895).

Employee Liable. — An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. Clark v. Whitehurst, 171 N.C. 1, 86 S.E. 78 (1915).

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-83.1. Fixtures subject to larceny.

All common law distinctions providing that personal property that has become affixed to real property is not subject to a charge of larceny are abolished. Any person who shall remove or take and carry away, or shall aid another in removing, taking or carrying away, any property that is affixed to real property, with the intent to steal the property, shall be guilty of larceny and shall be punished as provided by statute. (2008-128, s. 2.)

Editor's Note. — Session Laws 2008-128, s. 3, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-128, s. 2, enacted this section as G.S. 14-83A; it was recodified as G.S. 14-83.1 at the direction of the Revisor of Statutes.

§ 14-84. Animals subject to larceny.

All common-law distinctions among animals with respect to their being subject to larceny are abolished. Any animal that is in a person's possession is the subject of larceny. (1919, c. 116, s. 9; C.S., s. 4263; 1955, c. 804; 1983, c. 35, s. 1.)

CASE NOTES

Elements of Offense. — Under this section, the State was obliged to prove that defendant took and carried away the dog in question without the owner's consent, and with the intent to deprive the owner of his property permanently. State v. Rowell, 74 N.C. App. 595, 328 S.E.2d 606 (1985).

Evidence Held Sufficient. — Evidence which tended to show that the dog in question was taken from its lot without the owner's consent, that defendant had the dog almost immediately thereafter, falsely claiming that the owner had given it to him, and that he then sold the dog to another was sufficient to justify conviction under this section. State v. Rowell, 74 N.C. App. 595, 328 S.E.2d 606 (1985).

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 14-85. Pursuing or injuring livestock with intent to steal.

If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a Class H felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (1866, c. 57; Code, s. 1068; Rev., s. 3504; C.S., s. 4264; 1993, c. 539, s. 1172; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Sufficiency of Indictment. — An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," was sufficiently definite. State v. Credle, 91 N.C. 640 (1884).

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 14-86: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(3), effective October 1, 1994.

§ 14-86.1. Seizure and forfeiture of conveyances used in committing larceny and similar crimes.

(a) All conveyances, including vehicles, watercraft or aircraft, used to unlawfully conceal, convey or transport property in violation of G.S. 14-71, 14-71.1, or 20-106, or used by any person in the commission of armed or common-law robbery, or used in violation of G.S. 14-72.7, or used by any person in the commission of any larceny when the value of the property taken is more than two thousand dollars ($2,000) shall be subject to forfeiture as provided herein, except that:

(1) No conveyance used by any person as a common carrier in the transaction of the business of the common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in custody or control of such conveyance was a consenting party or privy to a violation that may subject the conveyance to forfeiture under this section;

(2) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or any state;

(3) No conveyance shall be forfeited pursuant to this section unless the violation involved is a felony;

(4) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission;

(5) No conveyance shall be forfeited under the provisions of this section unless the owner knew or had reason to believe the vehicle was being used in the commission of any violation that may subject the conveyance to forfeiture under this section;

(6) The trial judge in the criminal proceeding which may subject the conveyance to forfeiture may order the seized conveyance returned to the owner if he finds forfeiture inappropriate. If the conveyance is not returned to the owner the procedures provided in subsection (e) shall apply.

As used in this section concerning a violation of G.S. 14-72.7, the term "conveyance" includes any "instrumentality" as defined in that section.

(b) Any conveyance subject to forfeiture under this section may be seized by any law-enforcement officer upon process issued by any district or superior court having original jurisdiction over the offense except that seizure without such process may be made when:

(1) The seizure is incident to an arrest or subject to a search under a search warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this section.

(c) The conveyance shall be deemed to be in custody of the law-enforcement agency seizing it. The law-enforcement agency may remove the property to a place designated by it or request that the North Carolina Department of

Justice or Department of Crime Control and Public Safety take custody of the property and remove it to an appropriate location for disposition in accordance with law; provided, the conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by an officer of the agency seizing the conveyance and shall be conditioned upon the return of said property to the custody of said officer on the day of trial to abide the judgment of the court.

(d) Whenever a conveyance is forfeited under this section, the law-enforcement agency having custody of it may:

(1) Retain the conveyance for official use; or

(2) Transfer the conveyance which was forfeited under the provisions of this section to the North Carolina Department of Justice or to the North Carolina Department of Crime Control and Public Safety when, in the discretion of the presiding judge and upon application of the North Carolina Department of Justice or the North Carolina Department of Crime Control and Public Safety, said conveyance may be of official use to the North Carolina Department of Justice or the North Carolina Department of Crime Control and Public Safety; or

(3) Upon determination by the director of any law-enforcement agency that a conveyance transferred pursuant to the provisions of this section is of no further use to said agency, such conveyance may be sold as surplus property in the same manner as other conveyances owned by the law-enforcement agency. The proceeds from such sale, after deducting the cost thereof, shall be paid to the school fund of the county in which said conveyance was seized. Any conveyance transferred to any law-enforcement agency under the provisions of this section which has been modified or especially equipped from its original manufactured condition so as to increase its speed shall be used in the performance of official duties only. Such conveyance shall not be resold, transferred or disposed of other than as junk unless the special equipment or modification has been removed and destroyed, and the vehicle restored to its original manufactured condition.

(e) All conveyances subject to forfeiture under the provisions of this section shall be forfeited pursuant to the procedures for forfeiture of conveyances used to conceal, convey, or transport intoxicating beverages found in G.S. 18B-504. Provided, nothing in this section or G.S. 18B-504 shall be construed to require a conveyance to be sold when it can be used in the performance of official duties of the law-enforcement agency. (1979, c. 592; 1983, c. 74; c. 768, s. 2; 1991, c. 523, s. 4; 2007-178, s. 2.)

Editor's Note. — Subsection (a), as amended by Session Laws 2007-178, s. 2, effective December 1, 2007, is applicable to offenses committed on or after that date.

Session Laws 2007-178, s. 5, contains a severability clause.

CASE NOTES

Vehicles. — Where defendant used two vehicles in the commission of armed robbery, forfeiture of both vehicles was authorized by this section. State v. Bishop, 343 N.C. 518, 472 S.E.2d 842 (1996), cert. denied, 519 U.S. 1097, 117 S. Ct. 779, 136 L. Ed. 2d 723 (1997).

A town lacked authority to seize a vehicle used by its owner to aid and abet a felonious larceny, because only "law-enforcement officers" are authorized to seize conveyances, and the town was not a "law-enforcement officer." In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

Search Warrant. — A town had standing to apply for a search warrant authorizing seizure of a vehicle, although the town had no authority to conduct the search, where the town sought seizure and forfeiture of a vehicle used to aid and abet a felonious larceny. In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

Only district attorneys are to prosecute forfeiture proceedings. In re 1990 Red Cherokee Jeep, 131 N.C. App. 108, 505 S.E.2d 588 (1998).

§ 14-86.2. Larceny, destruction, defacement, or vandalism of portable toilets or pumper trucks.

Unless the conduct is covered under some other provision of law providing greater punishment, if any person steals, takes from its temporary location or from any person having the lawful custody thereof, or willfully destroys, defaces, or vandalizes a chemical or portable toilet as defined in G.S. 130A-290 or a pumper truck that is operated by a septage management firm that is permitted by the Department of Environment and Natural Resources under G.S. 130A-291.1, the person is guilty of a Class 1 misdemeanor. (2009-37, s. 1.)

Editor's Note. — Session Laws 2009-37, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§§ 14-86.3, 14-86.4: Reserved for future codification purposes.

Article 16A.

Organized Retail Theft.

§ 14-86.5. Definitions.

The following definitions apply in this Article:

(1) "Retail property." — Any new article, product, commodity, item, or component intended to be sold in retail commerce.

(2) "Retail property fence." — A person or business that buys retail property knowing or believing that retail property is stolen.

(3) "Theft." — To take possession of, carry away, transfer, or cause to be carried away the retail property of another with the intent to steal the retail property.

(4) "Value." — The retail value of an item as advertised by the affected retail establishment, to include all applicable taxes. (2007-373, s. 3.)

Editor's Note. — This article, as added by Session Laws 2007-373, s. 4, effective December 1, 2007, is applicable to offenses committed on or after that date.

§ 14-86.6. Organized retail theft.

(a) A person is guilty of a Class H felony if the person:

(1) Conspires with another person to commit theft of retail property from retail establishments, with a value exceeding one thousand five hundred dollars ($1,500) aggregated over a 90-day period, with the intent to sell that retail property for monetary or other gain, and who takes or causes that retail property to be placed in the control of a retail property fence or other person in exchange for consideration.

(2) Receives or possesses any retail property that has been taken or stolen in violation of subdivision (1) of this subsection while knowing or having reasonable grounds to believe the property is stolen.

(b) Any interest a person has acquired or maintained in violation of this section shall be subject to forfeiture pursuant to the procedures for forfeiture set out in G.S. 18B-504. (2007-373, s. 3; 2008-187, s. 34(c).)

Effect of Amendments. — Session Laws 2008-187, s. 34(c), effective August 7, 2008, substituted "from retail establishments" for "from a retail establishment" in subdivision (a)(1).

ARTICLE 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

(b), (c) Repealed by Session Laws 1979, c. 760, s. 5.

(d) Repealed by Session Laws 1993, c. 539, s. 1173. (1929, c. 187, s. 1; 1975, cc. 543, 846; 1977, c. 871, ss. 1, 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, ss. 12, 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1173; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to facilities and programs for youthful offenders, see G.S. 148-49.10 through 148-49.16.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For note on lesser included offenses, see 2 Campbell L. Rev. 145 (1980).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For article, "Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated," see 66 N.C.L. Rev. 283 (1988).

CASE NOTES

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I. GENERAL CONSIDERATION.

Purpose. — The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947); State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955). See State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

A principal purpose of this section was to increase the penalties for armed robberies effected by the use of dangerous weapons. Ashford v. Edwards, 780 F.2d 405 (4th Cir. 1985).

This section seeks retribution by punishing a specific offender, rather than deterrence by creating a new crime of possession of a firearm during a robbery. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

The section's thrust was not to redefine robbery by eliminating the element of a taking from the offense, but rather to provide that an attempted taking with a dangerous weapon be punished as severely as a completed taking under the same circumstances, and that both be punished more severely than forceful takings committed without dangerous weapons. State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

The purpose of the section was to increase the punishment for common law robbery when firearms or other dangerous weapons were used to commit a robbery, whether or not the robber succeeded in the effort to take personal property. State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction. Where a continuous transaction occurs, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial. State v. Olson, 330 N.C. 557, 411 S.E.2d 592 (1992).

For the offense of robbery with a dangerous weapon there must be a continuous transaction in which the threat or use of the dangerous weapon and the taking are so joined in time and circumstances as to be inseparable. State v. Barnes, 125 N.C. App. 75, 479 S.E.2d 236 (1996), aff'd, 347 N.C. 350, 492 S.E.2d 355 (1997).

Common-Law Offense Not Changed. — This section does not change the offense of common-law robbery or divide it into degrees. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Section Increases Penalty for Use of Weapon Rather Than Creating New Offense. — This section creates no new offense. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed. In re Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972); State v. Ribens, 299 N.C. 385, 261 S.E.2d 867 (1980).

The use, or threatened use, of firearms or other dangerous weapons in perpetrating a robbery does not add to or subtract from the common-law offense of robbery, but this section provides a more severe punishment for a robbery attempted or accomplished with the use of a dangerous weapon. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

This section creates no new offense, but provides that when firearms or other dangerous weapons are used, more severe punishment may be imposed. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

This section does not create a new crime, it merely increases the punishment which may be imposed from common-law robbery where the perpetrator employs a weapon. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

The focus of this section is not the creation of a new crime for commission of an offense with a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

State must show active participation or accessory before the fact in a prosecution for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Principals Equally Guilty. — All who are present at the place of a crime and are either aiding, abetting, assisting or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

Both principals in the first degree and principals in the second degree are considered principals and are equally guilty of common-law robbery. State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982).

Persons Who Aid and Abet Attempt. — By its express terms, this section extends to one who aids and abets in an attempt to commit armed robbery. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

Guilt of Coconspirator for Murder Committed in Course of Armed Robbery. — When a conspiracy is formed to commit an armed robbery and any one of the conspirators commits a murder in the perpetration or attempted perpetration of the armed robbery, all conspirators actually or constructively present, aiding and abetting the actual perpetrators of the crime of armed robbery are guilty of murder in the first degree. Where one has entered into the perpetration of a felony and has aided or encouraged its commission, he cannot escape criminal liability by withdrawing from the scene. State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983).

Exception to signing of judgment entered upon defendant's conviction of armed robbery was without merit where the indictment properly charged defendant with armed robbery, the evidence supported the judgment and the sentence was within the statutory limits. State v. Hughes, 8 N.C. App. 334, 174 S.E.2d 1 (1970).

Conviction of Armed Robbery and Unlawful Use of a Conveyance Upheld. — Defendant did not suffer conviction for the same crime twice by being convicted of armed robbery and the unlawful use of a conveyance; defendant was not charged with the armed robbery of an automobile, but instead, he was charged with the larceny of the automobile after the crime of armed robbery had been completed; therefore, defendant could be convicted of the larceny of the automobile as a separate crime. State v. Stevens, 94 N.C. App. 194, 379 S.E.2d 863, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

Variance Between Indictment and Evidence Not Fatal. — Variance between an indictment, which stated defendant took a wallet and its contents, a television, and a VCR from a victim, and the evidence at trial, which showed defendant took $50 from the victim while his accomplice took the other items, was not fatal to the indictment; the gist of the offense of robbery with a dangerous weapon was not the taking of personal property but rather a taking or attempted taking by force or putting a victim in fear by use of a dangerous weapon and the evidence at trial tended to show defendant took the money from the victim at gunpoint. State v. McCree, 160 N.C. App. 19, 584 S.E.2d 348, 2003 N.C. App. LEXIS 1667 (2003), notice of appeal dismissed, cert. denied, 357 N.C. 661, 590 S.E.2d 855 (2003).

Plain Error Found. — Trial court committed plain error in failing to instruct the jury on conspiracy to commit common law robbery as the jury was properly instructed on robbery with a dangerous weapon and common law robbery, apparently based on the conflicting evidence regarding whether the gun used was real or fake; the same conflicting evidence directly pertained to defendant's charge of conspiracy to commit common law robbery as there was conflicting evidence as to whether the agreement was that the person who committed the robbery would use a real or a fake gun. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

Instruction on Parole Ineligibility in Capital Case. — Where a state prisoner, who was convicted of first-degree murder, first-degree rape, kidnapping, armed robbery, and the burning of personal property, in violation of G.S. 14-17, 14-27.2(a)(2), 14-39, 14-87, and 14-66, argued that the sentencing court erred by failing to provide a parole ineligibility instruction, the prisoner, who was sentenced to death for the murder conviction, was not entitled to federal habeas corpus relief because the prisoner would have been eligible for parole under former G.S. 15A-1371(a1) if the jury had recommended life imprisonment; thus, because the prisoner was eligible for parole as a matter of law, the prisoner was not entitled to a parole ineligibility instruction. Campbell v. Polk, 447 F.3d 270, 2006 U.S. App. LEXIS 11591 (4th Cir. 2006).

Applied in State v. Riddle, 205 N.C. 591, 172 S.E. 400 (1933); State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951); State v. Kerley, 246 N.C. 157, 97 S.E.2d 876 (1957); State v. Sheffield, 251 N.C. 309, 111 S.E.2d 195 (1959); State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960); State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963); State v. Goins, 261 N.C. 707, 136 S.E.2d 97 (1964); State v. McNeil, 263 N.C. 260, 139 S.E.2d 667 (1965); State v. Chamberlain, 263 N.C. 406, 139 S.E.2d 620 (1965); State v. Haney, 263 N.C. 816, 140 S.E.2d 544 (1965); State v. Reid, 263 N.C. 825, 140 S.E.2d 547 (1965); State v. Benfield, 264 N.C. 75, 140 S.E.2d 706 (1965); State v. Fletcher, 264 N.C. 482, 141 S.E.2d 873 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Bridges, 266 N.C. 354, 146 S.E.2d 107 (1966); State v. McKissick, 268 N.C. 411, 150 S.E.2d 767 (1966); State v. Day, 268 N.C. 464, 150 S.E.2d

863 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Goodman, 269 N.C. 305, 152 S.E.2d 116 (1967); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Aycoth, 270 N.C. 270, 154 S.E.2d 59 (1967); State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967); State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967); State v. Aycoth, 272 N.C. 48, 157 S.E.2d 655 (1967); State v. McNair, 272 N.C. 130, 157 S.E.2d 660 (1967); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Davis, 273 N.C. 349, 160 S.E.2d 75 (1968); State v. Williams, 1 N.C. App. 127, 160 S.E.2d 121 (1968); State v. Hamm, 1 N.C. App. 444, 161 S.E.2d 758 (1968); State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Gwyn, 7 N.C. App. 397, 172 S.E.2d 105 (1970); State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970); State v. Elliott, 9 N.C. App. 1, 175 S.E.2d 312 (1970); State v. Summerlin, 9 N.C. App. 457, 176 S.E.2d 356 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Little, 13 N.C. App. 228, 185 S.E.2d 23 (1971); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Long, 280 N.C. 633, 187 S.E.2d 47 (1972); State v. Davis, 14 N.C. App. 278, 188 S.E.2d 13 (1972); State v. Jackson, 14 N.C. App. 288, 188 S.E.2d 28 (1972); State v. Wynn, 14 N.C. App. 291, 187 S.E.2d 881 (1972); State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972); State v. Long, 14 N.C. App. 653, 188 S.E.2d 533 (1972); State v. McLean, 14 N.C. App. 664, 188 S.E.2d 525 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Howes, 19 N.C. App. 155, 198 S.E.2d 86 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Capel, 21 N.C. App. 311, 204 S.E.2d 226 (1974); State v. Lucas, 21 N.C. App. 343, 204 S.E.2d 195 (1974); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974); State v. Teat, 22 N.C. App. 484, 206 S.E.2d 732 (1974); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Dunn, 26 N.C. App. 475, 216 S.E.2d 412 (1975); State v. Portee, 28 N.C. App. 507, 221 S.E.2d 722 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979); State v. Reid, 55 N.C. App. 72, 284 S.E.2d 519 (1981); State v. Whitaker, 55 N.C. App. 666, 286 S.E.2d 640 (1982); State v. Thompson, 57 N.C. App. 142, 291 S.E.2d 266 (1982); State v. Richardson, 58 N.C. App. 558, 297 S.E.2d 921 (1982); State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983); State v. Gonzalez, 62 N.C. App. 146, 302 S.E.2d 463 (1983); State v. Murray, 310 N.C. 541, 313 S.E.2d 523 (1984); State v. Johnson, 310 N.C. 574, 313 S.E.2d 560 (1984); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Williams, 69 N.C. App. 126, 316 S.E.2d 322 (1984); State v. Wallace, 71 N.C. App. 681, 323 S.E.2d 403 (1984); State v. Moose, 73 N.C. App. 264, 326 S.E.2d 343 (1985); State v. Suggs, 86 N.C. App. 588, 359 S.E.2d 24 (1987); State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992); State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992); State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475 (1992); State v. Williams, 108 N.C. App. 295, 423 S.E.2d 333 (1992); State v. Summey, 109 N.C. App. 518, 428 S.E.2d 245 (1993); Robbins v. Freeman, 127 N.C. App. 162, 487 S.E.2d 771 (1997); State v. Cobb, 150 N.C. App. 31, 563 S.E.2d 600, 2002 N.C. App. LEXIS 387 (2002); State v. Earwood, 155 N.C. App. 698, 574 S.E.2d 707, 2003 N.C. App. LEXIS 20 (2003); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007); State v. Taylor, 191 N.C. App. 561, 664 S.E.2d 375, 2008 N.C. App. LEXIS 1476 (2008).

Cited in State v. Williams, 116 N.C. App. 354, 447 S.E.2d 437; State v. Murph, 212 N.C. 494, 193 S.E. 709 (1937); State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967); State v. Guthrie, 269 N.C. 699, 153 S.E.2d 361 (1967); State v. Green, 2 N.C. App. 391, 163 S.E.2d 14 (1968); Broyhill v. Morris, 408 F.2d 820 (4th Cir. 1969); State v. Bumper, 5 N.C. App. 528, 169 S.E.2d 65 (1969); State v. Smith, 278 N.C. 476, 180 S.E.2d 7 (1971); State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971); State v. Carthens, 284 N.C. 111, 199 S.E.2d 456 (1973); State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. Jones, 26 N.C. App. 467, 216 S.E.2d 387 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979); State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706 (1979); In re Vinson, 40 N.C. App. 423, 252 S.E.2d 854 (1979); In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980); State v. Mullen, 53 N.C. App. 106, 280 S.E.2d 11 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981); State v. Anderson, 303 N.C. 185, 278 S.E.2d 238 (1981); State v. Smith, 304 N.C. 706, 285 S.E.2d 800 (1982); In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982); State v. Stevens, 305 N.C. 712, 291 S.E.2d 585 (1982); Bryant v. Cherry, 687 F.2d 48 (4th Cir. 1982); State v. Moore, 65 N.C. App. 56, 308 S.E.2d 723

(1983); State v. Yarborough, 64 N.C. App. 500, 307 S.E.2d 794 (1983); Hyman v. Garrison, 567 F. Supp. 588 (E.D.N.C. 1983); State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Foster, 63 N.C. App. 507, 305 S.E.2d 219 (1983); State v. Miller, 64 N.C. App. 390, 307 S.E.2d 439 (1983); State v. Herbin, 64 N.C. App. 711, 308 S.E.2d 338 (1983); Ledford v. Hinton, 563 F. Supp. 785 (W.D.N.C. 1983); State v. Pickett, 65 N.C. App. 617, 309 S.E.2d 711 (1983); State v. Thompson, 66 N.C. App. 679, 312 S.E.2d 212 (1984); State v. Cunningham, 68 N.C. App. 117, 314 S.E.2d 556 (1984); State v. Grier, 70 N.C. App. 40, 318 S.E.2d 889 (1984); State v. Latta, 75 N.C. 611, 331 S.E.2d 213 (1985); State v. Woods, 77 N.C. App. 622, 336 S.E.2d 1 (1985); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985); State v. Woods, 317 N.C. 143, 343 S.E.2d 538 (1986); State v. Alston, 82 N.C. App. 372, 346 S.E.2d 184 (1986); State v. Williams, 82 N.C. App. 281, 346 S.E.2d 315 (1986); State v. Williams, 83 N.C. App. 527, 350 S.E.2d 914 (1986); State v. Mack, 87 N.C. App. 24, 359 S.E.2d 485 (1987); State v. Alston, 323 N.C. 614, 374 S.E.2d 247 (1988); State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989); State v. Annadale, 95 N.C. App. 734, 383 S.E.2d 679 (1989); State v. Ellis, 100 N.C. App. 591, 397 S.E.2d 518 (1990); State v. Tilley, 100 N.C. App. 588, 397 S.E.2d 368 (1990); Howell v. Barker, 904 F.2d 889 (4th Cir. 1990); State v. Haskins, 104 N.C. App. 675, 411 S.E.2d 376 (1991); State v. Brooks, 105 N.C. App. 413, 413 S.E.2d 312 (1992); State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992); State v. Wilson, 108 N.C. App. 117, 423 S.E.2d 473 (1992); State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992); United States v. Fonville, 5 F.3d 781 (4th Cir. 1993); State v. Capps, 114 N.C. App. 156, 441 S.E.2d 621 (1994); State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996); State v. Stewart, 122 N.C. App. 748, 471 S.E.2d 647 (1996); State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (1998); State v. Holt, 144 N.C. App. 112, 547 S.E.2d 148, 2001 N.C. App. LEXIS 324 (2001); State v. Frazier, 150 N.C. App. 416, 562 S.E.2d 910, 2002 N.C. App. LEXIS 483 (2002); State v. Hinton, 155 N.C. App. 561, 573 S.E.2d 609, 2002 N.C. App. LEXIS 1578 (2002); State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898, 2004 N.C. App. LEXIS 181 (2004); State v. Roache, 358 N.C. 243, 595 S.E.2d 381, 2004 N.C. LEXIS 340 (2004); State v. Berryman, 170 N.C. App. 336, 612 S.E.2d 672, 2005 N.C. App. LEXIS 1004 (2005); State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656, 2007 N.C. App. LEXIS 2084 (2007); State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701, 2008 N.C. App. LEXIS 431 (2008); State v. Allen, — N.C. App. —, 667 S.E.2d 295, 2008 N.C. App. LEXIS 1820 (2008).

II. COMMON-LAW ROBBERY.

Elements of Offense. — Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972); State v. Hoover, 14 N.C. App. 154, 187 S.E.2d 453, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (1972); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977); State v. Melvin, 57 N.C. App. 503, 291 S.E.2d 885, cert. denied, 306 N.C. 748, 295 S.E.2d 484 (1982).

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972); State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980); State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Common-law robbery is the felonious, nonconsensual taking of money or personal property from the person or presence of another by means of violence or fear. State v. Smith, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982).

The essential elements of the offense of common-law robbery are the taking with the felonious intent of defendant to permanently deprive the owner of his property and to convert the owner's property to his own use. State v. McCullough, 79 N.C. App. 541, 340 S.E.2d 132, cert. denied, 316 N.C. 556, 344 S.E.2d 13 (1986).

Common-law robbery is the taking and carrying away of personal property of another from his person or presence without his consent by violence or by putting him in fear and with the intent to deprive him of its use permanently, the taker knowing that he was not entitled to take it. State v. McCullough, 79 N.C. App. 541, 340 S.E.2d 132, cert. denied, 316 N.C. 556, 344 S.E.2d 13 (1986).

Not Defined by Statute. — Robbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated form of larceny. State v. Smith, 268 N.C. 167, 150

S.E.2d 194 (1966); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970); State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Highway robbery is a common-law offense and is frequently denominated "common-law robbery." State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Felonious Intent Is Essential Element. — An essential element of the offense of common-law robbery is a felonious taking, i.e., a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

A homicide victim is still a "person" within the meaning of the statutory definition of armed robbery, so long as the death and the taking were so connected as to form a continuous chain of events; the same rule must hold for common-law robbery. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

Use or threatened use of a firearm or other dangerous weapon is not an essential of common-law robbery. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

"Fear" Not Limited to Fear of Death. — The word "fear" as used in the phrase, "putting him in fear," in the definition of common-law robbery is not confined to fear of death. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

Proof of Violence or Fear Sufficient. — For robbery at common law it is not necessary to prove both violence and putting in fear — proof of either is sufficient. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

Absent the elements of violence or intimidation, the offense becomes larceny. State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Degree of force used in common-law robbery is immaterial so long as it is sufficient to cause the victim to part with his property. State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

Solicitation to commit common-law robbery is an infamous crime within the meaning of G.S. 14-3. State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

A spouse may be indicted and convicted of robbery with a dangerous weapon against his or her spouse; the common law rule exempting spouses from prosecution in larceny cases does not apply to prosecutions for armed robbery. State v. Mahaley, 122 N.C. App. 490, 470 S.E.2d 549 (1996).

Evidence Held Sufficient. — Where testimony established that victim's apartment was "a mess" and "in total disarray" and that victim usually kept her apartment neat and clean rather than in the state seen by investigating officers, the evidence permitted a reasonable inference that defendant had engaged in a purposeful search of victim's apartment, at least some part of which occurred in her presence against her will and by putting her in fear, culminating in removal of a radio and ring; therefore, court did not err in refusing to dismiss charge of common-law robbery. State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

III. ARMED ROBBERY.

Armed robbery is a crime of violence, the very nature of which suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Conviction for conspiracy to commit robbery with a dangerous weapon under G.S. 14-87 provided a predicate offense for sentencing under the Armed Career Criminal Act, 18 U.S.C.S. § 924(e)(2)(B), because it was similar to enumerated offenses under § 924(e)(2)(B)(ii), and it was a dangerous crime of violence, which created a serious potential risk of physical injury to another. United States v. White, 571 F.3d 365, 2009 U.S. App. LEXIS 14608 (4th Cir. 2009).

Gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982), overruled on other grounds, 322 N.C. 518, 369 S.E.2d 819 (1988).

Elements of Offense. — Under this section, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977); State v. Davis, 301 N.C. 394, 271 S.E.2d 263 (1980); State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

An armed robbery occurs when an individual takes or attempts to take personal property from the person of another, or in his presence, or from any place of business or residence where there is a person or persons in attendance, by the use or threatened use of a dangerous weapon, whereby the life of a person is endangered or threatened. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

The essentials of the offense set forth in this section are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898, appeal dismissed, 295 N.C. 651, 248 S.E.2d 255 (1978); State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981); State v. Chambers, 53 N.C. App. 358, 280 S.E.2d 636, cert. denied, 304 N.C. 197, 285 S.E.2d 103 (1981); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Willis, 61 N.C. App. 244, 300 S.E.2d 829, cert. denied, 308 N.C. 680, 304 S.E.2d 761 (1983); State v. Abdullah, 309 N.C. 63, 306 S.E.2d 100 (1983); State v. Greene, 67 N.C. App. 703, 314 S.E.2d 262, cert. denied and appeal dismissed, 311 N.C. 405, 319 S.E.2d 276 (1984); State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986), cert. denied, 319 N.C. 460, 356 S.E.2d 8 (1987).

To obtain a conviction for the offense of armed robbery, the State must prove three elements: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means;" and (3) danger or threat to the life of the victim. In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (1995).

The elements necessary to constitute armed robbery under this section are: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and (3) whereby the life of a person is endangered or threatened. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Leonard, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985); State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985); State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

Armed robbery under this section consists of the following elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened. Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

The state sufficiently proved the elements necessary to constitute armed robbery. State v. Wilson, 121 N.C. App. 720, 468 S.E.2d 475 (1996).

It is the taking of personal property from another with force or putting that person in fear that is the gist of this offense, and the ownership of the property taken is not relevant; indeed, the State need only show that the property taken was in the "care, custody, control, management, or possession" of the person from whom it was taken. State v. Willis, 127 N.C. App. 549, 492 S.E.2d 43 (1997).

Armed robbery has the following essential elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. State v. Willis, 127 N.C. App. 549, 492 S.E.2d 43 (1997).

When defendant was convicted of two counts of robbery with a dangerous weapon under G.S. 14-87(a), based on defendant taking personal property from two victims who were married to each other, defendant's claim that defendant should only have been sentenced on one count because the property taken was marital property had no merit because, as long as the evidence showed defendant was not taking defendant's own property, which it did, ownership was irrelevant. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Decedent as Victim. — A homicide victim is still a person, within the meaning of the robbery statute, when the interval between the fatal blow and the taking of property is short. State v. Wilson, 354 N.C. 493, 556 S.E.2d 272, 2001 N.C. LEXIS 1236 (2001).

Robbery from a dead victim was possible when the taking and the death were part of a continuous chain of events. State v. Gainey, 355 N.C. 73, 558 S.E.2d 463, 2002 N.C. LEXIS 21 (2002), cert. denied, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002).

Adjudication of a Juvenile. — Where the State's evidence showed more than "mere possession" of the weapon, the gun was fired into the air shortly before the juvenile demanded candy, the juvenile deliberately gestured toward the gun in his pocket while demanding the candy, and the victim was scared that if he did not comply, the juvenile might shoot him, the trial court did not err in denying the juvenile's motion to dismiss and adjudicating him delinquent on the armed robbery charge. In re Stowe, 118 N.C. App. 662, 456 S.E.2d 336 (1995).

This section superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed "with the use or threatened use of . . . firearms or other dangerous weapon, implement or means whereby the life of a person is endangered or threatened." State v. Rogers, 246 N.C. 611, 99 S.E.2d 803 (1957); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Critical and essential difference between armed robbery and common-law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Where a weapon which is dangerous within the meaning of this section is used in a robbery, the only difference between common-law robbery and armed robbery is whether the life of the person robbed is endangered or threatened by the weapon. State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972).

The essential difference between armed robbery and common-law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980).

The essential difference between armed robbery and common-law robbery is that, to prove the former, the State must produce evidence sufficient to show that the victim was endangered or threatened by the use or threatened use of a firearm or other dangerous weapon, implement or means. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Danger or Threat to Life Must Be Found. — Prerequisite to conviction for armed robbery, the jury must find from the evidence, beyond a reasonable doubt, that the life of the victim was endangered or threatened by the use, or threatened use, of firearms or other dangerous weapon, implement, or means. A conviction of "guilty as charged" may not be based on a finding that the accused "used force or intimidation sufficient to create an apprehension of danger." This is a critical distinction between armed robbery as defined in this section, and common-law robbery. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968); State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981).

This section requires, among other things, that a robbery be accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. State v. Jones, 292 N.C. 255, 232 S.E.2d 707 (1977).

Intent to Kill or Inflict Serious Injury Are Not Elements. — The crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury. State v. Kearns, 27 N.C. App. 354, 219 S.E.2d 228 (1975), cert. denied, 289 N.C. 300, 222 S.E.2d 700 (1976).

Use of force or intimidation must necessarily precede or be concomitant with the taking before the defendant can properly be found guilty of armed robbery. That is, the use of force or violence must be such as to induce the victim to part with his or her property. State v. Richardson, 308 N.C. 470, 302 S.E.2d 799 (1983); State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

In this jurisdiction, for defendant to be found guilty of armed robbery, his use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable. State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

Exact time relationship between violence and actual taking is unimportant, as long as there is one continuing transaction amounting to armed robbery, with the elements of violence and of taking so joined in time and circumstances as to be inseparable. State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

The commission of armed robbery as defined by subsection (a) of this section does not depend upon whether the threat or use of violence precedes or follows the taking of the victim's property. Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the taking is immaterial. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

As Is Forming of Intent and Use of Force. — Provided that the theft and the force are aspects of a single transaction, it is immaterial whether the intention to commit the theft was formed before or after force was used upon the victims. State v. Green, 321 N.C. 594, 365 S.E.2d 587, cert. denied, 488 U.S. 900, 109 S. Ct. 247, 102 L. Ed. 2d 235 (1988).

Felony-Murder Rule. — An essential element of armed robbery, indeed the heart of the offense, is that a firearm or other dangerous weapon be used whereby the life of a person is endangered or threatened. This act is by its nature inherently dangerous to human life; and, if this danger against which the statute is aimed occurs and the robber kills, the act is ordinarily murder under the felony-murder rule. State v. Barnett, 307 N.C. 608, 300 S.E.2d 340 (1983).

Presence of Victim. — The definition of robbery necessarily carries with it the concept that the offense can only be committed in the presence of the victim. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975).

The word "presence" taken from the common-law elements and used in an indictment under this section, must be interpreted broadly and with due consideration to the main element of the crime — intimidation or force by the use or threatened use of firearms. State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

If the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim. State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Herring, 74 N.C. App. 269, 328 S.E.2d 23 (1985), aff'd, 318 N.C. 188, 340 S.E.2d 105 (1986).

Ownership of the property is generally immaterial to the offense of armed robbery as long as the proof is sufficient to establish ownership in someone other than the defendant. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982).

Profit Immaterial. — So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964); State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970); State v. Rawls, 70 N.C. App. 230, 319 S.E.2d 622 (1984), cert. denied, 317 N.C. 713, 347 S.E.2d 451 (1986).

Illustrative Cases. — Where one of the robbers approached victim, pointed a gun at him, and victim did not move and was not injured the act of threatening with a gun was an inherent inevitable feature of the robbery and was insufficient to support a conviction for kidnapping. State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (1998).

The evidence was sufficient for a conviction on armed robbery under this section, where an inference existed that defendant took money from the victim's person after having shot him with a firearm even though other evidence supported a contrary conclusion that the shooting and the taking of the money were two separate transactions. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Defendant was properly convicted of robbery because one of the victims testified that defendant, along with another, burst into a home with guns, demanded that the occupants give up their money and place it onto a table, and that the victim put money on the table in compliance with the demands. State v. Bethea, 156 N.C. App. 167, 575 S.E.2d 831, 2003 N.C. App. LEXIS 68 (2003).

Evidence of, inter alia, defendant's prior history or robbing people, defendant's statement made prior to the commission of the alleged crime that he had planned to rob the victim when the victim returned to buy cocaine, and defendant's actions was sufficient for the jury to convict defendant of armed robbery. State v. Gillis, 158 N.C. App. 48, 580 S.E.2d 32, 2003 N.C. App. LEXIS 941 (2003).

Trial court properly denied defendant's motion to dismiss the armed robbery charges against him, and the evidence was sufficient to support defendant's armed robbery conviction, where: (1) the sole eyewitness testified that she heard someone yell "give me your shit" and "I don't have anything, man," (2) the eyewitness testified that defendant rummaged through the victim's car, (3) the victim's wallet and other personal items were ultimately found strewn outside his car, and (4) prior to the shooting, the eyewitness saw the victim put a handgun in his car. State v. Johnson, 161 N.C. App. 504, 588 S.E.2d 488, 2003 N.C. App. LEXIS 2194 (2003).

Evidence was sufficient to show defendant and another acted in concert to robbery with a dangerous weapon, including testimony that defendant and another had common a plan or purpose to obtain money to go to Florida. State v. Combs, 182 N.C. App. 365, 642 S.E.2d 491, 2007 N.C. App. LEXIS 696 (2007).

Conviction upheld. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; the trial court did not err in admitting the in-court and out-of-court identification of defendant as the perpetrator of a robbery by a store clerk, the State presented a sufficient foundation for the admission of a videotape of the robbery into evidence, and testimony by a police officer which allegedly stated that defendant was a liar did not rise to the level of plain error. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

Substantial evidence was presented from which a jury could find a defendant committed robbery with a dangerous weapon, in violation of G.S. 14-87(a), because a co-defendant testified that defendant retrieved a gun from the co-defendant before entering victims' hotel room, a victim testified that one of the defendants brandished a gun upon entering the hotel room, and the other victim testified the firearm appeared to be a black revolver and that one of the robbers poked the victim in the head several times with the gun, so the defendant's motion to dismiss was properly denied. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Defendant was not entitled to a jury instruction on second-degree murder or manslaughter since the state proceeded on a theory of felony murder only, relying on robbery with a dangerous weapon as the underlying felony, and the evidence of the G.S. 14-87(a) elements was not in conflict; defendant had permission to access the victim's marijuana in a temporary manner, but then used a dangerous weapon to remove the drug from the victim's possession. State v. Gwynn, 362 N.C. 334, 661 S.E.2d 706, 2008 N.C. LEXIS 486 (2008).

Trial court did not err in denying defendant's motion to dismiss a robbery charged based on insufficient evidence of the use of a firearm during the robbery, as the law would presume the instrument to be what defendant's conduct represented it to be — a firearm or other dangerous weapon. State v. Ford, — N.C. App. —, 669 S.E.2d 832, 2008 N.C. App. LEXIS 2228 (2008).

Ineffective Assistance of Counsel Not Found. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; defendant did not receive ineffective assistance of counsel pursuant to the test in G.S. 15A-1443(a), as counsel did not err in failing to object to the identification of defendant, or to the introduction of a videotape of the robbery, based on a legitimate trial strategy. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

IV. ATTEMPTED ROBBERY.

Attempt Is of Equal Gravity with Completed Act. — This section makes the attempt to commit the offense an offense of equal gravity with the completed act. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

Elements of attempted armed robbery are: (1) The unlawful attempted taking of personal property from another, (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means," and (3) danger or threat to the life of the victim. State v. Torbit, 77 N.C. App. 816, 336 S.E.2d 122, appeal dismissed and cert. denied, 316 N.C. 201, 341 S.E.2d 573 (1985).

An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his or her life with a dangerous weapon, does some overt act calculated to bring about this result. State v. Allison, 319 N.C. 92, 352 S.E.2d 420 (1987).

Attempt Completes Offense. — An attempt to take money or other personal property from another under the circumstances delineated by this section constitutes an accomplished offense, and is punishable to the same extent as if there was an actual taking. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Offense is complete if there is an attempt to take property by use of firearms or other dangerous weapons. Thus, all that is necessary to prove the offense is that an attempt was made to rob by the use of a firearm or other dangerous weapon. State v. Thompson, 64 N.C. App. 485, 307 S.E.2d 838 (1983), cert. denied, 313 N.C. 513, 329 S.E.2d 399 (1985).

The attempt to take property by the forbidden means, all other elements being present, completes the offense of armed robbery. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

The offense is complete if there is either a taking or an attempt to take the personal property of another by the means and in the manner prescribed by this section, but there must be one or the other. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971); State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

Under this section an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is a completed crime and is punishable to the same extent as if the property had been taken as intended. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

Under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972); State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977); State v. Hunt, 297 N.C. 447, 255 S.E.2d 182 (1979).

If all of the elements are present, the offense is complete whether the taking is successful or amounts only to an attempt to take personalty from the victim. State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 153 (1973).

Intent Required. — One of the elements of an attempt to commit a crime is that defendant must have intent to commit the substantive offense. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

It is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction. State v. Faison, 330 N.C. 347, 411 S.E.2d 143 (1991).

Overt Act Required. — There can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

An attempt occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976); State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some over act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

Attempted armed robbery occurs when a person with the requisite intent does some overt act calculated to unlawfully deprive another of personal property by endangering or threatening his life with a firearm. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

Court Guided by Peculiar Facts of Case. — In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

Overt Act Held to Have Occurred Before Interruption. — Where defendant entered a store, pulled a gun from under his shirt, pointed it at the proprietor at close range and ordered the proprietor not to move and not to put his hands under the counter, and having obtained the owner's compliance with his demands, then proceeded to order him to move away from the counter, directing him to move to the center of the store, and at this point the intended robbery was interrupted, the crime of attempted armed robbery was complete because defendant had manifested an intent to rob and had done an affirmative act beyond mere preparation in furtherance of that intent. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

Evidence Held to Raise Suspicion That No Overt Act Occurred. — In a prosecution for attempted armed robbery, the evidence did no more than place defendant in the hardware store with a pistol in his belt. He had no accomplice. He did not make a gesture indicating an intent to touch, withdraw or otherwise threaten the use of the pistol. There was, therefore, no threat, actual or constructive, of the use of a deadly weapon. He did not make a demand, express or implied, for money or other property. The evidence raised a suspicion that defendant may have intended to commit a robbery or other crime but fell short of showing an overt act in furtherance of an intent to rob. State v. Jacobs, 31 N.C. App. 582, 230 S.E.2d 550 (1976).

Although lurking outside a place of business with a loaded pistol may be unlawful conduct, it does not constitute the sort of overt act which would clearly show that defendant attempted to rob that business. State v. Parker, 66 N.C. App. 355, 311 S.E.2d 327 (1984).

Evidence Held Sufficient. — Despite testimony of victim to a completed armed robbery, where defendant testified that when he went into house he intended to rob both men who were there, but that after he shot murder victim the other victim asked defendant not to shoot him and threw his wallet toward defendant and that defendant left without taking the wallet, this was evidence from which the jury could find all the elements of attempted armed robbery so as to support a verdict of felony murder based on attempted armed robbery. State v. Blake, 326 N.C. 31, 387 S.E.2d 160 (1990).

The evidence supported the defendant's conviction of armed robbery, where he took marijuana from a guest of the victim, and when the victim would not move from the doorway, he brandished a pistol at her, threatened to shoot her, and took $31 off her television set as he was leaving, which established a continuous transaction, with the threatened use of a firearm so connected in time and circumstance with the actual taking as to be inseparable. State v. McDonald, 130 N.C. App. 263, 502 S.E.2d 409 (1998).

Although defendant testified that defendant was attempting to retrieve a necklace which another person took from defendant in an earlier robbery when defendant pointed a gun at the other person and told the other person "to give it up," evidence supported jury's finding that defendant had felonious intent, and the appellate court sustained defendant's conviction for attempted robbery with a firearm. State v. Poole, 154 N.C. App. 419, 572 S.E.2d 433, 2002 N.C. App. LEXIS 1444 (2002), cert. denied, 356 N.C. 689, 578 S.E.2d 589 (2003).

V. USE OR THREATENED USE OF DANGEROUS WEAPON.

A. In General.

Main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944); State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); State v. Haddick, 76 N.C. App. 524, 333 S.E.2d 518 (1985).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use of or threatened use of firearms or other dangerous weapon. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965); State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In an indictment for robbery with firearms or other dangerous weapons, the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapons. State v. Harris, 8 N.C. App. 653, 175 S.E.2d 334 (1970).

In an indictment for robbery, the kind and value of the property taken is not material — the gist of the offense is not the taking, but a taking by force or putting in fear. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

The gist of the offense of armed robbery is not the taking but the taking by force or putting in fear. Testimony by the victim of the armed robbery that he was scared is sufficient to meet the requirements of the statute. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

The gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use or threatened use of firearms or other dangerous weapons whereby the life of a person is endangered or threatened. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, cert. denied and appeal dismissed, 301 N.C. 238, 283 S.E.2d 134 (1980).

Defendant's claim that the trial court erred in allowing a victim of his armed robbery to testify as to how she felt when the gun was placed to her head was reviewed by plain error standard because he had not preserved that issue for review by having raised it in the trial court, pursuant to N.C. R. App. P. 10(b)(1); the court found that the testimony was relevant, pursuant to G.S. 8C-1, Rule 401, in that her testimony as to her fear for her life and her intimidation proved the main element of the offense of robbery with a dangerous weapon in violation of G.S. 14-87. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Possession, use or threatened use of a firearm is a separate element from "endangering or threatening" the life of a person in the crime of armed robbery. State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987).

Representations of Firearm and Reasonable Belief by Victim Sufficient. — The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 883 (1998), appeal dismissed, 348 N.C. 76, 505 S.E.2d 883 (1998).

To obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. Proof requires that the victim reasonably believed that defendant possessed, or used or threatened to use a firearm in the perpetration of the crime. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 883 (1998), appeal dismissed, 348 N.C. 76, 505 S.E.2d 883 (1998).

Question Is Whether Use of Particular Instrument Threatened or Endangered Life. — In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of this section, the determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened. State v. Alston, 305 N.C. 647, 290 S.E.2d 614 (1982); State v. Joyner, 67 N.C. App. 134, 312 S.E.2d 681 (1984), aff'd, 312 N.C. 779, 324 S.E.2d 841 (1985).

In determining whether a robbery with a particular implement constitutes a violation of this section, the determinative question is whether the evidence was sufficient to support a jury finding that a person's life was in fact endangered or threatened. State v. Joyner, 312 N.C. 779, 324 S.E.2d 841 (1985).

Not Whether Victim Was Scared or in Fear of His Life. — The question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

The question under this section is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of the opened knife, not whether the person was scared or in fear of his life. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

Where there was evidence sufficient to show that the victim was in fear for her life, the State did not have to prove such fear to overcome defendant's motion for nonsuit. Rather, the State could prove, at the least, that during the course of the robbery or attempted robbery, there was a threatened use of a dangerous weapon which endangered or threatened the life of the victim. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

"Endangered or Threatened" Construed Conjunctively. — Although this section sets forth disjunctively, "endangered or threatened," several means or ways by which this offense may be committed, a warrant thereunder correctly charges them conjunctively, as "endangered and threatened." State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

Presumption That Victim Was Endangered or Threatened. — Where defendant uses a dangerous weapon per se, there is a mandatory presumption that the victim's life was in fact endangered or threatened. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Effect on Presumption of Evidence that Victim Was Not Endangered or Threatened. — Where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. However, when any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a mere permissive inference which permits but does not require the jury to infer the elemental fact of danger or threat to life from the basic fact proven, that is, robbery with what appeared to the victim to be a firearm or other dangerous weapon. State v. Allen, 74 N.C. App. 449, 328 S.E.2d 615, rev'd on other grounds, 317 N.C. 119, 343 S.E.2d 893 (1986).

While evidence that defendant was found with an inoperable pistol or that he used a cap pistol removed the mandatory presumption of danger or threat to life, allowing the jury to consider the lesser included offense of common law robbery, the evidence was not so compelling as to prevent a permissive inference of danger or threat to life or to require a directed verdict in defendant's favor as to the charge of robbery with a dangerous weapon, as defendant had ample time to have discarded the barrel portion of the pistol which was found in his possession, and, testimony at trial clearly showed that a gun barrel was seen in defendant's hand at the time of the robbery. State v. Allen, 74 N.C. App. 449, 328 S.E.2d 615, rev'd on other grounds, 317 N.C. 119, 343 S.E.2d 893 (1986).

Danger or Threat Must Be Shown Beyond Reasonable Doubt. — For a conviction of robbery with firearms or other dangerous weapons, the State must further show beyond a reasonable doubt that the life of a person was endangered or threatened by the defendant's, or his accomplice's, possession, use or threatened use of a firearm or other dangerous weapon, implement or means; proof of this additional element is not required for conviction of the offense of common-law robbery. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Serious injury need not be shown at all in a prosecution for armed robbery. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Nor Intent to Kill. — Neither the infliction of serious injury nor an intent to kill is an essential element of the charge of armed robbery. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

Evidence of a continuing threat meets the element of endangering or threatening a person's life in an armed robbery charge. State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987).

In a prosecution for robbery with a dangerous weapon, the evidence was sufficient to allow a jury to find that defendant's use of a knife to threaten the victim's life was part of a continuous transaction beginning when defendant stole videos from the victim, as the victim chased defendant after he took the videos, and defendant's use of the knife was necessary to allow defendant to successfully complete his taking of the videos. State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663, 2003 N.C. App. LEXIS 1434 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Continuing Threat Held to Extend to Victim's Subsequent Acts. — Where, although the victim did not testify that defendant actually pointed the gun at her at the time she gave her ring to his accomplice, earlier there had been such "use" of the firearm as to force her to commit certain acts, and it had been made clear to her on several occasions prior to the actual taking of her ring that the firearm would be used against her if she did not comply, this continuing threat extended to every subsequent act by her, and thus constituted a "threatened use" of a firearm which "endangered or threatened" her life within the terms of subsection (a). State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Where there was a display of a firearm which induced the victim to acquiesce to the defendants' demands, and on several occasions the defendants indicated that they would use the weapon if the victim resisted, the conduct of the defendants rose to the level of a continuing threat of the use of a firearm sufficient to support conviction of the defendants under this section. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Intent to Harm Not Required. — This section does not require the State to prove that defendant intended to cut the victim, it requires only a showing that defendant used or threatened to use a dangerous weapon or implement and posed a danger or threat to the life of the victim. State v. Harris, 115 N.C. App. 560, 445 S.E.2d 626 (1994).

Actual Possession of Weapon Necessary. — The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common-law robbery, and construing the title and context of the statute together to ascertain the legislative intent, it was held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it was reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. State v. Keller, 214 N.C. 447, 199 S.E. 620 (1938).

The actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon. Whether it was a firearm or a toy pistol, and if a toy pistol, whether it was a dangerous weapon were questions for the jury under proper instructions. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

But Mere Possession Insufficient. — Mere possession of a firearm during the course of a robbery is insufficient to support an armed robbery conviction under this section; rather, the section includes an additional requirement that the possession of the firearm threaten or endanger the life of a person. State v. Gibbons, 303 N.C. 484, 279 S.E.2d 574 (1981); State v. Bartow, 77 N.C. App. 103, 334 S.E.2d 480 (1985).

The mere possession of a firearm during the course of taking property is not a violation of subsection (a) of this section; the firearm must be used to endanger or threaten the life of a person, as that element is the essence of armed robbery. State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987).

Operable Gun Required. — Subsection (a) is distinguishable because the only way a person's life would be threatened is with the use of an operable gun; the armed robbery statute necessarily implies that the gun be operable. To the contrary, G.S. 14-269.2(b) states it is illegal to carry any gun on school property. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Statement in an indictment that defendant kept his hand in his coat while demanding money was insufficient to support a charge of armed robbery in violation of G.S. 14-87, because it failed either to state expressly that the weapon was dangerous or to allege facts that showed the dangerous nature of the alleged weapon. State v. Marshall, 188 N.C. App. 744, 656 S.E.2d 709, 2008 N.C. App. LEXIS 277 (2008).

When the evidence shows that a firearm, or what appeared to be a firearm, was used in accomplishing a robbery, and there is no evidence that the firearm was incapable of endangering or threatening the victim's life, the jury may infer, if it is not required to find, that the victim's life was endangered or threatened by the weapon. State v. Hewett, 87 N.C. App. 423, 361 S.E.2d 104 (1987).

Force May Be Actual or Constructive. — The element of force in the offense of robbery may be actual or constructive. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Actual Force". — Actual force implies physical violence. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Constructive Force". — Under constructive force are included all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Exhibition of a pistol while demanding money conveyed the message loud and clear that the victim's life was being threatened. State v. Green, 2 N.C. App. 170, 162 S.E.2d 641 (1968).

Verbal Demand to Surrender Money Not Required. — The fact that neither defendant nor a companion made any verbal demand on the prosecuting witness to surrender money did not entitle defendant to a nonsuit in an armed robbery prosecution, where evidence showed that the witness had immediately pitched the money onto the floor when a gun was pointed in his face. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Threats Expressed by Nonverbal Conduct. — Threats under this section may be expressed by nonverbal conduct as well as by words, and the fact that defendant left the pistol stuck in his belt or pants instead of pointing it directly at his victim did not lessen his implied threat to use it or the danger to the life of his victim had he not yielded. State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

Assault on Victim's Husband as Threat. — Where victim was standing about a foot from her husband during defendant's assault upon and robbery of him, and saw defendant reach for her husband's notebook, knock him to the ground, and take her husband's watch and wallet, it was clear that defendant made a threat to victim's life, which threat did not end when defendant finished robbing her husband but continued through the time he took victim's shoulder bag, even though he never pointed his gun at her, told her to give him her bag, or verbally threatened her life, as defendant's assault of victim's husband in order to take his property spoke louder than any words of threat. State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987).

Use of Gun to Facilitate Escape Held Concomitant with Robbery Attempt. — Defendant was not entitled to dismissal of charge of attempted robbery with a firearm on grounds that there was no evidence that he displayed, used, or threatened to use the gun during the course of the attempted robbery, but that the evidence showed that his gun was used only to facilitate his escape, where the evidence was sufficient to allow the jury to conclude that defendant's use or threatened use of his gun was concomitant with and inseparable from his robbery attempt. State v. Von Cunningham, 97 N.C. App. 631, 389 S.E.2d 286, cert. denied, 326 N.C. 802, 393 S.E.2d 905 (1990).

While defendant's use of intimidation with a gun occurred after the taking of the property, the effort to avoid apprehension was an action continuous with the taking and was a part of the robbery attempt; defendant's armed robbery conviction was affirmed where, after taking shirts from a store, defendant showed the security officers who tried to stop him that he had a gun. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Where defendant was in possession of a knife, but did not use or threaten to use the knife during the taking of victim's purse, and victim was asleep at the time of the taking, trial court erred in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon. State v. Dalton, 122 N.C. App. 666, 471 S.E.2d 657 (1996).

No Voluntary Intent to Abandon Fruits of Thievery. — Defendant's act of pushing away a shopping cart containing a stolen saw before brandishing a knife and threatening an employee did not evince a voluntary intent to abandon the fruits of defendant's thievery; there was substantial evidence supporting conviction of robbery with a dangerous weapon, State v. Hurley, 180 N.C. App. 680, 637 S.E.2d 919, 2006 N.C. App. LEXIS 2499 (2006).

Evidence Held Sufficient. — Even though trial judge dismissed first degree rape charge for insufficient evidence of a firearm, the judge was not required to dismiss the armed robbery charge for the same reason. State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (1998), cert. denied, 348 N.C. 76, 505 S.E.2d 883 (1998), appeal dismissed, 348 N.C. 76, 505 S.E.2d 883 (1998).

In a prosecution for robbery with a dangerous weapon, the evidence was sufficient to allow a jury to find that defendant threatened the victim's life when he stole videos from the victim, as he asked "You want a piece of this?" while waving a pocketknife with a two to three-inch blade at the victim, after the victim chased him. State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663, 2003 N.C. App. LEXIS 1434 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Evidence was sufficient that to show that defendant, together with an accomplice, pursuant to a common purpose, committed the crime of robbery with a dangerous weapon under G.S. 14-87(a) as defendant and her accomplice: (1) entered a store; (2) took merchandise without paying for it; (3) were pursued by a manager into the parking lot; and (4) where the chase ended when defendant shoved the manager to the ground and the accomplice attempted to run over her with an SUV; the assault with the SUV on the manager after being pushed to the ground by defendant was made in an attempt to end the manager's pursuit of the merchandise taken from the store, and even though the accomplice was circling in the SUV, the accomplice never left the premises of the common parking lot between the store and the adjacent bank. State v. Hill, 182 N.C. App. 88, 641 S.E.2d 380, 2007 N.C. App. LEXIS 495 (2007).

B. Dangerous Weapon.

"Dangerous Weapon" Defined. — By statute, the "dangerous weapon" or means must be one which endangers or threatens life. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

"Means." — Because the term "means" in G.S. 14-87 follows the terms "firearm," "other dangerous weapon," and "implement," the legislature intended the "means" employed by an armed robber to consist of some extraneous instrument similar to a "firearm," "implement," or "other dangerous weapon." State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Rifle Used as Club. — Rifle did not cease to be a firearm by virtue of being used as a club. State v. McNatt, 342 N.C. 173, 463 S.E.2d 76 (1995).

Instrument Incapable of Endangering Life Is Not a Dangerous Weapon. — No matter what an instrument appears to be, if in fact it is a cap pistol, or a toy pistol, or some other instrument incapable of threatening or endangering life, it cannot be a firearm or other dangerous weapon within the meaning of the armed robbery statute. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986).

Factors Determining Dangerousness. — Whether an instrument can be considered a dangerous weapon depends on the nature of the instrument, the manner in which the defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

Requirement of "External" Weapon or Instrument. — Common sense and the clear intent of G.S. 14-87 lead the North Carolina Court of Appeals to conclude that an individual cannot possess, use, or threaten to use a dangerous weapon during a robbery where that individual is not possessing, using, or threatening to use some external weapon or instrument during the robbery; the critical difference between armed and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Claim of Possession of Firearm by Defendant is Sufficient. — Defendant's convictions of robbery with a firearm, G.S. 14-87(a), and having attained the status of habitual felon, G.S. 14-7.3, were affirmed; the State was only required to prove that defendant claimed that he possessed a firearm during his robberies of two stores. State v. Jarrett, 167 N.C. App. 336, 607 S.E.2d 661, 2004 N.C. App. LEXIS 2173 (2004), cert. denied, 359 N.C. 324, 611 S.E.2d 840 (2005).

Defendant Failed to Prove Weapon Was Not Dangerous. — There was no error in the finding that defendant used a dangerous weapon in the commission of the robbery where defendant failed to show conclusively that the weapon was not operational and did not eliminate the permissive inference of danger to the victim. State v. Duncan, 136 N.C. App. 515, 524 S.E.2d 808, 2000 N.C. App. 59 (2000).

Dangerous Character of Weapon Presumed from Conduct. — When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be — a firearm or other dangerous weapon. State v. Quick, 60 N.C. App. 771, 299 S.E.2d 815 (1983); State v. Allen, 74 N.C. App. 449, 328 S.E.2d 615, rev'd on other grounds, 317 N.C. 119, 343 S.E.2d 893 (1986).

Dangerous Character of Weapon Inferred from Wound. — Evidence tending to show that the victim of a robbery was left unconscious from a blow, inflicting a wound in the back of her head requiring eight stitches to close and causing her to be hospitalized for two weeks, was sufficient to show that the robbery was committed by the use of a dangerous weapon, since the dangerous character of the weapon may be inferred from the wound. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

The evidence was clearly sufficient to raise an inference of the use of a deadly weapon when the victim had what looked like a board print on his face and he was bleeding from his face and eyes, with a broken cheekbone. State v. Phillips, 87 N.C. App. 246, 360 S.E.2d 475 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 665 (1988).

Danger Inferred from Use of Knife. — It may be inferred that the threat of use and actual use of a knife constitute a danger to a person's life for the purposes of this section. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

When Character of Weapon Is a Question of Law. — Where the alleged dangerous weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether it is dangerous within the foregoing definition is one of law, and the court must take the responsibility of so declaring. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Appearance and Manner of Use of Instrument. — Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from its appearance and the manner of its use. The court cannot perceive how the victims could have determined with certainty that the firearm was real unless defendant had actually fired a shot. State v. Quick, 60 N.C. App. 771, 299 S.E.2d 815 (1983).

Inability to Identify Weapon. — When a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon was without probative value. State v. Thompson, 297 N.C. 285, 254 S.E.2d 526 (1979).

A robbery victim should not be required to force the issue merely to determine the true character of the weapon. Thus, when a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value. State v. Quick, 60 N.C. App. 771, 299 S.E.2d 815 (1983).

Evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon was not of sufficient probative value to warrant submission of the lesser included offense of common-law robbery. State v. Quick, 60 N.C. App. 771, 299 S.E.2d 815 (1983).

Weapon Need Not Be a Firearm. — A weapon does not have to be a firearm to be a life-threatening weapon. State v. Funderburk, 60 N.C. App. 777, 299 S.E.2d 822, cert. denied, 307 N.C. 699, 301 S.E.2d 392 (1983).

Use of Implement Which Appears to Be a Firearm. — When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, the law presumes, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be — an implement endangering or threatening the life of the person being robbed. Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. If the jury in such cases finds the basic fact (that the robbery was accomplished with what appeared to the victim to be a firearm or other dangerous weapon), the jury must find the elemental fact (that a life was endangered or threatened). This is so because, when no evidence is introduced tending to show that a life was not endangered or threatened, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds that basic facts do exist beyond a reasonable doubt. State v. Joyner, 312 N.C. 779, 324 S.E.2d 841 (1985).

Use of Implement Which Appears to Be a Firearm — Function of Jury. — In an armed robbery case, the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was. Finally, if other evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986).

Where there was evidence that the instrument used by defendant in a robbery appeared to be a firearm capable of endangering or threatening the life of the victim, and there was also evidence that the instrument was either a cap pistol or an inoperative firearm incapable of threatening or endangering the life of the victim, it was for the jury to determine the nature of the weapon. The jury should have been instructed that they could, but were not required to, infer from the instrument's appearance to the victim that it was a firearm or other dangerous weapon. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986).

Same — Instruction to Jury. — In a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, and there is no evidence to the contrary, it would be proper to instruct the jury to conclude that the instrument was what it appeared to be. However, the jury should not be so instructed if there is evidence that the instrument was not, in fact, such a weapon, but was a toy pistol or some other instrument incapable of threatening or endangering the victim's life, even if the victim thought otherwise. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986).

Absence of Firing Pin from Firearm. — The purpose of subsection (a) of this section would be frustrated or defeated if the court accepted defendant's contention that in the absence of a firing pin, a rifle is not a firearm under this section. The robbery victim should not have to force such issues of whether the instrument actually possesses a firing pin, whether the instrument is loaded, or whether the instrument is real. State v. Joyner, 67 N.C. App. 134, 312 S.E.2d 681 (1984), aff'd, 312 N.C. 779, 324 S.E.2d 841 (1985).

Use of Pistol as Club. — A pistol used as a club could be as dangerous as a blackjack. State v. Funderburk, 60 N.C. App. 777, 299 S.E.2d 822, cert. denied, 307 N.C. 699, 301 S.E.2d 392 (1983).

BB Rifle. — Testimony of defendant that the rifle was a BB rifle constituted affirmative evidence which indicated that the victims' lives were not endangered or threatened in fact by his possession, use or threatened use of the rifle and was affirmative testimony tending to prove the absence of an element of the offense charged under this section; such evidence required submission of the case to the jury on the lesser included offense of common-law robbery as well as the greater offense of robbery with firearms or other dangerous weapons. State v. Alston, 305 N.C. 647, 290 S.E.2d 614 (1982).

BB Gun. — Defendant's conviction of robbery with a dangerous weapon by the use of a BB gun required evidence that a BB gun was a dangerous weapon, as well as a jury instruction on the definition of a dangerous weapon. State v. Fleming, 148 N.C. App. 16, 557 S.E.2d 560, 2001 N.C. App. LEXIS 1276 (2001).

Pellet Gun. — The testimony by defendant that the rifle he used during the robbery was a Remington pellet gun was sufficient to support a jury finding that the lives of the victims were endangered or threatened by his possession, use or threatened use of the rifle. State v. Alston, 305 N.C. 647, 290 S.E.2d 614 (1982).

A pellet gun may be a dangerous weapon per se, or at a minimum, such a determination must be made upon a consideration of the instrument's use. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Where defendant placed a pellet gun into the clerk's back, pointed directly at her kidney, the evidence showed the projectile from such a pistol was capable of totally penetrating a quarter-inch of plywood, and, thus, very likely would have resulted in a life-threatening injury to the clerk had defendant fired the weapon. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Use of Vehicle as Weapon. — Evidence was sufficient that defendant's accomplice had a dangerous weapon for purposes of G.S. 14-87(a) in her possession at the time she obtained the property as: (1) the accomplice drove an SUV owned by defendant towards a store manager in an attempt to "run the lady over"; (2) a witness saw defendant shove the manager to the ground, and the SUV swerve toward the manager as she was coming back to pick up defendant; (3) the witness thought the SUV was going to hit the manager; and (4) the accomplice drove defendant's SUV in such a manner as to endanger the life of the manager. State v. Hill, 182 N.C. App. 88, 641 S.E.2d 380, 2007 N.C. App. LEXIS 495 (2007).

Knife Not Always Dangerous Per Se. — A knife is not always a dangerous weapon per se. The circumstances of the case, rather than the physical description of the knife itself, ultimately determine this issue. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

But Is When Serious Bodily Injury or Death Results. — Where the victim has suffered serious bodily injury or death, the courts have consistently held that a knife is a dangerous or deadly weapon per se, absent production or detailed description. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

When Character of Knife Is a Jury Question. — In cases where the knife has not been produced or described in detail, and the victim has not suffered injury or death, the question of whether a knife is a dangerous weapon is generally for the jury. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

Where, in view of the circumstances under which knife (which was never produced) was used in robbery, there was some evidence of the nonexistence of the element of danger to life, the court erred in defining the knife as a dangerous weapon and in refusing to submit common-law robbery to the jury. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

Pocketknife. — A pocketknife, considering its use or threatened use by defendant, was a dangerous weapon. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

The evidence fully supported trial judge's instruction that pocketknife used to threaten victim was a dangerous or deadly weapon likely to produce death or great bodily injury, where there was evidence that the blade was three to four inches long and was held at various times to the victim's throat, side and stomach, and defendant threatened to cut off the victim's clothing with the knife and to cut her throat from "ear to ear" if she did not comply with his demands. State v. Mason, 317 N.C. 283, 345 S.E.2d 195 (1986).

In a prosecution for robbery with a dangerous weapon, the evidence was sufficient to allow a jury to find that defendant used a dangerous weapon when he stole videos from the victim, as he used a pocketknife with a two to three-inch blade to threaten the victim's life, after the victim chased him. State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663, 2003 N.C. App. LEXIS 1434 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Box Cutter. — Trial court did not err by instructing that box cutter with an exposed, sharply pointed razor blade was dangerous per se. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Evidence that two defendants entered a video store, pushed a 65-year-old clerk to the floor and placed a box cutter to her throat, and took $380 was sufficient to sustain defendants' convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. State v. Distance, 163 N.C. App. 711, 594 S.E.2d 221, 2004 N.C. App. LEXIS 576 (2004).

Butcher Knife. — Evidence was sufficient to support the verdict of guilty of armed robbery; the record was replete with evidence that defendant had in his possession a 10-inch butcher knife and while it is obvious that a knife is not a "firearm," it is a "dangerous weapon" as described by this section. State v.

Stevens, 94 N.C. App. 194, 379 S.E.2d 863, cert. denied, 325 N.C. 275, 384 S.E.2d 527 (1989).

Glass Bottle. — Where the evidence showed that the victim was struck in the back of the head with a glass bottle, causing him to fall to the ground, the evidence was sufficient to support a finding that the bottle was a dangerous weapon. State v. Moses, 154 N.C. App. 332, 572 S.E.2d 223, 2002 N.C. App. LEXIS 1452 (2002).

Broken Bottle. — Where defendant held a broken bottleneck to victim's face and lip and threatened to cut her badly, the defendant's use of the broken bottleneck constituted a dangerous weapon. State v. Harris, 115 N.C. App. 560, 445 S.E.2d 626 (1994).

Hammer. — Evidence did not compel a finding that hammer brandished by defendant was a dangerous weapon, and therefore, the trial court erred in refusing to instruct the jury on the lesser included offense of common law robbery. State v. Jackson, 85 N.C. App. 531, 355 S.E.2d 224 (1987).

Gasoline. — Where defendant's use of gasoline, by throwing it in victim's face, amounted to the use of a dangerous weapon, conviction for attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon was upheld. State v. Cockerham, 129 N.C. App. 831, 497 S.E.2d 831 (1998), cert. denied, 348 N.C. 503, 510 S.E.2d 659 (1998).

Fists, Hands, and Feet. — Trial court erred by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon because the State failed to demonstrate that he either possessed or used a dangerous weapon, implement, or means during the attack; defendant's fists, hands, and feet could not be considered dangerous weapons for purposes of G.S. 14-87. State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Although G.S. 14-87 refers to the possession, use, or threatened use of "means" during the robbery, the North Carolina Court of Appeals is not convinced that "means" was included in the statute in order to reach the situation where a robbery was perpetrated by the use of hands, fists, or feet; it is a recognized principle of statutory construction that when particular or specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind. State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

Despite prior holdings of the North Carolina Court of Appeals that, under certain circumstances, a defendant's hands, fists, and feet can be considered deadly weapons for the purposes of an assault conviction, the court has never held that hands, fists, and feet can be considered dangerous weapons for the purposes of G.S. 14-87. State v. Duff, 171 N.C. App. 662, 615 S.E.2d 373, 2005 N.C. App. LEXIS 1367 (2005).

For purposes of the robbery with a dangerous weapon statute, G.S. 14-87, a defendant's hands and feet may not be considered dangerous weapons. State v. Hinton, 361 N.C. 207, 639 S.E.2d 437, 2007 N.C. LEXIS 33 (2007).

Conflicting Evidence as to Whether Gun Was Real. — Defendant's motion to dismiss a conspiracy to commit robbery with a dangerous weapon charge was properly denied as there was conflicting evidence as to whether a gun given to a person who committed a robbery (the actor) was real or not and there was sufficient evidence that the gun was an operable weapon where: (1) defendant and two other men told the actor to rob a store in exchange for drugs, which she agreed to do, (2) the men provided the actor with a gun and she committed the robbery, (3) the actor spoke primarily with defendant regarding the robbery, (4) the actor stated that one of the men told her that the gun was fake, but that she was uncertain whether it was fake, and (5) the actor stated that defendant and the others had a real gun and a fake gun and that she believed she had been given the fake one. State v. Carter, 177 N.C. App. 539, 629 S.E.2d 332, 2006 N.C. App. LEXIS 1078 (2006).

VI. TAKING AND INTENT.

Taking or Attempt to Take Required. — The offense requires the taking, or the attempt to take, in robbery with firearms. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

There must be an actual taking of property for there to be the crime of common-law robbery, whereas under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Lock, 284 N.C. 182, 200 S.E.2d 49 (1973); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

It is not incumbent upon the State to prove that defendants actually took money. In a prosecution for the offense of armed robbery the offense is complete if there is an attempt to take personal property by use of firearms. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

In order to commit robbery, property must be taken, which is larceny; thus the taking or attempted taking of property is an essential element of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

The taking and carrying away is an essential element of the crime of robbery. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

Taking Must Be with Felonious Intent. — The taking must be done animo furandi, with a felonious intent to appropriate the goods taken to some use or purpose of the taker. State

v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975).

In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. State v. Jones, 57 N.C. App. 460, 291 S.E.2d 869 (1982).

A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery, and it is prejudicial error for the court to charge that defendant may be convicted of such offense even though the taking was without felonious intent. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

A taking of personal property with felonious intent is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery. The court must so instruct the jury in every robbery case, and must in some sufficient form explain and define the term "felonious intent." The extent of the definition required depends upon the evidence in the particular case. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery. If he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

"Felonious taking" is an essential element of the crime of armed robbery, and it means "a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker." State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Felonious intent is an essential element of the offense of armed robbery and of the attempt to commit armed robbery; felonious intent means the intent to permanently deprive the owner of his property. State v. Wheeler, 122 N.C. App. 653, 471 S.E.2d 636 (1996).

Although the defendant claimed provocation, according to the defendant's own statement, when the victim declined to make a loan to the defendant, the defendant struck the victim several times on the head with a sledgehammer, reached into the victim's back pocket after the victim fell, removed the victim's wallet, and then left the scene to clean up; therefore, the taking of the wallet occurred in an unbroken transaction. State v. Barden, 356 N.C. 316, 572 S.E.2d 108, 2002 N.C. LEXIS 1115 (2002).

Taking from Dead Victim. — When the death and the taking are so connected as to form a continuous chain of events, a taking from the body of a dead victim is a taking "from the person." State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Fact that the victim is already dead when his possessions are taken is not an impediment in this jurisdiction to the defendant's conviction for armed robbery. All that is required is that the elements of armed robbery occur under circumstances and in a time frame that can be perceived as a single transaction. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

Neither the commission of armed robbery, as defined in subsection (a), nor the commission of felony murder based on armed robbery, depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

Person or persons in attendance. — Store clerk saw the defendant in her store in a "mask" and with a gun and fled the store; even though the defendant took the money after the store clerk fled, the robbery occurred in the store clerk's "presence" under G.S. 14-87 because the defendant made his purposes known to her. State v. Tuck, 173 N.C. App. 61, 618 S.E.2d 265, 2005 N.C. App. LEXIS 1930 (2005).

Defendant Guilty Although He Did Not Keep Victim's Money After Stabbing Him. — Although defendant did not keep any of the victim's money, the crime of armed robbery was complete as the defendant stood over the man he had stabbed and made the decision whether to keep the small sum of money that he had taken from his victim or to discard it before fleeing. State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980).

Instruction as to "Felonious Intent" Depends on Facts of Case. — The comprehensiveness and specificity of the definition and explanation of "felonious intent" required in a charge depends on the facts in the particular case. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

What Constitutes Intent. — When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (animus furandi). State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

"Intent to Rob" Is a Sufficient Definition of "Felonious Intent." — The word "rob" was known to the common law and the expression "intent to rob" is a sufficient definition of "felonious intent" as applied to this section, in the absence of evidence raising an inference of a different intent or purpose. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965); State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, "felonious intent" may be simply defined as an "intent to rob" or "intent to steal." On the other hand, where the evidence raises a direct issue as to the intent and purpose of the taking, a more comprehensive definition is required. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Since "Rob" Imports an Intent to Steal. — "Rob" or "robbery" has a well-defined meaning and imports an intent to steal. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Where evidence did not permit inference that defendant ever intended to return property forcibly taken but required the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there was no justification for indulging the fiction that the taking was for a temporary purpose, without any animus furandi or lucri causa. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Intent to Permanently Deprive. — Trial court did not err in denying the defendant's motion to dismiss a robbery charge as the evidence that the defendant's accomplice took the victim's work vehicle and subsequently abandoned it near the crime scene was sufficient to show an intent to permanently deprive the victim of his property. State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870, 2002 N.C. LEXIS 1260 (2002).

Intent for Purposes of Felony Murder. — Neither the commission of armed robbery, as defined by subsection (a) of this section, nor the commission of felony murder based on armed robbery depends upon whether the intention to commit the taking of the victim's property was formed before or after the killing. State v. Handy, 331 N.C. 515, 419 S.E.2d 545 (1992).

Taking Under Claim of Right or as Prank. — A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Taking Held Not Under Bona Fide Claim of Title. — In a prosecution for armed robbery the defendant's contention that he could not be found guilty of robbery and forcibly taking property from the actual possession of another where he had a bona fide claim of right or title to the property since such belief negates the requisite animus furandi or intent to steal was without merit where (1) the defendant denied taking any property from the prosecuting witness at all; (2) the defendant and others were "dealing" in marijuana, which is prohibited by Chapter 90 of the General Statutes; (3) the alleged claim or debt was an unliquidated amount of money; and (4) the defendant used a "sawed-off" shotgun to aid him in collection of the debt or claim to the property taken over the objections of the prosecuting witness. State v. Oxner, 37 N.C. App. 600, 246 S.E.2d 546 (1978), aff'd, 297 N.C. 44, 252 S.E.2d 705 (1979).

Time of Formulating Intent. — When the circumstances of an alleged armed robbery reveal that defendant intended to permanently deprive the owner of his property and the taking was effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction. State v. Fields, 315 N.C. 191, 337 S.E.2d 518 (1985).

When the circumstances of armed robbery reveal an intent to permanently deprive the owner of his property and a taking effectuated by the use of a dangerous weapon, it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use of force can be perceived by the jury as constituting a single transaction. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

There was sufficient evidence that money was taken by the defendant where victim testified that when she went to bed she had a ten dollar bill in a brown envelope with her name on it and that the envelope was inside her bra that was hanging on the chair in her bedroom, the victim testified she knew the defendant had gotten the ten dollars ($10.00) because she heard him "a ' rambling around in there", and the bra and the brown envelope with the victim's name on it were found in the culvert near defendant's trailer. State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Sufficient evidence was presented that capital murder defendant took property from the victim so as to support his conviction for armed robbery, where the defendant told a friend that he had robbed and killed the victim, the defendant suddenly had a large sum of money, and the victim, who normally carried a large sum of money, had only $9.00 when his body was discovered. State v. Call, 349 N.C. 382, 508 S.E.2d 496 (1998).

Evidence of Intent. — Where the State's evidence showed that defendant struck victim on the head with a stick while he was attempting to leave skating rink with the night's receipts, defendant entered the skating rink and threatened victims and three hundred dollars was missing from a desk in the apartment after the defendant fled was sufficient to give rise to a reasonable inference that defendant intended to deprive another of personal property. State v. Brandon, 120 N.C. App. 815, 463 S.E.2d 798 (1995).

VII. LESSER OFFENSES.

Included Offenses — Common-Law Robbery, Assault, Larceny from Person, and Simple Larceny. — An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948); State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955); State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959); State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

In a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964); State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Fletcher, 27 N.C. App. 672, 220 S.E.2d 101 (1975).

An indictment for robbery with firearms will support a conviction of a lesser offense such as common-law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

An indictment under this section includes common-law robbery. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965); State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Tarrant, 70 N.C. App. 449, 320 S.E.2d 291 (1984); State v. Owens, 73 N.C. App. 631, 327 S.E.2d 42, cert. denied, 314 N.C. 120, 332 S.E.2d 488 (1985).

In a prosecution for robbery with a dangerous weapon, the accused may be acquitted of the crime charged and convicted of a lesser offense included in the offense charged, such as common-law robbery, if there is evidence from which the commission of such lesser offense can be found. State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

Common-law robbery is distinguished from armed robbery by the absence of the element of the use or threatened use of a firearm or other dangerous weapon, and is accordingly a lesser included offense of armed robbery. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

Same — Larceny. — Larceny is a lesser included offense of armed robbery. State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988), overruling State v. Hurst, 320 N.C. 589, 359 S.E.2d 776 (1987).

Common-law robbery is a lesser included offense of armed robbery. State v. Harris, 91 N.C. App. 526, 372 S.E.2d 336 (1988), reaffirmed in State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Larceny is a lesser included offense of robbery with a dangerous weapon; and, armed robbery is an aggravated form of larceny. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Defendant's first-degree burglary conviction was not improper because, although the jury instructions, which stated that the State had to prove, inter alia, that at the time of the breaking and entering, defendant intended to commit robbery with a firearm or attempted to commit robbery with a firearm, were at variance with the indictment, which alleged that defendant committed the offense by breaking and entering with the intent to commit felony larceny, the jury instructions actually benefitted defendant by adding an additional element for the State to prove, and thus there was no prejudicial error; any error in the jury charge was not prejudicial because larceny was a lesser-included offense of robbery with a dangerous weapon. State v. Farrar, 361 N.C. 675, 651 S.E.2d 865, 2007 N.C. LEXIS 1097 (2007).

Same — Misdemeanor Larceny. — In prosecution for armed robbery, where all of the essential elements of larceny would be proven by proof of the allegations in the indictment, where defendant's own evidence regarding his acquisition of where automobile in question would have supported a conviction of larceny, and where although the indictment charged that the value of the stolen property was approximately $1,490, the State introduced no evidence of value, the court's refusal to instruct the jury on misdemeanor larceny was prejudicial error. State v. White, 85 N.C. App. 531, 354 S.E.2d 324 (1987), aff'd, 322 N.C. 506, 369 S.E.2d 813 (1988).

Same — Accessory Before the Fact. —

The crime of accessory before the fact to robbery is included in the indictment for robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Same — Highway robbery is a lesser offense embraced in the charge of robbery with firearms or other dangerous weapon. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Same — Assault on the Person. — The crime of robbery ex vi termini includes an assault on the person. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

Same — Assault on the Person with Deadly Weapon. — The crime of armed robbery defined in this section includes an assault on the person with a deadly weapon. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Mullen, 47 N.C. App. 667, 267 S.E.2d 564, cert. denied, 301 N.C. 103, 273 S.E.2d 308 (1980).

Assault with a deadly weapon is a lesser included offense of robbery with firearms, and the jury may acquit as to the greater charge and return a verdict as to the lesser if the evidence warrants such a finding. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

The crime of armed robbery includes an assault on a person with a deadly weapon; however, where the assault charged contains a necessary ingredient which is not an essential ingredient of armed robbery, the fact that the assault is committed during the perpetration of the armed robbery does not deprive the assault of its character as a complete and separate offense. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Offenses Not Included — Accessory After the Fact. — Armed robbery differs in fact and in law from accessory after the fact under G.S. 14-7. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Where the bill of indictment charges armed robbery, both a waiver and information are necessary, under G.S. 15-140.1 (now G.S. 15A-642), to vest the court with jurisdiction to try the defendant, or to entertain his plea, on a charge of accessory after the fact of armed robbery, because the offense of accessory after the fact is not a lesser included offense of the principal crime. State v. Brown, 21 N.C. App. 87, 202 S.E.2d 798 (1974).

A directed verdict of not guilty of armed robbery foreclosed the State from subsequent prosecutions of defendant for armed robbery or for any lesser included offenses of armed robbery. But accessory after the fact of armed robbery is not a lesser included offense of armed robbery. Therefore, general double jeopardy principles would not bar the trial of defendant on charges of accessory after the fact to armed robbery. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, cert. denied, 295 N.C. 649, 248 S.E.2d 253 (1978), 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

Same — Assault Under § 14-32(a). — The crime of felonious assault defined in G.S. 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in this section. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Assault with a deadly weapon with intent to kill inflicting serious injury cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an acquittal on the assault charge would not bar a conviction on the armed robbery charge. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), appeal dismissed and cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Same — Assault Under § 14-32(b). — An assault with a deadly weapon inflicting serious injury, defined by G.S. 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Where defendant was charged with armed robbery but found guilty of assault with a deadly weapon inflicting serious bodily injury, the trial court should have granted his motion in arrest of judgment, since assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery, but a separate offense. State v. Perry, 18 N.C. App. 141, 196 S.E.2d 369 (1973).

Assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted common-law robbery. State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975).

Assault with a deadly weapon is not a lesser included offense of attempted armed robbery. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550, cert. denied, 323 N.C. 619, 374 S.E.2d 116 (1988).

Fact that allegations in armed robbery indictment include charge of assault does not render the indictment invalid. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 2199, 29 L. Ed. 2d 428 (1971).

Conviction of armed robbery does not establish guilt of felonious assault. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Alexander, 284 N.C. 87, 199

S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

Armed robbery and felonious assault charges are separate and distinct offenses. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

Fact that felonious assault is committed during perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Distinction between robbery and forcible trespass is that in the former there is, and in the latter is not, a felonious intention to take the goods, and appropriate them to the offender's own use. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

When Instructions as to Lesser Included Offenses Required. — The court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed. But where there is evidence tending to show the commission of a lesser offense the court, of its own motion, should submit such offense to the jury for its determination. State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959).

In trial for murder and common-law robbery, absent affirmative evidence that defendant took victim's belongings only as an afterthought, and that the violence committed against victim served no intimidating purpose, defendant was not entitled to an instruction on misdemeanor larceny. State v. Davis, 325 N.C. 603, 386 S.E.2d 418 (1989), cert. denied, 496 U.S. 905, 110 S. Ct. 2587, 110 L. Ed. 2d 268 (1990).

It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. However, the trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

The necessity for instructing the jury as to an included crime of lesser degree than that charged, arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed, and the presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

In an armed robbery prosecution, there is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of the crime charged. State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

The trial court is not required to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. State v. Hailstock, 15 N.C. App. 556, 190 S.E.2d 376, cert. denied, 281 N.C. 760, 191 S.E.2d 363 (1972); State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

It is not necessary to submit the lesser included offense to the jury if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Common-law robbery is a lesser included offense of armed robbery, and it is error to refuse to submit common-law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law. State v. Jackson, 85 N.C. App. 531, 355 S.E.2d 224 (1987).

Same — Common-Law Robbery. — Common-law robbery is a lesser included offense of armed robbery. However, the necessity for instructing the jury as to a lesser included offense arises only when there is evidence to support such a verdict. State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence relating to the elements of the crime charged, an instruction on common-law robbery is not required. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980).

Where all of the evidence tended to show that an armed robbery was committed by the defendant, and others, acting in concert, and that the defendant aided and abetted in the use and threatened use of a firearm wielded by another, and there was no evidence tending to show the commission of common-law robbery, it would have been error for the trial court to charge on the unsupported lesser degree of the crime. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

The evidence did not support an instruction on common-law robbery, where there was no evidence in the record of a taking, an essential element of the crime of common-law robbery. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972).

Where the evidence for the State clearly shows an armed robbery and there is no evidence of a lesser offense, the trial court is not required to submit to the jury the lesser included offenses of common-law robbery and assault. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 2199, 29 L. Ed. 2d 428 (1971).

In a prosecution for robbery with a dangerous weapon, defendant's denial of his participation in the robbery and his denial that he saw a gun during the robbery did not constitute evidence sufficient to require the trial court to submit an issue of common-law robbery to the jury. State v. Coats, 46 N.C. App. 615, 265 S.E.2d 486, aff'd, 301 N.C. 216, 270 S.E.2d 422 (1980).

When the State offered evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what appeared to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon was not of sufficient probative value to warrant submission of the lesser included offense of common-law robbery. That portion of State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972), which is inconsistent with this is no longer authoritative. State v. Thompson, 297 N.C. 285, 254 S.E.2d 526 (1979).

Trial court in an armed robbery case properly refused defendants' request for an instruction on common-law robbery, where victim testified that all he observed during the incident before being rendered unconscious was the barrel of a gun held at his forehead, and there was no evidence in the record to contradict this testimony. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

Where the evidence showed that defendant perpetrated robbery with the threatened use of a dangerous weapon held a couple of inches from the victim's side, and there was no conflicting evidence relating to the elements of the crime, the court did not err in failing to instruct on common law robbery. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Where all of the State's uncontradicted evidence, if believed, tended to compel the conclusion that a glass vase, as wielded by the defendant, "endangered or threatened" the victim's life, and hence, was a dangerous weapon, there was no evidence to support an instruction on the lesser included offense of common-law robbery. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

Where the uncontroverted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting the defendant's guilt of a lesser offense, the trial court does not err in failing to instruct the jury on the lesser included offense of common-law robbery. State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985).

In a prosecution for armed robbery, the trial court did not err in refusing to instruct the jury on attempted common-law robbery, where the defendant admitted on cross-examination that he intended to rob the store and that he intended to frighten the cashier with a shotgun, and he admitted also that he pointed the shotgun in the cashier's direction. State v. Haddick, 76 N.C. App. 524, 333 S.E.2d 518 (1985).

While common-law robbery is a lesser included offense of armed robbery, and an indictment for armed robbery will support a conviction of common-law robbery, trial judge is not required to instruct on common-law robbery when defendant is indicted for armed robbery if the uncontradicted evidence indicates that the robbery was perpetrated by the use or threatened use of what appeared to be a dangerous weapon. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980); State v. Tarrant, 70 N.C. App. 449, 320 S.E.2d 291 (1984).

It is error to refuse to submit common-law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law. State v. Smallwood, 78 N.C. App. 365, 337 S.E.2d 143 (1985).

Where the State's evidence was to the effect that defendant's companion held a knife to the victim's throat in perpetrating a robbery, and that the victim received a cut on his neck, and that defendant and his companion attacked and beat their victim and took money from his person, but no knife was introduced in evidence or described by any witness, it was error for the court to fail to submit the question of defendant's guilt of the lesser crime of common-law robbery. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

When there is evidence of defendant's guilt of common-law robbery, it is error for the court to fail to submit the lesser offense to the jury. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

In an armed robbery prosecution where there was no other evidence of a weapon, and the robbery victim was not sure whether defendant actually had a weapon, it was error for the trial judge to fail to charge on the lesser offense of common-law robbery. State v. Jackson, 27 N.C. App. 675, 219 S.E.2d 816 (1975).

Where conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery, the trial judge, even without request for special instructions, should have submitted the lesser offense of common-law robbery to the jury under proper instructions. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Common-law robbery is a lesser included offense of armed robbery, and it is error to refuse to submit common-law robbery to the jury where the evidence does not compel a finding that the weapon allegedly used is a dangerous weapon as a matter of law. State v. Jackson, 85 N.C. App. 531, 355 S.E.2d 224 (1987).

In defendant's prosecution for robbery with a dangerous weapon under G.S. 14-87(a), defendant was not entitled to an instruction on the lesser-included offense of common-law robbery because evidence was presented that three robbers, including defendant, used a handgun when the robbers entered the victims' hotel room and stole the victims' money and cellular telephones, so the evidence tended to show that the robbers perpetrated the robbery with a firearm capable of endangering or threatening the lives of the victims. State v. Morgan, 183 N.C. App. 160, 645 S.E.2d 93, 2007 N.C. App. LEXIS 1050 (2007), appeal dismissed, review denied, 362 N.C. 241 660 S.E.2d 536 (2008).

Same — Attempted Common-Law Robbery. — The trial court in a prosecution for attempted armed robbery was not required to submit the lesser offense of attempted common-law robbery because of the failure of the State's witnesses to testify that the sawed-off shotgun used by defendant was not a toy, where all of the evidence indicated that defendant used a sawed-off shotgun in the crime and there was no evidence that the shotgun was not a real and functioning deadly weapon. State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583, cert. denied, 295 N.C. 650, 248 S.E.2d 254 (1978).

Where under the State's evidence, a defendant would be guilty of attempted armed robbery, and under the defendant's evidence, he would not be guilty of attempted armed robbery or attempted common-law robbery, the judge is not required to instruct the jury that it might return a verdict of guilty of attempted common-law robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Same — Felonious Larceny. — In a prosecution for armed robbery the trial court erred in failing to instruct the jury on the lesser included offense of felonious larceny where defendant's testimony, that he did not at any time draw a knife on the victim's assistant manager, did not have a knife in his possession at any time while he was with the assistant manager, did not say anything at any time to threaten or force the assistant manager to give him money, but merely walked out with the money when the assistant manager turned his back to defendant, would have negated the element of violence or intimidation required to elevate the crime of felonious larceny to that of common-law robbery or armed robbery; moreover, the fact that defendant closed the door to the assistant manager's office as he ran out and locked it from the outside, leaving the assistant manager confined inside was not precedent to nor concomitant or contemporaneous with the act of taking the money bag, and the act of closing and locking the door therefore could not be held to constitute the requisite violence or putting in fear to make the crime in question robbery as a matter of law. State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Same — Assault with Deadly Weapon and Simple Assault. — Where there was no evidence in an armed robbery prosecution that any offense other than armed robbery or common-law robbery had been committed, the trial court did not err in failing to submit the issues of assault with a deadly weapon and simple assault. State v. Gurkin, 8 N.C. App. 304, 174 S.E.2d 20 (1970).

In a prosecution for attempted armed robbery, the necessity for instructing the jury as to included crimes of assault with a deadly weapon and simple assault arises when and only when there is evidence from which the jury could find that such included crimes of lesser degree were committed. The presence of such evidence is the determinative factor. State v. Sanders, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

Although there was evidence of all the essential elements of the crime of robbery, defendant's evidence asserting a claim of ownership of the stereo created a conflict in the evidence as to felonious intent. There certainly was ample evidence of the lesser included crime of an assault with a deadly weapon. Thus, defendant was entitled to a charge on the crime of assault with a deadly weapon in order to have the different views arising on the evidence presented to the jury upon proper instructions. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

When the State's evidence tends to show armed robbery, there is no conflicting evidence relating to elements of the offense and the only offense committed, if any, was the one charged, the court is not required to instruct on the lesser included offense of assault with a deadly weapon. State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976).

Where the State's evidence was positive and without conflict on all of the elements of the charge of robbery with a firearm, and there was no evidence to the contrary, instructions on the lesser included offenses of common-law robbery, assault with a deadly weapon and simple assault were not required. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), appeal dismissed and cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Where all of the State's evidence tended to show the armed robbery of another person and where all of defendant's evidence tended to show that he committed no crime, the trial court was not required to charge on the lesser offense of assault with a deadly weapon. State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971).

Even though the crime of attempted armed robbery as defined in this section includes the crime of assault with a deadly weapon, the absence of any evidence that the defendant committed such a crime of lesser degree made it unnecessary for the court to submit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon. State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

The evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant by the use of a pistol disarmed such owner and took his rifle. Even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively showed that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to mere chance, and therefore the evidence disclosed the animus furandi, and did not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

Where there was no evidence that defendant was guilty of either assault with a deadly weapon or simple assault, the trial judge was not required to charge on the lesser included offenses of this section. State v. Hewett, 87 N.C. App. 423, 361 S.E.2d 104 (1987).

Refusal to charge on lesser included offenses held proper. State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974).

Where the State introduced substantial evidence of defendant's guilt of robbery with a firearm the trial court did not err by refusing to charge on the lesser included offense of larceny. State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997), cert. denied, 522 U.S. 1092, 118 S. Ct. 886, 139 L. Ed. 2d 873 (1998).

Where there was no evidence presented to support an instruction on common law robbery as a lesser-included offense of armed robbery, the trial court did not err by not instructing the jury on common law robbery. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Where the evidence showed defendants used guns to rob people, judge's decision not to charge the jury on the lesser offense of common robbery was proper in defendants' trial for robbery with a dangerous weapon. State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004).

Merger of Sentences. — Trial court erred when it failed to arrest judgment on defendant's armed robbery conviction under G.S. 14-87(a); when defendant was convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty was returned on the underlying felony, the armed robbery conviction provided no basis for an additional sentence, hence it merged into the murder conviction. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005), cert. denied, — U.S. —, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Distinction Between Robbery and Use of Victim's Gun. — In an appeal as of right with regard to the imposition of a sentence of death against a defendant following a jury trial, which resulted in his conviction for the first-degree murder of a police officer while in the performance of his duties, the trial court did not err by denying his motion to dismiss the charge of robbery with a dangerous weapon since the evidence presented was sufficient for the jury to find that the defendant's use of the victim's gun was inseparable from the taking of it and the defendant's efforts to flee, thus, it was a continuous transaction. State v. Maness, 363 N.C. 261, 677 S.E.2d 796, 2009 N.C. LEXIS 621 (June 18, 2009).

VIII. INDICTMENT.

Description of Property. — An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

An indictment was defective under this section where it did not describe any property sufficiently to show that it was the subject of robbery, and although the indictment stated a value, what property had that value did not appear. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Same — Particular Identity or Value. — It is not necessary to describe accurately or prove the particular identity or value of the property further than to show it was the property of the person assaulted or in his care, and had a value. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Attempted armed robbery indictment which alleged the attempted taking of an unspecified amount of cash from the presence of an individual with the use of a weapon was not insufficient for failing to specify the amount of cash or the true legal owner of the cash. State v. Burroughs, 147 N.C. App. 693, 556 S.E.2d 339, 2001 N.C. App. LEXIS 1240 (2001).

Property Should Be Described by Usual Name. — Property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Sufficiency of Allegation of Ownership. — In an indictment for robbery the allegation of ownership of the property taken is sufficient when it negates the idea that the accused was taking his own property. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982), overruled on other grounds, 322 N.C. 506, 369 S.E.2d 813 (1988).

It is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

It is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. State v. Jackson, 306 N.C. 642, 295 S.E.2d 383 (1982).

In an indictment for robbery the allegation of ownership of the property taken is sufficient when it negates the idea that the accused was taking his own property. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

To allege and prove the crime of armed robbery, it is not necessary that ownership of the property be laid in any particular person, at least so long as the allegation and proof are sufficient to negate the idea of the accused's taking his own property. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

Name of Person in Attendance. — It is plain from this section that it is not necessary that the name of the person in attendance in the place of business be set out in the bill of indictment. It is only required that, upon trial, the State must prove that someone was in attendance. State v. Rankin, 55 N.C. App. 478, 286 S.E.2d 119, appeal dismissed and cert. denied, 305 N.C. 590, 292 S.E.2d 11 (1982).

Charge of Aiding and Abetting Unnecessary. — Person who aids or abets another in the commission of armed robbery is guilty under this section, and it is not necessary that the indictment charge him with aiding and abetting. State v. Ferree, 54 N.C. App. 183, 282 S.E.2d 587 (1981).

Kind and value of property taken is not material so long as it is described by allegation and proof sufficient to show that it is the subject of robbery. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

It Must Appear That Article Taken Had Some Value. — Although value need not be averred by a specific allegation, it must appear from the indictment that the article taken had some value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

The allegation in a bill of indictment that the property taken was "personal property of the value of ..." was insufficient to charge the offense of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Where the gist of the offense as described in the indictment is the attempt to commit robbery by the use or threatened use of firearms, the force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the property involved is described in an indictment under this section as "U.S. currency," it is the subject of robbery and some value can be inferred from the description of the property itself. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Reaves, 15 N.C. App. 476, 190 S.E.2d 358, cert. denied, 282

N.C. 155, 191 S.E.2d 604 (1972).

The bill of indictment upon which defendant is tried for attempted armed robbery is fatally defective when it fails to allege that defendant attempted to take any property or thing of value from anyone. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

And That It May Be Subject of Larceny. — The property taken must be such as is the subject of larceny to constitute the offense of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property must be such as is the subject of larceny. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

Money is recognized by law as property which may be the subject of larceny, and hence of robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, willfully and feloniously took money from the motel. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Bill Need Not Allege That Defendant Intended Conversion of Property. — A bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own use. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Indictments Consolidated. — An indictment charging defendants with rape and an indictment charging defendants with armed robbery could be consolidated for trial when it appeared that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes were so connected in time and place that the evidence on the trial of the one was competent and admissible on the trial of the other. State v. Morrow, 262 N.C. 592, 138 S.E.2d 245 (1964).

In a prosecution of defendant for armed robbery and murder, the trial court did not err in consolidating defendant's case for trial with that of a codefendant since defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Indictment Sufficient. — Indictment was sufficient where it alleged each of the essential elements of armed robbery: the unlawful taking or attempted taking of personal property of another; the possession, use, or threatened use of firearms or other dangerous weapon, implement or means; and danger or threat to the life of the victim. State v. Patterson, 182 N.C. App. 102, 641 S.E.2d 376, 2007 N.C. App. LEXIS 485 (2007).

Bill of Indictment Illegally Amended to Charge Felony of Attempted Armed Robbery. — See State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Indictment Charged Larceny Not Robbery. — An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified, a sum of money, charged the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

Instruction as to Lesser Included Offense Not Required. — Trial court was not required to instruct jury on lesser included offense of misdemeanor larceny when state's evidence sufficiently established requisite elements of robbery with a dangerous weapon, and defendant's version of the events was consistent with the state's evidence up until time criminal activity began, at which time, defendant portrayed himself as both a victim and an innocent bystander who was helpless to the mischievous but criminal conduct of his codefendant. State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358, cert. denied, 327 N.C. 143, 394 S.E.2d 183 (1990).

Indictment Properly Dismissed. — In defendant's conviction for robbery with firearm, the trial court properly denied defendant's motion to dismiss the indictment based on the State's withholding of evidence favorable to defendant, as any possible violation of defendant's rights was completely cured and without prejudice. State v. Geddie, — N.C. App. —, — S.E.2d —, 2003 N.C. App. LEXIS 85 (Feb. 18, 2003).

Amended Indictment Upheld. — Because a showing of a taking is not a necessary element of the crime of robbery with a dangerous weapon, the amendment of the indictment against defendant from attempted robbery with a dangerous weapon to robbery with a dangerous weapon sufficiently apprised defendant of the charge against him with enough certainty to have enabled him to prepare his defense and was not in error; further, since the classifications and punishments of the crimes of attempted robbery with a dangerous weapon and robbery with a dangerous weapon are identical, the amendment to defendant's indictment did not deprive the trial court of knowledge as to the judgment to pronounce in the event of conviction since the amendment did not substantially alter the charge. State v. Van Trusell, 170 N.C. App. 33, 612 S.E.2d 195, 2005 N.C. App. LEXIS 886 (2005), cert. denied, — N.C. —, 620 S.E.2d 196 (2005).

Amendment of an indictment alleging robbery with a dangerous weapon to remove allegations concerning the amount of money taken during the robberies was permissible because the amendment did not constitute substantial alterations in that the value of the property taken was not an element of the offense but merely surplusage. State v. McCallum, 187 N.C. App. 628, 653 S.E.2d 915, 2007 N.C. App. LEXIS 2561 (2007).

Bill Need Not Name all Victims. — Force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense of armed robbery, G.S. 14-87; the deletion of one of two victim's names from the indictment at trial did not change the degree or nature of the charged offense of armed robbery and did not prejudice defendant's theory of defense, and thus the trial court properly allowed the amendment. State v. Ingram, 160 N.C. App. 224, 585 S.E.2d 253, 2003 N.C. App. LEXIS 1731 (2003).

IX. EVIDENCE.

Evidence of Demand for Property Not Mentioned in Indictment. — Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there was no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944).

Evidence of Demand Not Necessary. — Evidence that defendants drew their pistols, and one defendant told victim, "Buddy, don't even try it," held sufficient to show attempted armed robbery, even without a demand for money or property. State v. Davis, 340 N.C. 1, 455 S.E.2d 627, cert. denied, 516 U.S. 846, 116 S. Ct. 136, 133 L. Ed. 2d 83 (1995).

Robbery of Same Premises on Prior Occasion. — In prosecution for armed robbery the trial court did not err in allowing an eyewitness to testify that the defendant robbed the same restaurant three days before the crime for which he was on trial. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

Evidence of a prior robbery was relevant and admissible where defendant's statement indicated money from the prior robbery was used to buy walkie-talkies, ski masks, and shotguns for the robbery in the case at bar, and the robberies were similar. State v. Colvin, 92 N.C. App. 152, 374 S.E.2d 126 (1988), cert. denied, 324 N.C. 249, 377 S.E.2d 758 (1989).

Photographs of Robbery. — The trial court properly allowed the photographs of the robbery to be admitted into evidence where the accuracy of the photographs was established by the testimony of a witness who was familiar with the scene, object and person portrayed therein. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

Videotape of Robbery. — Defendant in robbery case argued that the judge erred in allowing the jury to view a videotape without first instructing them that it was admissible solely for the purpose of illustrating the victim's testimony; however, defendant did not request a limiting instruction, and since the State laid a proper foundation to introduce the videotape for either substantive or illustrative purposes, no limiting instruction was necessary. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1989), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

Testimony as to Absence of Fingerprints. — In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder, since, the trial court, after the motions to strike were allowed, instructed the jury not to consider the striken evidence and specifically referred to the evidence and the witness who provided it, there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, 272 S.E.2d 852 (1981).

Handguns. — In a prosecution for armed robbery, the Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error, since (1) on the basis of the record before the court, it was unable to conclude that the admission of the exhibits by the trial court was in fact error, as the exhibits in question were not placed before the court for its examination, nor was there any stipulation placed in the record which would serve to describe the exhibits; and (2) even if the exhibits were erroneously admitted, defendants were not prejudiced by their admission into evidence, as several witnesses positively identified defendants as the persons who perpetrated the robbery. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Admission of Weapon Without Description. — Where the court admitted the weapon (a box cutter) itself into evidence, although a verbal description supplemental to introduction of the weapon would have been preferable, its omission was not fatal, and pursuant to N.C.R.A.P. 9(b)(5), the appellate court would order the weapon sent up and added to the record on appeal. State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985).

Previous Abandoned Plan as Evidence. — In a prosecution for armed robbery, evidence of a plan to rob a shopping mall, which plan was abandoned because of circumstances at the mall unfavorable to the successful execution of the planned crime, was admissible where within minutes the same parties were engaged in a plan which resulted in the armed robbery. The evidence elicited by the defendants concerning their hesitancy to engage in the charged crimes emphasized the relevancy of the evidence of the abandoned plan, which tends to show intent and the existence of the abandoned plan, which tends to show intent and the existence of a plan and design among defendants and their confederates to obtain money by means of a robbery. State v. Martin, 309 N.C. 465, 308 S.E.2d 277 (1983).

Possession of Recently Stolen Property Raises Presumption. — If and when it is established that there was an armed robbery in which property was stolen, then the possession of such recently stolen property raises a presumption of fact that the possessor is guilty of the armed robbery. State v. Hickson, 25 N.C. App. 619, 214 S.E.2d 259, appeal dismissed, 288 N.C. 246, 217 S.E.2d 670 (1975).

Possession of a non-unique item similar or identical to a stolen item, standing alone, is not sufficient to establish defendant's possession of the stolen item, so as to apply the doctrine of recent possession for the purpose of inferring that defendant was the thief. State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986), overruled on other grounds, State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987).

Defendant's confession, without more, was substantial evidence of each of the essential elements of the crime to support his conviction for robbery of victim with a dangerous weapon. State v. James, 321 N.C. 676, 365 S.E.2d 579 (1988).

Trial court's striking of defendant's statement that he did not rob the business in question constituted prejudicial error entitling him to a new trial. Defendant's testimony later in the trial to the effect that he took no money in the course of the robbery did not render the court's action harmless, since the offense of robbery with a dangerous weapon is completed if there is an attempt to take personal property by the use of a firearm or other deadly weapon. State v. Lassiter, 70 N.C. App. 731, 321 S.E.2d 175 (1984), cert. denied, 313 N.C. 512, 329 S.E.2d 398 (1985).

Defense of Voluntary Intoxication. — Defendant's testimony about his drug use on the night of the crime failed to establish a defense of cocaine-induced intoxication and thus rendered harmless the judge's alleged misstatement regarding defendant's inability to raise the defense of voluntary intoxication to the crime of robbery with a firearm. State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 757 (1989).

Robbery victim's testimony that defendant had his hand in his pocket as if he was brandishing a gun was sufficient to support defendant's conviction of robbery with a dangerous weapon; that defendant never said he had a gun and that the victim never actually saw a firearm was not fatal to the State's case, as the victim reasonably believed that defendant possessed a firearm during the robbery. State v. Bartley, 156 N.C. App. 490, 577 S.E.2d 319, 2003 N.C. App. LEXIS 204 (2003).

Evidence held sufficient to be submitted to the jury on the charge of robbery with firearms. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956), overruled on other grounds sub nom. State v. England, 278 N.C. 42, 178 S.E.2d 577 (1971).

Testimony by armed robbery victim, including identification of defendant, was sufficient for submission of case to the jury. State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970).

The evidence that defendant had a pistol within easy reach, that he had threatened the prosecutrix with it, and that she was in fear for her life when he took her money, was sufficient to go to the jury on the robbery with firearms charge. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a store employee was robbed at gunpoint by more than one person; that the persons who robbed him fled from the scene in a red Dodge Aspen; that at least one person fled into the woods at the end of a high speed chase by a county police officer; that police officers used a bloodhound to follow the trail of that person to a location where both defendants were found hiding under a bridge; and that a .32 caliber revolver was also found at that location. State v. Porter, 303 N.C. 680, 281 S.E.2d 377 (1980).

In a prosecution for armed robbery, evidence from which the jury could find that defendant was driving an automobile in the vicinity of the place where the armed robbery occurred with the intention of aiding the robber in his escape, and that defendant picked the robber up in his automobile a few minutes after the robbery and aided the robber in leaving the scene was sufficient evidence to overcome defendant's motion to dismiss. State v. Monroe, 78 N.C. App. 661, 338 S.E.2d 137 (1986).

Evidence held sufficient to permit the jury to infer that defendant committed armed robbery. State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where the evidence tended to show that the night manager of a motel sensed an object against his head which felt like a pistol barrel and he heard it click, a toy pistol was found in defendant's room, and money and a .38 caliber pistol were taken in the robbery. State v. Dark, 26 N.C. App. 610, 216 S.E.2d 498, cert. denied, 288 N.C. 245, 217 S.E.2d 669 (1975).

Where the State's evidence showed that the defendant held a dangerous weapon in his hand at the time he assaulted the victim, that he still had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator, and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim, viewing this evidence in the light most favorable to the State, there was sufficient evidence to submit the charge of armed robbery to the jury and the trial court properly denied the defendant's motion for nonsuit as to that charge. State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a male wearing a stocking mask over his face ran toward the manager of a grocery store who was leaving the store after closing; the man had a gun pointed at the manager; the manager, who was carrying an automatic pistol, turned and fired six times at the man who then fled; approximately an hour later police went to an apartment about six blocks from the store where they found defendant lying on the floor bleeding from gunshot wounds; the apartment was the residence of defendant's aunt; defendant was taken to the hospital where clothes he was wearing, including trousers and tennis shoes, were taken into custody by police; the tread pattern on the bottom of the tennis shoes was found to be similar to a footprint found near a mud puddle behind the store and to other footprints in the area; and no other shootings were reported that evening. State v. Quinerly, 50 N.C. App. 563, 274 S.E.2d 285, cert. denied, 302 N.C. 632, 280 S.E.2d 447 (1981).

Trial court did not err in denying defendant's motions to dismiss armed robbery charge where the evidence showed that after defendant initially dragged victim to defendant's truck, victim said to defendant, "Do you want to get the money? You can get the money and go," since the fact that the idea of making money from victim's employer may have originated with victim rather than defendant did not necessarily remove the armed robbery issue from the jury. State v. Sutcliff, 322 N.C. 85, 366 S.E.2d 476 (1988).

Where the State's evidence tended to show that defendant was found hiding beneath a house in the area that the robbers were reported to have run, defendant matched the description of one of the robbers and was in the company of the other defendant who was positively identified by a victim as one of the robbers, and from the area beneath and around the house, law enforcement officers found a pair of flowered shorts and a burgundy silk-type shirt with holes cut in each, two pairs of tennis shoes, a pocket knife, and $305.00, all of which were linked to the robbery, the trial court did not err in submitting the evidence to the jury. State v. Cannon, 92 N.C. App. 246, 374 S.E.2d 604 (1988), rev'd on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990).

The evidence was sufficient to support a finding by the jury that defendant was guilty of conspiracy to commit armed robbery and attempted armed robbery. State v. Bell, 338 N.C. 363, 450 S.E.2d 710 (1994), cert. denied, 515 U.S. 1163, 115 S. Ct. 2619, 132 L. Ed. 2d 861 (1995).

Where there was substantial evidence to support a finding that the offense charged had been committed and that the defendant committed it, the case was for the jury and the motion to dismiss was properly denied. State v. Workman, 344 N.C. 482, 476 S.E.2d 301 (1996).

Trial court did not err in denying defendant's motion to dismiss a robbery with a dangerous weapon charge for insufficient evidence; although the victim had not seen defendant's knife until defendant was in custody, an officer who saw the incident testified that he had seen the knife after defendant took the victim's wallet and immediately after a short chase by the victim, defendant was holding the knife and the wallet while threatening the victim. State v. Blair, 181 N.C. App. 236, 638 S.E.2d 914, 2007 N.C. App. LEXIS 85 (2007), cert. denied, appeal dismissed, 361 N.C. 570, 650 S.E.2d 815 (2007).

Evidence that defendant and the victim knew each other and were in close communication; that defendant told defendant's cousin that defendant and defendant's son were leaving to commit a robbery; that defendant told defendant's cousin defendant could obtain firearms; and that, after the murder, defendant was in possession of certain firearms stolen from the victim's house was sufficient to support a conviction for robbery with a dangerous weapon and, thus, to send the charge to the jury. State v. Rankin, 191 N.C. App. 332, 663 S.E.2d 438, 2008 N.C. App. LEXIS 1320 (2008).

Evidence of Taking Sufficient. — Although the state did not introduce the money found on defendant's person, there was substantial evidence that defendant and his accomplices unlawfully took the victim's personal property. State v. Donnell, 117 N.C. App. 184, 450 S.E.2d 533 (1994).

Taking the circumstantial evidence in the light most favorable to the State, a reasonable jury could have been convinced beyond a reasonable doubt that there was a taking, so the evidence was sufficient for a conviction for robbery with a dangerous weapon, G.S. 14-87(a), and the defendant's motion to dismiss was properly denied. State v. White, 154 N.C. App. 598, 572 S.E.2d 825, 2002 N.C. App. LEXIS 1520 (2002).

Evidence was sufficient to support the "taking" element of armed robbery, as a jury could have reasonably concluded that the victim's purse, which was remained within the victim's arms reach, was no longer under the victim's protection because defendant had a gun pressed into the victim's stomach. State v. Patterson, 182 N.C. App. 102, 641 S.E.2d 376, 2007 N.C. App. LEXIS 485 (2007).

Evidence Sufficient to Be Submitted to Jury in Prosecution for Conspiracy to Commit Armed Robbery. — See State v. Mason, 24 N.C. App. 568, 211 S.E.2d 501, cert. denied, 286 N.C. 725, 213 S.E.2d 725 (1975).

Evidence Sufficient to Show Conspiracy. — Evidence held sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with codefendant in the robbery, with each having preassigned roles, and that defendant and codefendant conspired to commit the robbery. State v. Ayudkya, 96 N.C. App. 606, 386 S.E.2d 604 (1989).

Evidence held sufficient to show that defendant acted in concert with another in armed robbery. State v. Bray, 321 N.C. 663, 365 S.E.2d 571 (1988).

Evidence was sufficient to convict each defendant of robbery with a dangerous weapon where the evidence showed the defendants acted in concert; one defendant's act of pointing a gun at the victims was sufficient to implicate both defendants for robbery with a dangerous weapon, even though they had not planned, prior to the crime, on using a weapon. State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176, 2004 N.C. App. LEXIS 694 (2004).

Evidence that defendant, a gang member, (1) on one night met with other gang members to participate in an initiation of gang members, (2) participated in obtaining bullets to support gang missions, (3) asked to be allowed to shoot a victim that was abducted by other gang members, and (4) grumbled when he was not chosen to shoot and kill the victim, was sufficient to show that defendant joined with one or more persons to kidnap, rob, assault with a deadly weapon, and attempt to murder the victim, and was constructively present when the crimes were carried out. State v. Tirado, 358 N.C. 551, 599 S.E.2d 515, 2004 N.C. LEXIS 911 (2004), cert. denied, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

Defendant's participation in elaborate preparations for robbery was sufficient to prove guilt of conspiracy to commit robbery with a dangerous weapon. State v. Colvin, 90 N.C. App. 50, 367 S.E.2d 340, cert. denied, 322 N.C. 608, 370 S.E.2d 249 (1988).

Evidence Insufficient to Show Taking with Intent to Deprive Decedent of Property. — Where the evidence clearly established that defendant and deceased struggled violently in the area where most of decedent's personal property was discovered, and defendant's uncontroverted testimony refuted the conclusion that he forcibly took these items from the decedent with the intent to steal them, the logical inference was that decedent lost these items during the struggle. There was simply no substantial evidence of a taking by defendant with the intent to permanently deprive decedent of the property. Therefore, defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been dismissed. State v. Bates, 309 N.C. 528, 308 S.E.2d 258 (1983).

The evidence of robbery with a dangerous weapon was sufficient for the trial court to submit it as an aggravating circumstance where the wallet—containing a driver's license and other papers, but no money—was found lying open in front of the victim's body; inside the wallet were a drop and a smear of blood which the defendant admitted could have come from his hand but which he could not explain given the fact that he claimed not to have taken the money until after cleaning up and disposing of the murder weapon and bloody clothes, supporting a reasonable inference that defendant removed the money immediately after the murder. State v. Frogge, 351 N.C. 576, 528 S.E.2d 893, 2000 N.C. LEXIS 357 (2000), cert. denied, 531 U.S. 994, 121 S. Ct. 487, 148 L. Ed. 2d 459 (2000).

Testimony As to State of Mind Admissible. — Testimony by two of the adult armed robbery victims as to the children's state of mind was relevant to suggest that their lives were endangered and threatened by defendant's actions. State v. Anderson, 181 N.C. App. 655, 640 S.E.2d 797, 2007 N.C. App. LEXIS 410 (2007).

Evidence held sufficient to sustain conviction in State v. Vance, 268 N.C. 287, 150 S.E.2d 418 (1966).

The evidence of the State was sufficient to support the verdict of robbery with a firearm where it was established that defendant picked the victim, furnished the weapon, was present during the robbery, refused to identify the robbers, and tried to mislead the officers by identifying another person. State v. Moore, 22 N.C. App. 679, 207 S.E.2d 358, cert. denied, 285 N.C. 762, 209 S.E.2d 286 (1974).

The evidence was sufficient to show that the crime of armed robbery was committed and that defendant committed it, where it tended to show that the victim's personal property was taken from his person without his consent by violent means with the intent to steal, and a firearm was used, even though the victim was shot first and then his money was taken. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

Evidence that store personnel allowed defendant to take a coat only because they were afraid, since he had a gun and threatened to kill one of them, was sufficient to support a jury finding that the defendant's use or threatened use of the gun was inseparable from the taking and induced the victims to part with the coat. State v. Hope, 317 N.C. 302, 345 S.E.2d 361 (1986).

Where there was evidence that a .410 shotgun and other property was taken from residence and that the .410 shotgun was used to kill victim, the jury could have found beyond a reasonable doubt that defendant used violence before he left the victim's premises with the stolen property, and therefore, before the taking was over, and thus the evidence was sufficient to support a conviction of robbery with a deadly weapon. State v. Sumpter, 318 N.C. 102, 347 S.E.2d 396 (1986).

The evidence was clearly sufficient to show that the defendant, whether acting alone or together with the codefendant pursuant to a common purpose, committed the crimes of second-degree murder and armed robbery against the victim. State v. Giles, 83 N.C. App. 487, 350 S.E.2d 868 (1986), cert. denied, 319 N.C. 460, 356 S.E.2d 8 (1987).

Evidence held to constitute substantial evidence of each element of armed robbery and first-degree murder committed with premeditation and deliberation, and of defendant as the perpetrator. State v. Williams, 319 N.C. 73, 352 S.E.2d 428 (1987).

Evidence held sufficient to support convictions of robberies with a firearm of two murder victims. State v. Robbins, 319 N.C. 465, 356 S.E.2d 279, cert. denied, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

Evidence tending to show a continuous transaction in which defendant critically wounded the victim and removed his wallet a short time afterwards was sufficient to support defendant's conviction for armed robbery. State v. Rasor, 319 N.C. 577, 356 S.E.2d 328 (1987).

Evidence held sufficient to convict defendant of both first degree burglary and robbery with a dangerous weapon. State v. Maness, 321 N.C. 454, 364 S.E.2d 349 (1988).

Evidence held sufficient to allow the jury to reasonably find that murder was committed by defendant in furtherance of a robbery of the victim and his place of business, and accordingly, to support defendant's convictions for both second-degree murder and armed robbery. State v. Pearson, 89 N.C. App. 620, 366 S.E.2d 895, cert. denied, 323 N.C. 178, 373 S.E.2d 120 (1988).

The following evidence, viewed in the light most favorable to the State, supported defendant's conviction for both felony murder and armed robbery: (1) the defendant was at the scene of the crimes at the approximate time of the crimes; (2) he left a witness in a car while he entered a store; (3) he returned to car wearing a different shirt; (4) he was seen leaving the store; (5) he gave money to a witness stating he had gotten it in the store and had had to shoot someone; (6) he threatened to shoot witness if he told anyone; and (7) there had been money in the store earlier in the day. State v. Small, 328 N.C. 175, 400 S.E.2d 413 (1991).

State's evidence was sufficient to support a felony murder charge based on robbery with a dangerous weapon, as the evidence showed defendant and the victim together on a store surveillance videotape, and the next evening defendant was in possession of the victim's car, wallet, boom box, and other personal property; the evidence also showed that the victim kept his wallet in the pocket of his trousers and his boom box in the house. DNA evidence placed defendant at the victim's home, and the victim's blood was found on defendant's trousers. State v. Campbell, 359 N.C. 644, 617 S.E.2d 1, 2005 N.C. LEXIS 842 (2005).

Substantial evidence existed in the record to support the trial court's submission of the case against defendant for robbery with a dangerous weapon to the jury even though no physical evidence was found. State v. Roddey, 110 N.C. App. 810, 431 S.E.2d 245 (1993).

Where there was evidence that defendant was in possession of money apparently belonging to the victim at the time witness and other defendant entered the victim's home and where there was also evidence that defendant was in possession of a gun at that time, there was sufficient evidence to support defendant's conviction for robbery with a dangerous weapon. State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (1993).

Evidence was clearly sufficient to show that defendant robbed victim with the use of a dangerous weapon. State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (1993).

The evidence supported the defendant's convictions of robbery with a dangerous weapon and attempted robbery with a dangerous weapon, where the defendant and his accomplice entered a victim's home, displayed weapons, and required certain victims to give them money and jewelry. State v. Allred, 131 N.C. App. 11, 505 S.E.2d 153 (1998).

Evidence supported the defendant's conviction for robbery with a dangerous weapon, where the defendant was seen in a bar near the victim's home shortly before he was robbed and murdered, the defendant's palm print was found in the victim's home, and the defendant was seen driving the victim's car and trying to use his cash card shortly before his body was discovered. State v. Thomas, 350 N.C. 315, 514 S.E.2d 486, 1999 N.C. App. LEXIS 246 (1999), cert. denied, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999).

The victim's testimony that defendant "held a metal object towards her" and demanded all the money in the store's cash register, coupled with her testimony that she was afraid for her life, was sufficient to satisfy the requirements of this section. State v. Stevenson, 136 N.C. App. 235, 523 S.E.2d 734, 1999 N.C. App. LEXIS 1378 (1999), cert. denied, 351 N.C. 368, 543 S.E.2d 144 (2000).

State presented substantial evidence to support each element of robbery with a dangerous weapon; there was substantial evidence that defendant was the man who unlawfully took the victims' personal property, that a dangerous weapon was used in the robbery, and that the lives of the victims were threatened. State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776, 2002 N.C. App. LEXIS 1274 (2002), cert. denied, 357 N.C. 168, 581 S.E.2d 440 (2003).

Although the State Supreme Court cautioned counsel against using Biblical arguments when arguing to the jury that a defendant deserved the death penalty, the court held that the prosecutor's use of Biblical references during an argument to the jury in defendant's case were not so grossly improper that the trial court erred by failing to intervene ex mero motu, and the court upheld defendant's convictions for first-degree murder and robbery with a firearm based on evidence which showed that defendant shot a victim twice in the face with a shotgun and took the victim's car and other personal property. State v. Haselden, 357 N.C. 1, 577 S.E.2d 594, 2003 N.C. LEXIS 318 (2003).

Evidence that defendant entered an apartment armed with a loaded shotgun, chambered a round of ammunition, verbally threatened the occupants with death, hit one of the occupants in the head to coerce surrender of his property, and shot another occupant in the head at close range while he was involved in a confrontation with another robber was sufficient to sustain the jury's verdict that the killing and robbery were part of a single transaction, and the trial court did not err when it selected attempted armed robbery as the predicate felony for felony murder, arrested only that conviction, and entered judgments convicting defendant of felony murder and three counts of armed robbery. State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889, 2003 N.C. App. LEXIS 2039 (2003).

There was substantial evidence that defendant used a dangerous weapon to rob her victim, and defendant's conviction for robbery with a dangerous weapon was affirmed where, although the victim did not know who struck her, she testified that the last thing she remembered before waking up in a hospital's emergency room was getting out of her vehicle to speak with defendant following a collision which defendant admitted having caused intentionally; although no weapon was produced at trial, a treating doctor testified that the victim received head injuries consistent with the use of a foreign instrument against the back of her head, and that, although her other injuries were consistent with a fall, in his opinion her head injuries occurred before she fell to the curb. State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64, 2004 N.C. App. LEXIS 509 (2004), cert. denied, 359 N.C. 196, 608 S.E.2d 65 (2004).

Evidence Held Insufficient to Support Conviction. — Proof of the defendant's presence in a place of business, his possession therein of a firearm and his intent to commit the offense of robbery was not sufficient to support a conviction of the offense described in this section, for it omitted the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Where the evidence was insufficient to establish that murder victim was in possession of his watch or ring at the time of alleged robbery, the fact that these items were absent from the scene of the murder and alleged robbery and were never recovered thereafter was insufficient to establish proof of robbery with a dangerous weapon. State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986), overruled on other grounds, State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987).

Uncontradicted evidence offered by the State that the defendant, who had been asked by county police to act as an informant about break-ins at grocery stores possibly involving the co-defendant, informed the police of the intended robbery beforehand and later assisted the police in gathering evidence did not permit a reasonable inference that the defendant had the specific intent to unlawfully deprive the store owner of his personal property, and, thus, the trial court erred in denying the defendant's motions to dismiss the charge of attempted robbery with a dangerous weapon. State v. Allison, 319 N.C. 92, 352 S.E.2d 420 (1987).

Evidence Held Insufficient to Support Conviction. — Where there was not sufficient evidence to show the juvenile knew that his friend was going to rob the victim, nor did the State introduce any evidence tending to show that the juvenile encouraged the commission of the crime, and in fact, tried to help stop the attack, the robbery charge should have been dismissed. In re R.P.M., 172 N.C. App. 782, 616 S.E.2d 627, 2005 N.C. App. LEXIS 1803 (2005).

Evidence held insufficient to convict defendant of robbery with a dangerous weapon in violation of this section and assault with a deadly weapon inflicting serious bodily injury in violation of G.S. 14-32(b). State v. Griffin, 84 N.C. App. 671, 353 S.E.2d 679, cert. denied, 319 N.C. 407, 354 S.E.2d 732 (1987).

Defendant's conviction of armed robbery, pursuant to G.S. 14-87, had to be reversed because defendant used only his hands in the robbery and, thus, the evidence was not sufficient to support the conviction of armed robbery; however, pursuant to G.S. 15-170, there was sufficient evidence for a conviction of the lesser included offense of common law robbery, as defendant stole a car from the victim with the use of force. State v. Staten, 172 N.C. App. 673, 616 S.E.2d 650, 2005 N.C. App. LEXIS 1777 (2005), cert. denied, — U.S. —, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Evidence Held Sufficient to Show Use of Dangerous Weapon. — Defendant's conviction of robbery with a dangerous weapon, G.S. 14-87, was affirmed, because evidence was sufficient to support the conviction of robbery with a dangerous weapon, because the evidence established that defendant used a box cutter, which was classified as a dangerous weapon, and that the victim believed that his life was being threatened. State v. Pratt, 161 N.C. App. 161, 587 S.E.2d 437, 2003 N.C. App. LEXIS 1979 (2003).

Failure to Show Material or Prejudicial Errors. — In the appeal of a conviction for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury, where defendant assigned as error the failure of the trial court to sustain three objections made by defendant during the testimony of the victim in which the victim stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she can still see the defendant's face when she closes her eyes; and that she let the defendant take the money because he had a gun, the defendant may have been correct in his assertion that these answers were in places speculative or unresponsive, but neither the defendant nor the record showed that the errors were material or prejudicial, and absent such a showing defendant was not entitled to a new trial. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

Variance as to Ownership. — In respect of armed robbery, variance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982), overruled on other grounds, State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Variance as to Ownership of Store from Which Property Taken. — A variance between the allegation in the indictment which alleged that one person was the owner and in charge of the store from which the property was forcibly taken and the evidence which disclosed that another person owned the store was not fatal to an indictment which contained all essential averments required by the statute. State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971).

No Fatal Variance Between Indictment and Evidence. — There was no fatal variance between an indictment which charged that property was taken from the "residence" or "place of business" of a named person and evidence that the armed robbery occurred at a finance company where the person named was employed, the property having been in the lawful custody of such person. State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970).

Variance Between Allegations and Proof as to Property Taken Not Material. — Variance between the allegations of the indictment and the proof in respect of the property taken was not material. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Judgment of Nonsuit for Variance Improvidently Entered. — The fact that one employee named in the indictment as the person endangered and threatened and from whom the store's money had been taken happened to be farther from the store's money than two other employees when it was taken into possession by robbers did not negate the fact that the money was taken from the presence of that employee and all other employees then on duty in the store; therefore a judgment of nonsuit for variance was improvidently entered. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Evidence Sufficient to Deny Motion to Dismiss. — Trial court properly denied defendants' motion to dismiss, pursuant to G.S. 15A-954, in their criminal trial wherein they were charged with robbery with a dangerous weapon in violation of G.S. 14-87, as there was substantial evidence of each essential element of the offense and of defendants' identities as the perpetrators; a restaurant employee who was held at gunpoint while the restaurant was robbed testified as to the elements of the offense, and an accomplice who also worked in the restaurant identified defendants as the perpetrators. State v. Jackson, 161 N.C. App. 118, 588 S.E.2d 11, 2003 N.C. App. LEXIS 1980 (2003).

Evidence was sufficient to show defendant attempted to commit the crime of attempted robbery with a dangerous weapon because, viewing the evidence in the light most favorable to the state, a reasonable person could find that defendant and his accomplices, while acting in concert, tried to rob a victim of her pocketbook as they entered the victim's house with guns drawn. State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006), rev'd in part, 361 N.C. 675, 651 S.E.2d 865 (2007), aff'd on remand, — N.C. —, 660 S.E.2d 116, 2008 N.C. App. LEXIS 898 (2008), State v. Farrar, 179 N.C. App. 561, 634 S.E.2d 253, 2006 N.C. App. LEXIS 1966 (2006).

Evidence that the victim was going to buy marijuana, defendant had money with the victim's blood on defendant, and defendant had several bags of marijuana on defendant was sufficient to allow a jury to infer that defendant robbed the victim and killed the vicitm in the process and thus, to withstand defendant's motion to dismiss the charge of felony murder based on armed robbery. State v. Dawkins, — N.C. App. —, 675 S.E.2d 402, 2009 N.C. App. LEXIS 513 (2009).

Evidence was Sufficient to Find Defendant Aided and Abetted the Armed Robbery. — State offered sufficient circumstantial evidence to allow the jury to find that defendant aided and abetted the friend's armed robbery by driving the "get away" car; immediately after committing the robbery, the friend got into the car at the gas station with his loaded gun, a ski cap, and gloves although it was a hot May day, and a paper bag with the stolen money, defendant then drove off, with a loaded gun under his own seat, taking the "back way home," while the friend lay down on the back seat of the car. State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680, 2003 N.C. App. LEXIS 1491 (2003).

X. INSTRUCTIONS.

Instruction on Element of Felonious Taking. — In every armed robbery case the judge must instruct the jury on the element of felonious taking, but he need not use the specific words "felonious taking"; he is only required to describe in accurate terms the state of mind necessary for the crime. State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974).

Explanation of Principles of Aiding and Abetting. — When the State presents evidence tending to show defendant might have aided and abetted, it is incumbent upon the trial court to explain the principles of aiding and abetting which apply to the particular evidence in the case. State v. Logan, 25 N.C. App. 49, 212 S.E.2d 236 (1975).

Reading Statute to Jury Without Further Comment. — Any error resulting from a plain reading of the statute to the jury without further comment is neither material nor prejudicial. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972).

Reference to "Some Weapon". — In its instructions, the trial court's use of the words "some weapon" rather than "firearms or other dangerous weapon," although not approved, was not such as to mislead or misinform the jury, where the court specified a pistol as the weapon allegedly used elsewhere in the charge. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Definition of Dangerous Weapon. — Although the court omitted the word "death" from the instruction defining dangerous weapon, the trial court's instruction as to the definition of serious bodily injury was appropriate to aid the jury in determining if the instrument was likely to cause death or serious bodily injury, and, therefore, to endanger or threaten life. State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24, cert. denied, 338 N.C. 671, 453 S.E.2d 185 (1994).

Victim's Belief That Weapon Was Firearm. — Where victim's testimony showed that she believed the gun to be a firearm, the trial court properly refused to give an instruction on the lesser included offense of common law robbery. State v. Wilson, 121 N.C. App. 720, 468 S.E.2d 475 (1996).

Instruction Not Relieving State of Proving Essential Element. — An instruction which merely informed the jury that a .22 caliber pistol was, in fact, a firearm, and should the jury find that defendant used a .22 caliber pistol on the occasion in question then such a weapon would be a firearm within the meaning of that term as used in this section, was not objectionable on the ground that the instruction in effect told the jury that defendant used a firearm in the commission of the robbery, thereby relieving the State of the burden of proving an essential element of armed robbery. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Common Purpose. — Fact that the trial court's instructions on the law of acting in concert allowed the jury to convict defendant of robbery with a dangerous weapon without proof that he shared a common purpose with his codefendants to use a firearm in the robbery did not result in error, in light of the principle that G.S. 14-87 did not create a new crime but merely increased the punishment which could be imposed for common law robbery when the perpetrator used a weapon. State v. Thompson, 149 N.C. App. 276, 560 S.E.2d 568, 2002 N.C. App. LEXIS 213 (2002), appeal dismissed, 355 N.C. 499, 564 S.E.2d 231 (2002).

Unauthorized Expression of Opinion. — Where defendants entered pleas of not guilty to charges of armed robbery and there was nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," was an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

Charge as to Two Counts Where Facts Supported Only One Count. — Where defendant took money from a store owner and no injury was inflicted on any one of the employees, even though the lives of all employees present were endangered, a charge and conviction of two counts of robbery was erroneous: Defendant committed only one robbery. State v. Potter, 285 N.C. 238, 204 S.E.2d 649 (1974).

Error to Give Instruction for Second-Degree Murder Based upon Mens Rea for Robbery. — Trial court erroneously instructed the jury it could convict defendant of second-degree murder if it found he acted in concert with co-felon "with a common purpose to commit robbery"; a conviction for second-degree murder requires a finding that defendant acted intentionally and with malice to kill the victim; therefore, the erroneous instruction given by the trial court could have allowed defendant to be convicted of second-degree murder based on the defendant's mens rea for robbery. State v. Hunt, 91 N.C. App. 574, 372 S.E.2d 744 (1988), cert. denied, 325 N.C. 430, 383 S.E.2d 656 (1989).

Evidence Supporting Charge on Both Kidnapping and Armed Robbery. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles where he was robbed, there was sufficient asportation and evidence to support a charge to the jury on both kidnapping and armed robbery, and the State is not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (1974).

Knife as Deadly Weapon. — In prosecution for assault with a deadly weapon with intent to kill inflicting serious injury and for attempted robbery with a dangerous weapon, where victim testified that she was stabbed with a pocketknife and treating physician testified that victim was bleeding profusely from all of her wounds when she arrived at hospital, that she lost from one to two quarts of blood and that she had to be hospitalized for four days, the trial court did not err in instructing the jury that a knife is a dangerous or deadly weapon. State v. Mason, 79 N.C. App. 477, 339 S.E.2d 474, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

Cap Pistol. — In a case where there was evidence that the instrument used by defendant in the robbery appeared to be a firearm capable of endangering or threatening the life of the victim and there was also evidence that the instrument was either a cap pistol or an inoperative firearm incapable of threatening or endangering the life of the victim, it was for the jury to determine the nature of the weapon. The jury should have been instructed that they could, but were not required to, infer from the instrument's appearance to the victim that it was a firearm or other dangerous weapon. State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986).

Instruction to Return Verdict of Guilty "as Charged". — In a prosecution for robbery by use of a knife, an instruction to return a verdict of guilty "as charged," without any reference to a knife or other weapon whereby the life of the victim was endangered or threatened, was erroneous. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

Lesser Included Offenses. — The elements of violence and taking were so joined in time and circumstances that the trial court did not err by refusing to instruct the jury on the lesser included offenses. State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996), cert. denied, 520 U.S. 1201, 117 S. Ct. 1562, 137 L. Ed. 2d 708 (1997).

The trial judge did not err in giving instructions for robbery with a dangerous weapon without instructing for the offense of misdemeanor larceny where the evidence presented at trial positively established the elements of armed robbery. State v. Washington, 142 N.C. App. 657, 544 S.E.2d 249, 2001 N.C. App. LEXIS 174 (2001).

Instruction on Attempt Not Warranted. — In view of evidence that defendant used a knife to rob victim, defendant was not entitled to have the court instruct the jury on attempted common law robbery. Defendant was either guilty of attempting to rob victim of his wallet and money by the threatened use of a knife or not guilty. State v. Rowland, 89 N.C. App. 372, 366 S.E.2d 550, cert. denied, 323 N.C. 619, 374 S.E.2d 116 (1988).

Failure to Instruct on Common-Law Robbery Was Error. — Defendant was entitled to a new trial on robbery with dangerous weapon charge, because the jury should have been instructed on lesser included offenses of common law robbery where the jury could have found that the victim relinquished the victim's car due to threat of being hit with defendant's fist, which was not a dangerous weapon. State

v. Ryder, — N.C. App. —, 674 S.E.2d 805, 2009 N.C. App. LEXIS 457 (2009).

Failure to Instruct on Common-Law Robbery Not Error. — The trial court did not err in denying request for an instruction on common-law robbery where state's evidence included use of pry bar, screwdriver, and lug wrench carried into the trailer by the assailants. State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (1994).

Failure to instruct the jury on the lesser included offense of common law robbery, in addition to robbery under G.S. 14-87, was not error because the evidence showed the police found what appeared to be a silver handgun outside a bedroom window where defendant's accomplice was found, and the victim told police that one of the men who robbed the store pointed a silver handgun at the clerk. State v. Ford, — N.C. App. —, 669 S.E.2d 832, 2008 N.C. App. LEXIS 2228 (2008).

Failure to Instruct on Defense of Voluntary Intoxication Not Error. — Where the only charge against defendant to which voluntary intoxication was relevant was the charge of robbery with a firearm, defendant not only testified as to his intent to commit robbery, he testified in great detail about the events that occurred in the supermarket and beyond defendant's own statements that he was "zooted" on the night in question, and the only suggestion of intoxication was witness's observation that defendant's eyes appeared "glassy," this evidence was not sufficient to have entitled defendant to an instruction on intoxication, and there was no error in the failure of the judge to submit the charge to the jury. State v. Attmore, 92 N.C. App. 385, 374 S.E.2d 649 (1988), cert. denied, 324 N.C. 248, 377 S.E.2d 757 (1989).

Error in the instructions with respect to actual or constructive possession did not entitle defendant to a new trial where the central issue was whether the defendant's use of the pistol to threaten and endanger the victim was close enough in time to the taking of the property as to constitute one continuous transaction and the trial court's instructions upon this point were clear and correct. State v. Jarrett, 137 N.C. App. 256, 527 S.E.2d 693, 2000 N.C. App. LEXIS 318 (2000).

Instruction on Defense of Duress Not Warranted. — Defendant's testimony that during struggle with victim he gained control of gun, demanded and received victim's wallet, and then shot him in the back of the head plainly negated a defense of duress, and the trial court did not err in refusing to give such an instruction in connection with armed robbery charge. State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990).

Instruction on Right Not to Retreat. — Defendant was entitled to a jury instruction relating the defendant's right not to retreat where the evidence revealed that defendant did not stab the victim until after trying to leave the house on two occasions and after the victim tried to choke her. State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994), cert. denied, 339 N.C. 616, 454 S.E.2d 259, 340 N.C. 115, 456 S.E.2d 320 (1995).

Instruction Proper Where Substantially the Same. — There was no error where the instruction given by the court was substantially the same as the one requested by the defendant. State v. Duncan, 136 N.C. App. 515, 524 S.E.2d 808, 2000 N.C. App. 59 (2000).

Requested Instructions. — In defendant's conviction for robbery with firearm, the trial court did not err in denying defendant's requested jury instructions that the victim had an interest in this case because of pending criminal charges; although the trial court's instruction was more general than defendant's requested instructions, it substantially conformed with defendant's request, and defendant was also allowed to cross-examine the victim regarding the pending criminal charges, and was allowed to argue the point to the jury. State v. Geddie, — N.C. App. —, — S.E.2d —, 2003 N.C. App. LEXIS 85 (Feb. 18, 2003).

Harmless Error. — In a prosecution for robbery with a dangerous weapon, if it was error for the trial court to fail to instruct the jury on misdemeanor larceny, the error was harmless beyond a reasonable doubt, under G.S. 15A-1443(b), given the overwhelming evidence of defendant's guilt as, while defendant denied possessing or using a knife to accomplish the taking, he did not deny his threat of force against the victim, and the victim's testimony unequivocally showed that in a single, continuous transaction defendant stole videotapes and, in order to escape, threatened the victim with a knife after a pursuit that ended only 20 feet from the victim's store. State v. Bellamy, 159 N.C. App. 143, 582 S.E.2d 663, 2003 N.C. App. LEXIS 1434 (2003), cert. denied, 357 N.C. 579, 589 S.E.2d 130 (2003).

Elements of the Offense. — Although a jury instruction did not specifically mention any particular element of the offense charged — only that the evidence tended to show that defendant admitted one or more facts relating to the crime charged under G.S. 14-87(a) — the testimony provided the evidence needed to support some of the elements of the charge. State v. Borders, 164 N.C. App. 120, 594 S.E.2d 813, 2004 N.C. App. LEXIS 740 (2004).

XI. PUNISHMENT.

Punishment Provisions Constitutional. — It is within the province of the General Assembly to prescribe maximum punishments which may be imposed upon those convicted of crime. It is not for courts to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved. The punishment provisions of this section are constitutionally valid. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Subsection (d) Controls over Fair Sentencing Act. — The legislature clearly intended the provisions of subsection (d) of this section to control over the conflicting provisions of the Fair Sentencing Act, G.S. 15A-1340.1 et seq. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Section 15A-1335 did not apply on resentencing where the judge did not weigh aggravating factors but imposed the minimum sentence of 14 years prescribed by subsection (d) of this section. State v. Williams, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

Minimum and Presumptive Sentence Is 14 Years. — Considering (1) the combined effect of subsection (d) of this section and G.S. 15A-1340.4(f) excepting robbery with a firearm from the 12-year presumptive sentence of other Class D felonies, and (2) the amendment of subsection (a) of this section specifically to state that one who robs with a firearm shall be guilty of a Class D felony (and not that the person shall be punished as a Class D felon), 14 years is not only the minimum, but also the presumptive, sentence in robbery with firearm cases. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

The language of subsection (d) of this section is unambiguous and its effect is clear. Any person convicted of armed robbery must receive no less than a 14-year sentence, notwithstanding any other provision of law. Thus, there is no room for judicial construction on this point. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Under subsection (d) of this section, trial judges are prohibited from imposing a term of less than 14 years. State v. Williams, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

And May Not Be Reduced Except for Good Behavior. — As the General Assembly has chosen to remove much of the discretionary power which judges previously exercised in the sentencing process, the 14-year sentence for armed robbery specified in subsection (d) of this section is a minimum which may not be reduced under the Fair Sentencing Act, G.S. 15A-1340.1 et seq., except by credit for good behavior. State v. Leeper, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Findings as to Aggravating and Mitigating Factors Not Required Where Presumptive Sentence Imposed. — Where the court imposes the presumptive sentence specified in subsection (d) of this section, it is not required to make any findings regarding aggravating and mitigating factors. State v. Horne, 59 N.C. App. 576, 297 S.E.2d 788 (1982); State v. Crain, 73 N.C. App. 269, 326 S.E.2d 120 (1985).

Possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in a robbery with firearm case. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 741, 299 S.E.2d 227 (1983).

Pecuniary Gain as Aggravating Factor. — If the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating factor. Pecuniary incentive is not always inherent in the crime. Thus, the determination, whether pecuniary gain as an aggravating factor, is also an element of the underlying offense, is a factual one. For example, if A hires or pays B to disarm C with the threatened use of a firearm and to throw C's weapon in the river, B could be convicted of robbery with a firearm, and B's sentence could be enhanced by the aggravating fact that the offense was committed for hire or pecuniary gain. State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 741, 299 S.E.2d 227 (1983).

Bodily Injury to Blind Victim as Aggravating Factor. — It was proper to find as a factor in aggravation that the defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove this offense. The infliction of bodily injury in any amount is not an element of either first-degree burglary or robbery with a firearm. State v. Isom, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

Aggravating Circumstance to Felony Murder. — Trial court did not err in allowing the jury to find as an aggravating circumstance that a murder was committed during a robbery where the evidence showed that, after the elderly victim invited defendant into his home, defendant grabbed the victim, choked him until he became unconscious, bound him, covered his face in tape, and left him to die from asphyxiation under a bed before defendant then ransacked the victim's home and left with cash, other personal items, and the victim's car. State v. Smith, 359 N.C. 199, 607 S.E.2d 607, 2005 N.C. LEXIS 28 (2005), cert. denied, — U.S. —, 126 S. Ct. 109, 163 L. Ed. 2d 121 (2005).

Sentences Need Not Be Consecutive for Offenses Disposed of at Same Proceeding. — Where two or more armed robbery offenses are being disposed of in the same sentencing proceeding, the sentences are not required by this section to be consecutive to one another because the defendant is not yet serving a sentence for any of the counts at the time of the sentencing proceeding. The sentencing court may impose consecutive sentences, but it is not required to do so. State v. Crain, 73 N.C. App. 269, 326 S.E.2d 120 (1985); State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987).

Punishment Within Statutory Limits Is Constitutional. — A sentence of 24 to 30 years for the offense of robbery with firearms does not exceed the maximum prescribed by this section and does not constitute cruel and unusual punishment. State v. LePard, 270 N.C. 157, 153 S.E.2d 875 (1967).

A sentence for robbery which was within the statutory maximum did not constitute the cruel and unusual punishment forbidden by N.C. Const., Art. I, § 14 (now N.C. Const., Art. I, § 27). State v. Witherspoon, 271 N.C. 714, 157 S.E.2d 362 (1967).

Punishment under this section which does not exceed the limit fixed by this section cannot be considered cruel and unusual in a constitutional sense. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970); State v. Neal, 19 N.C. App. 426, 199 S.E.2d 143 (1973); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

A sentence which is within the maximum authorized by statute is not cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Only Recourse Is Executive Clemency. — If defendant believes that the sentence imposed under this section upon his plea of guilty, understandingly and voluntarily made, is excessive, his sole recourse is to executive clemency, the sentence being within the statutory maximum. State v. Baugh, 268 N.C. 294, 150 S.E.2d 437 (1966).

Setting Minimum Sentence at Maximum. — In a prosecution for armed robbery, the trial court did not err in sentencing defendant to prison "for the term of not less than thirty (30) years" without specifying a minimum term, since the maximum punishment for armed robbery was 30 years (now 40 years), and the judge set the minimum sentence at the maximum allowed by law. State v. Lipscomb, 27 N.C. App. 416, 219 S.E.2d 349 (1975).

Maximum Punishment for Common Law Robbery. — When, on a charge of robbery with firearms or other dangerous weapons, the jury returns a verdict of guilty of robbery, the maximum sentence that may be imposed is ten years. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965).

Discretion of Trial Judge in Imposing Sentence. — As long as a sentence is within the statutory limits, the punishment imposed by a trial judge is in his discretion. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

By virtue of subsection (a) of this section, the legislature has granted a wide discretion to the trained presiding judge who has had the opportunity to hear the facts, observe the parties to the proceeding and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the limits of this section. The use of this discretionary power by the trial judge is not a denial of equal protection of the laws. State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

Where a sentence is within statutory limits the punishment actually imposed by the trial judge is a discretionary matter. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

The actual length of a sentence imposed is at the discretion of a trial judge so long as it is within statutory limits. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Allowing Victim to Comment on Punishment of Defendant. — In a prosecution for armed robbery the trial court did not commit prejudicial error by allowing a victim of the attempted armed robbery to make a statement relating to the punishment of the defendant. State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Indictment Insufficient to Permit Punishment Under Section. — A bill of indictment was sufficient to support a plea or conviction of highway robbery, for the facts alleged were sufficient to charge robbery by intimidation or violence, which is the gist of common-law robbery, but it did not allege that the life of a person was endangered or threatened by the use or threatened use of a dangerous weapon, instrument or means; hence, the indictment did not contain the additional allegations required in order to permit the more severe punishment provided for in this section. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Plea of Guilty of Robbery Without Firearms. — Where defendant was charged with attempted robbery with firearms, his plea of guilty of robbery without firearms was insufficient to support judgment, and the court erred in accepting such plea. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955).

Court May Not Change Effect of Guilty Plea by Increasing Punishment. — Upon a plea of guilty of highway robbery the court could not change the effect of the plea by finding facts and thereby exposing defendant to greater punishment than the plea would support. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Habitual Offender's Sentence Within Presumptive Range. — As defendant failed to show the court erred in sentencing defendant in the presumptive range as an habitual felon where the trial court made a brief comment regarding the sentencing range in terms of a failed plea bargain, the conviction and sentence of 145 to 183 months for robbery with a dangerous weapon and habitual felon status was affirmed. State v. McFadden, 181 N.C. App. 131, 638 S.E.2d 633, 2007 N.C. App. LEXIS 11 (2007).

"Great Monetary Value" Aggravating Factor Not Supported By Evidence. — Defendant was entitled to a new sentencing hearing after his armed robbery conviction because a finding as an aggravating factor that the offense involved the actual taking of great monetary value was not supported by the evidence where $1,300 and $700 were taken from the victims; the amounts of $1,300 and $700 do not constitute great or extraordinary amounts such that either represents a sum of "great monetary value" within the aggravating factor list. State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343, 2006 N.C. App. LEXIS 582 (2006).

XII. DOUBLE JEOPARDY.

Effect of Directed Verdict. — Since the crime of accessory after the fact has its beginning after the principal offense has been committed, a directed verdict of not guilty of armed robbery does not decide the issue of whether the defendant joined the criminal scheme after the robbery was complete. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, cert. denied, 295 N.C. 649, 248 S.E.2d 253 (1978); 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

Trial Court Erred in Allowing Conviction. — The trial court erred in allowing the jury to convict defendant of attempted armed robbery and of aiding and abetting in common-law robbery, a lesser included offense of armed robbery. State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973).

Prosecution as Accessory Before the Fact Not Barred by Insufficiency of Evidence to Support Armed Robbery Charge. — Insufficiency of the evidence to support a conviction for robbery did not entitle defendant to his discharge, and the State properly tried defendant on the same indictment as an accessory before the fact to the robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Prosecution for Armed Robbery Not Barred by Acquittal as Accessory. — An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly charged with killing, even though the two offenses were committed at the same time, and evidence of guilt of one of the offenses was substantially the same as the evidence of guilt of the other, the acquittal or conviction for one offense would not bar a subsequent prosecution for the other. State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936).

Merger of Armed Robbery and Murder Charges. — Where it appeared conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted, the robberies became a part of and were merged into the murder charges, and having been so used, the defendants could not again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

It was reversible error to impose sentences for a first-degree kidnapping and attempted robbery with a dangerous weapon offenses, both of which the jury was instructed could serve as underlying felonies to the charge of felony murder. State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152, 2005 N.C. App. LEXIS 2624 (2005), aff'd in part, vacated in part, review improvidently allowed in part, 361 N.C. 550, 648 S.E.2d 819 (2007).

A defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Charge of assault with a deadly weapon with intent to kill is not merged with armed robbery charge since "intent to kill" is not an element of armed robbery. State v. Alston, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

Separate Judgments May Be Entered for Armed Robbery and Felonious Assault. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Convictions of Armed Robbery and Assault with a Deadly Weapon Arising from Same Conduct Will Not Support Separate Judgments. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested because in such case, the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975).

If a person is convicted simultaneously of armed robbery and the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, separate judgments may not be pronounced. State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

Two offenses, G.S. 14-87(a) and G.S. 14-87.1, were not fungible, as the crime of robbery with a dangerous weapon contained the additional element that the life of a person was endangered or threatened by the use of the dangerous weapon; thus, defendant failed to show the trial court erred in sentencing him in the presumptive range as a Class D felony habitual felon. State v. McFadden, 181 N.C. App. 131, 638 S.E.2d 633, 2007 N.C. App. LEXIS 11 (2007).

Multiple Convictions Proper Where Several Persons Each Threatened and Robbed. — Where more than one person is present during a robbery wherein the life of each is threatened and property is taken from the person of each, the robber can be convicted of more than one armed robbery offense. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982), overruled on other grounds, State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Where the proof showed, and the jury found, that defendant threatened each of two partners in a restaurant business and demanded money from each of them without limitation, there was no federal constitutional infirmity in convicting him of two attempted armed robberies. Ashford v. Edwards, 780 F.2d 405 (4th Cir. 1985).

But Not Where Property Taken From Only One. — Where two persons, both employees, are present during a robbery wherein the life of each is threatened incident to the theft only of property or money belonging to the employer, a single armed robbery is committed. State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982), overruled on other grounds, State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988).

Conviction Under Federal and State Statutes. — Defendant who was convicted for robbing a bank in this State with a dangerous weapon in violation of 18 U.S.C. § 2113(d) was not entitled to dismissal of an indictment in the Superior Court of Perquimans County for committing the same robbery with a dangerous weapon in violation of this section on double jeopardy grounds, as defendant was not being prosecuted for the "same offense" that he had been punished for in the federal court. State v. Myers, 82 N.C. App. 299, 346 S.E.2d 273 (1986).

Robbery defendant's double jeopardy rights were violated because the fact that the bank's money was obtained from two tellers did not allow the State to indict defendant for two separate armed robberies. State v. Becton, 163 N.C. App. 592, 594 S.E.2d 143, 2004 N.C. App. LEXIS 419 (2004), appeal dismissed, 358 N.C. 733, 601 S.E.2d 862 (2004).

When defendant entered a guilty plea on a charge of armed robbery, former (d) of G.S. 14-87 required that an armed robbery prison term run consecutively with and commence at expiration of any other sentence being served by the offender; defendant's concurrent sentence for this offense was illegal and should have been vacated. State v. Ellis, 361 N.C. 200, 639 S.E.2d 425, 2007 N.C. LEXIS 38 (2007).

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Aggregated Sentences. — The post release supervision and parole commission cannot aggregate, pursuant to G.S. 15A-1354(b), the sentences imposed for armed robberies committed prior to October 1, 1994. See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

If an inmate is sentenced to consecutive armed robbery sentences at the same sentencing hearing, his sentence should be aggregated pursuant to G.S. 15A-1354(b). See opinion of Attorney General to Sam F. Boyd, Executive Director Post-Release Supervision and Parole Commission, — N.C.A.G. — (Aug. 1, 1995).

§ 14-87.1. Punishment for common-law robbery.

Robbery as defined at common law, other than robbery with a firearm or other dangerous weapon as defined by G.S. 14-87, shall be punishable as a Class G felony. (1979, c. 760, s. 5; 1993, c. 539, s. 1174; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

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No Substantial Evidence of Violence or Fear. — Where the evidence tended to show that defendant took the victim's watch by violence or fear, but there was no evidence that violence or fear induced her to give money to the defendant, the evidence tended to show that she gave the defendant her money in furtherance of her desire to have the watch back, the State failed to present substantial evidence that the victim was induced to part with her money as a result of violence or fear. State v. Parker, 322 N.C. 559, 369 S.E.2d 596 (1988).

Use of Gun as Aggravating Factor Under § 15A-1340.4. — Use of a deadly weapon has never been an element of proof required to establish common law robbery in North Carolina; consequently, the State's evidence proving defendant's use of the gun as an aggravating factor was not barred by G.S. 15A-1340.4(a). State v. Smaw, 96 N.C. App. 98, 384 S.E.2d 304 (1989).

Defendant Properly Required to Speak Words of Robber. — Notwithstanding the fact that the witness stated that she did not need to hear defendant speak in order to identify him, the trial court correctly requested and required defendant to speak the words the robber spoke to demonstrate his voice to the witness and to the jury for purposes of voice identification. State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994).

When Defendant May Be Convicted of Both Robbery and Another Offense. — The trial court did not err in finding defendant guilty of both common law robbery and second-degree kidnapping in connection with the robbery of a pizza restaurant where there was sufficient evidence of restraint of an employee beyond what was necessary for the commission of common law robbery, to wit: defendant placed the employee in a choke hold, hit him in the side three times, wrestled with the employee on the floor, grabbed the employee again around the throat, pointed a gun at his head and marched the employee to the front of the pizza shop. State v. Muhammad, 146 N.C. App. 292, 552 S.E.2d 236, 2001 N.C. App. LEXIS 862 (2001).

Evidence of Identity Deemed Sufficient. — Trial court properly denied defendant's motion to dismiss robbery charges on grounds of insufficient evidence that defendant was the perpetrator, as he was "eyeball to eyeball" with the victim on two occasions, and asked for the same amount of money for the same reasons and gave the same story on both occasions. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Evidence That Taking Was Accomplished By Fear Deemed Sufficient. — In a robbery prosecution, the evidence was sufficient to show the taking was accomplished by fear, even though the victim ran after her assailant after he robbed her, as the victim testified she had been "absolutely scared," in fear, frantic, and "scared to death" of defendant while defendant robbed her, and her employer testified that the victim was "in a terrible state," was "scared to death," and was acting unusual after the attack. State v. Wilson, 158 N.C. App. 235, 580 S.E.2d 386, 2003 N.C. App. LEXIS 1045 (2003).

Additional Element Not Required For Common Law Robbery. — Two offenses, G.S. 14-87(a) and G.S. 14-87.1, were not fungible, as the crime of robbery with a dangerous weapon contained the additional element that the life of a person was endangered or threatened by the use of the dangerous weapon; thus, defendant failed to show the trial court erred in sentencing him in the presumptive range as a Class D felony habitual felon. State v. McFadden, 181 N.C. App. 131, 638 S.E.2d 633, 2007 N.C. App. LEXIS 11 (2007).

Applied in State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989).

Cited in State v. Melton, 307 N.C. 370, 298 S.E.2d 673 (1983); State v. Eure, 61 N.C. App. 430, 301 S.E.2d 452 (1983); State v. Williams, 99 N.C. App. 333, 393 S.E.2d 156 (1990); United States v. Fonville, 5 F.3d 781 (4th Cir. 1993); State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996).

§ 14-88. Train robbery.

If any person shall enter upon any locomotive engine or car on any railroad in this State, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished as a Class D felon. (1895, c. 204, s. 2; Rev., s. 3765; C.S., s. 4266; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1175; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

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Cited in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-89: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(5), effective October 1, 1994.

§ 14-89.1. Safecracking.

(a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:

(1) By the use of explosives, drills, or tools; or
(2) Through the use of a stolen combination, key, electronic device, or other fraudulently acquired implement or means; or
(3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other surreptitious means; or
(4) By the use of any other safecracking implement or means.

(b) A person is also guilty of safecracking if he unlawfully removes from its premises a safe or vault for the purpose of stealing, tampering with, or ascertaining its contents.

(c) Safecracking shall be punishable as a Class I felony. (1961, c. 653; 1973, c. 235, s. 1; 1977, c. 1106; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1176; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

For survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

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Violation of this section is a felony. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

Safecracking is a separate and distinct crime, usually requiring special implements or explosives and particular skills. State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

Upon amending this section in 1977, the Legislature clearly intended felonious larceny and safecracking to remain separately punishable offenses; thus a defendant, at a single trial, may be convicted of both crimes as charged in indictments. State v. Strohauer, 84 N.C. App. 68, 351 S.E.2d 823 (1987).

Safecracking Is Not Identical to Former Crime of Burglary with Explosives. — Elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before October 1, 1977; the predecessor to this section provided as an essential element that the safe or vault be used for storing money or other valuables. State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981), appeal dismissed, 304 N.C. 732, 288 S.E.2d 804 (1982).

Attempt and Completed Offense of Safecracking Are of Equal Dignity. — This section makes the completed act of safecracking and attempted safecracking offenses of equal dignity. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

This section makes an attempt to force open a safe or vault a crime of equal dignity with the completed offense. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Acts Constituting Attempted Safecracking. — Removing the dial, sawing off the hinges, chiseling out a part of the concrete bottom of a small safe and smudging it with a blowtorch were held to go beyond mere preparation for safecracking and in law to constitute attempted safecracking. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Evidence sufficient to sustain conviction for safecracking. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

Evidence sufficient to sustain conviction of defendant as abettor of offense of attempted safecracking. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Evidence Insufficient For Conviction. — Legislature did not intend "safe" or "vault" to include a locking side compartment in a particle board desk; evidence that defendant tried to break open the locking side compartment of a desk did not support his conviction for safecracking in violation of G.S. 14-89.1. State v. Goodson, 178 N.C. App. 557, 631 S.E.2d 842, 2006 N.C. App. LEXIS 1565 (2006).

Failure to Allege "Feloniously". — An indictment for violation of this section which does not contain the word "feloniously" is fatally defective. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

An indictment which clearly states that a safe was opened "by the use of chopping tools," follows the language of the safecracking statute, and is entirely proper. State v. Martin, 20 N.C. App. 477, 201 S.E.2d 540 (1974).

Sentence of 48-50 years under former section held cruel and unusual punishment. See Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

Applied in State v. Cox, 262 N.C. 609, 138 S.E.2d 224 (1964); State v. Bullock, 268 N.C. 560, 151 S.E.2d 9 (1966); State v. Watson, 272 N.C. 526, 158 S.E.2d 334 (1968); State v. Thacker, 5 N.C. App. 197, 167 S.E. 879 (1969); State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971); State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Lewis, 281 N.C. 564, 189 S.E.2d 216 (1972); State v. Broadway, 16 N.C. App. 167, 191 S.E.2d 243 (1972); State v. Smith, 17 N.C. App. 694, 195 S.E.2d 369 (1973); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966); State v. Logner, 266 N.C. 238, 145 S.E.2d 867 (1966); State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969); Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977); State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

(a) This section shall apply to any person:

(1) Exercising a public trust.

(2) Holding a public office.

(3) Who is a guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, including, but not limited to, a settlement agent, as defined in G.S. 45A-3.

(4) Who is an officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person.

(b) Any person who shall:

(1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or

(2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use,

any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever that (i) belongs to any other person or corporation, unincorporated association or organization or (ii) are closing funds as defined in G.S. 45A-3, which shall have come into his possession or under his care, shall be guilty of a felony.

(c) If the value of the property described in subsection (b) of this section is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the value of the property is less than one hundred thousand dollars ($100,000), the person is guilty of a Class H felony. (21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; Code, s. 1014; 1889, c. 226; 1891, c. 188; 1897, c. 31; Rev., s. 3406; 1919, c. 97, s. 25; C.S., s. 4268; 1931, c. 158; 1939, c. 1; 1941, c. 31; 1967, c. 819; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(d); 2009-348, s. 1; 2009-570, s. 31.)

Cross References. — As to larceny by servants or other employees, see G.S. 14-74. As to the embezzlement of funds of a corporation by its officers, see G.S. 14-254. As to description in indictment for embezzlement, see G.S. 15-150. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to embezzlement of funds of a bank by its officers, see G.S. 53-129. As to embezzlement by a member of the State Sinking Fund Commission, see G.S. 142-40.

Effect of Amendments. — Session Laws 2009-348, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote the section.

Session Laws 2009-570, s. 31, effective August 28, 2009, substituted "G.S. 45A-3" for "G.S. 45-3" at the end of subdivision (a)(3).

Legal Periodicals. — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Who May Be Guilty of Embezzlement.
IV. Indictment.
V. Evidence.
VI. Instructions.

I. GENERAL CONSIDERATION.

Origin and Purpose. — Embezzlement was not a common-law offense. State v. Hill, 91 N.C. 561, (1884). It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed in them. 1 McLain Cr. Law, G.S. 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 308. State v. McDonald, 133 N.C. 580, 133 N.C. 680, 45 S.E. 582, 45 S.E. 582 (1903); State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

The offense of embezzlement is exclusively statutory. State v. Blair, 227 N.C. 70, 40 S.E.2d 460 (1946); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960); State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

The crime of embezzlement, unknown to the common law, was created and is defined by statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967); State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971); State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973); State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Strict Construction. — Statutes creating criminal offenses must be strictly construed. This rule has been applied with vigor in the construction of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

This section is a penal statute, creating a new offense, and cannot be extended by construction to persons not within the classes designated. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

The purpose of the 1939 amendment was to enlarge the scope of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

The words "or any other fiduciary" show clearly the General Assembly did not intend to restrict the application of the 1939 amendment to receivers. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Section 14-168.1 Compared. — Section 14-168.1 is more limited in its scope with regard to bailees than this section; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while this section covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between this section and G.S. 14-168.1 as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 does not remove bailees from this section or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-254 Compared. — The use of the word "abstract" in G.S. 14-254 differentiates it from this section. The latter applies to embezzlement and excepts offenders under 16 years of age. It is not necessary under G.S. 14-254 to allege that the defendant is more than 16 years old. State v. Switzer, 187 N.C. 88, 121 S.E. 43 (1924).

A defendant charged with embezzlement must have intended to defraud his principal. By contrast, a defendant violates G.S. 14-254 if he does any of the acts prohibited by the statute with an intent to defraud or deceive any person. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

A defendant charged with embezzlement must have received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal. Under G.S. 14-254 it is sufficient to show that a defendant as an agent or officer of a corporation abstracted or misapplied corporate funds. It need not be shown that he received such funds in the course of his employment. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Defendant May Be Charged But Not Convicted of Both Embezzlement and False Pretenses. — While a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction, the State may charge the defendant with both offenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

And State Need Not Elect Between Them. — As to embezzlement and false pretenses charges, the Legislature intended to give full effect to North Carolina's original common-law rule against requiring the State to elect between charges, if the felonies charged allegedly arose from the same transaction. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Where There Is Substantial Evidence of Each. — Where there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration; in doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

But Court May Only Submit Charge Supported by Evidence. — If the evidence at trial tends only to show embezzlement or tends only to show false pretenses, the trial court must submit only the charge supported by evidence for the jury's consideration. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Consolidated Conviction of Both Embezzlement and False Pretenses as Error. — Separate convictions for mutually exclusive offenses, even though consolidated for a single judgment, have potentially severe adverse collateral consequences; therefore, consolidating the two convictions against defendant for embezzlement and obtaining property by false pretenses and entering a single judgment did not reduce the trial court's error to harmless error. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Great Monetary Loss as Aggravating Factor. — Since the ratio of the amounts embezzled to the threshold amount of the offense charged was a factor to be considered in determining whether the imposition of an aggravated sentence was proper, defendant's embezzlement of $404,436 and $296,901 supported the imposition of an aggravated sentence, as they were sums of "great monetary value" when compared with threshold amount required for embezzlement of amounts over $100,000.00. State v. Cobb, 187 N.C. App. 295, 652 S.E.2d 699, 2007 N.C. App. LEXIS 2367 (2007).

False Accusation of Embezzlement Is Actionable Slander. — The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. Elmore v. Atlantic C.L.R.R., 189 N.C. 658, 127 S.E. 710 (1925).

Dischargeability in Bankruptcy. — The elements of embezzlement must be proved by clear and convincing evidence to establish a debt as nondischargeable, and a written agreement between the parties may be refuted by the actions of the parties. Great Am. Ins. Co. v. Storms, 28 Bankr. 761 (Bankr. E.D.N.C. 1983).

Applied in State v. Hitt, 25 N.C. App. 216, 212 S.E.2d 540 (1975); State v. Riley, 167 N.C. App. 346, 605 S.E.2d 212, 2004 N.C. App. LEXIS 2186 (2004); State v. Cobb, 361 N.C.

414, 646 S.E.2d 365, 2007 N.C. LEXIS 586 (2007).

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Harper, 94 N.C. 936 (1886); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904); State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906); Beck & Co. v. Bank of Thomasville, 161 N.C. 201, 76 S.E. 722 (1912); State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927); In re Hege, 205 N.C. 625, 172 S.E. 345 (1934); State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934); State v. Shore, 206 N.C. 743, 175 S.E. 116 (1934); State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977); Gillikin v. Whitley, 66 N.C. App. 694, 311 S.E.2d 677 (1984); Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985); State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998); In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007); State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007).

II. ELEMENTS OF THE OFFENSE.

Embezzlement Defined. — Embezzlement is simply a fraudulent breach of trust by misapplying the property entrusted to the defendant to the use either of himself or another, when done with a fraudulent intent. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Charges of Embezzlement and False Pretenses Mutually Exclusive. — Close scrutiny of the elements of embezzlement and obtaining property by false pretense shows that the two charges are mutually exclusive; in order to be found guilty of embezzlement, a defendant must obtain the property in question rightfully in the course of his employment by virtue of his fiduciary or agency relationship with his principal; the charge of obtaining property by false pretense requires the defendant to have wrongfully obtained the property at the outset. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 326 N.C. 576, 391 S.E.2d 165 (1990).

Elements of Embezzlement. — In order to convict a defendant of embezzlement, four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use. State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957); State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962); State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331, cert. denied, 301 N.C. 101, 273 S.E.2d 306 (1980).

Embezzlement in violation of this section requires the establishment of four elements: (1) That the defendant was the agent of the prosecutor; (2) that by the terms of his employment he was to receive the property of his principal; (3) that he received the property in the course of his employment; and (4) that, knowing it was not his own, he converted it to his own use or fraudulently misapplied it. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977); State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979), cert. denied, 299 N.C. 333, 265 S.E.2d 401, 449 U.S. 826, 101 S. Ct. 89, 66 L. Ed. 2d 29 (1980); State v. Seufert, 49 N.C. App. 524, 271 S.E.2d 756 (1980), cert. denied, 301 N.C. 726, 276 S.E.2d 289 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); State v. Tedder, 62 N.C. App. 12, 302 S.E.2d 318, cert. denied and appeal dismissed, 309 N.C. 324, 305 S.E.2d 561 (1983).

In order to convict a defendant of embezzlement under this section, the State must prove three distinct elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979); State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983); State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985); State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987); State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

This section makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship. The person accused must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulently converted the property to his own use. State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

Actual or Constructive Possession. — The phrase "which shall have come into his possession or under his care" contemplates actual and constructive possession. Thus, the possession required by this section to make out a prima facie case of embezzlement may be actual or constructive possession. State v. Jackson, 57 N.C. App. 71, 291 S.E.2d 190, cert.

denied, 306 N.C. 389, 294 S.E.2d 216 (1982).

Having access to property differs from possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, i.e., in a fiduciary capacity. State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 820 (1983).

Conversion to Own Use Need Not Be Shown. — To embezzle is for an agent fraudulently to misapply the property of his principal; it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. State v. Foust, 114 N.C. 842, 19 S.E. 275 (1894).

It is not necessary to show that the agent converted his principal's property to his own use so long as it is shown that the agent fraudulently or knowingly and willfully misapplied it. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979); State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983).

It is not necessary to show that the agent converted his principal's property to the agent's own use. It is sufficient to show that the agent fraudulently or knowingly and willfully misapplied it, or that he secreted it with intent to embezzle or fraudulently or knowingly and willfully misapply it. State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972); State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

In order to prove the third element of embezzlement under this section, it is not necessary to show the defendant converted the property to his own use, provided the state shows that defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which he received it as agent or fiduciary. State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

Fraudulent Intent Is an Essential Element. — The intent to fraudulently or willfully misapply the principal's property for purposes other than that for which it was received is an essential element of embezzlement that the State must prove beyond a reasonable doubt. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

The criminality of the act of embezzlement depends upon the intent, and therefore the State must show the intent to defraud beyond a reasonable doubt. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Meaning of Fraudulent Intent. — Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935); State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942); State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978); State v. Earnest, 64 N.C. App. 162, 306 S.E.2d 560 (1983).

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Gentry, 228 N.C. 643, 46 S.E.2d 863, cert. denied, 335 U.S. 818, 69 S. Ct. 39, 93 L. Ed. 372 (1948); State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

The fraudulent intent required under this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it in the course of his employment. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

Intent Must Be Proved Beyond a Reasonable Doubt. — The conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud. State v. McDonald, 133 N.C. 580, 133 N.C. 680, 45 S.E. 582, 45 S.E. 582 (1903).

But Direct Proof of Intent Is Not Necessary. — Fraudulent intent is a necessary element of the statutory offense of embezzlement and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935).

Fraudulent intent within the meaning of this section may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred. State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962); State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972); State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1977); State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Conversion Without Intent Is Insufficient. — The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. State v. Cahoon, 206 N.C. 388, 174 S.E. 91 (1934).

Proof of conversion of principal's property without proof of fraudulent intent will not sustain a conviction of embezzlement, and the State's failure to show substantial evidence of fraudulent intent would be sufficient grounds to grant defendant's motion to dismiss. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

And the act of conversion does not raise the presumption of a felonious intent in a prosecution of an indictment for embezzlement. State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Intent to Repay Is No Defense. — An intent to restore the property embezzled or a readiness and willingness to do so at a later date is not a defense to a prosecution under this section. State v. Summers, 141 N.C. 841, 53 S.E. 856 (1906); State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Trespass is not a necessary element. In embezzlement the possession of the property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime. State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

Nor Is Demand for Payment. — A demand is not necessary to support a prosecution under this section, as it is not made a prerequisite to prosecution. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

It need not be alleged or proved that the property had been committed to the care of defendant, nor that any breach of confidence or trust, save that which grows out of the relation of owner and servant or agent, had occurred. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888).

Property of Prosecutor. — The property alleged to have been embezzled must be the property of the prosecutor. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899).

Goods Received Under Special Directions. — Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzles the same, he is indictable under this section. State v. Costin, 89 N.C. 511 (1883).

Age of Defendant. — The burden of showing that he is underage is on the defendant and the State is not called on to prove that he is past 16 years old, for this is a matter of defense and within the defendant's knowledge. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

Evidence Held Sufficient. — The mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement, regardless of the defendant's fraudulent intent at the time of making such a false entry. But depositing funds of another in one's own account, together with the making of incorrect entries in books of account, and failing to turn the other's funds over to him at a time when obligated to do so, is sufficient evidence of conversion. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971).

Evidence that defendant attorney, knowing money was not his, nonetheless deposited client's check into his personal account and subsequently failed to turn the funds over to client was sufficient to show embezzlement. State v. Melvin, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

Where the record supported conclusion that defendant was victim's attorney, received money from the victim rightfully in the course of his employment, and it was clear that the victim never obtained a share in a partnership for which the money was intended, there was sufficient evidence to support the inference that defendant either fraudulently or knowingly and willfully misapplied his client's funds or that he secreted them with the intent to embezzle. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 326 N.C. 576, 391 S.E.2d 165 (1990).

Evidence held insufficient to show fraudulent intent. State v. Britt, 87 N.C. App. 152, 360 S.E.2d 291 (1987), cert. denied, 321 N.C. 475, 364 S.E.2d 924 (1988).

Defendant could not be convicted of aiding and abetting embezzlement where defendant's spouse obtained blank checks from the family business and used defendant's parent's signature stamp to forge nearly one-half million dollars worth of checks, all without permission, because the spouse had not received the blank checks that were forged in the course of employment or by the terms of employment and it followed that because the State had failed to prove that the spouse was guilty of embezzlement, without proof that an embezzlement occurred. State v. Weaver, 160 N.C. App. 613, 586 S.E.2d 841, 2003 N.C. App. LEXIS 1931 (2003), aff'd, — N.C. —, 607 S.E.2d 599 (2005).

Lawful possession or control element of the crime of embezzlement was not satisfied when defendant's wife, an administrative employee, took a corporate signature stamp without permission and wrote unauthorized corporate checks, thereby misappropriating funds from her employer; such evidence supported a finding of larceny rather than embezzlement. State

v. Weaver, 359 N.C. 246, 607 S.E.2d 599, 2005 N.C. LEXIS 30 (2005).

Evidence was insufficient to support an embezzlement conviction where defendant opened a post office box and bank accounts in the name of her employers without authorization, directed checks to the post office box, deposited the checks into the unauthorized accounts, and wrote checks to herself from those accounts; defendant never took lawful possession of the incoming checks, nor was she entrusted with the checks by virtue of a fiduciary capacity, but, instead, acquired the incoming checks through misrepresentation, State v. Palmer, 175 N.C. App. 208, 622 S.E.2d 676, 2005 N.C. App. LEXIS 2712 (2005).

III. WHO MAY BE GUILTY OF EMBEZZLEMENT.

Fiduciary Defined. — The trial court in a prosecution for embezzlement properly defined a fiduciary as "a person having a duty created by his undertaking to act primarily for another's benefit." State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979), appeal dismissed, 299 N.C. 333, 265 S.E.2d 401, cert. denied, 449 U.S. 826, 101 S. Ct. 89, 66 L. Ed. 2d 29 (1980).

Defendant Need Not Be Corporate Agent or Fiduciary. — A defendant charged with embezzlement need not be an agent or fiduciary of a corporation. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Fiduciary Relationship Shown. — Defendant's promises, promotions, receipt and disbursement of money, and his positions in the condominium development corporations placed him in a fiduciary relationship with all of the investors and potential purchasers of condominium properties; the evidence was sufficient that defendant misapplied or converted funds of investors and potential purchasers. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Bailee. — The fact that Public Laws 1941, ch. 31, amended this section by adding "bailee" to the classes of persons specified constituted a legislative declaration that theretofore a bailee was not included in the definition of classes of persons made by the statute. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

A contractor is not an officer, clerk or servant within the meaning of this section. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899).

Vendor. — This section does not embrace a vendor in an executory contract of purchase and sale. State v. Blair, 227 N.C. 70, 40 S.E.2d 460 (1946); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The relation of lessor and lessee is not embraced by this section. State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900).

Debtor and Creditor. — Where the relationship between the parties is that of debtor and creditor and not that of employee and employer, the debtor cannot be guilty of embezzlement of any funds due on the account. Gray v. Bennett, 250 N.C. 707, 110 S.E.2d 324 (1959).

Where the parties' conduct indicates a debtor-creditor relation, funds that come into the hands of the debtor belong to him, and his subsequent use of them is not embezzlement. Great Am. Ins. Co. v. Storms, 28 Bankr. 761 (Bankr. E.D.N.C. 1983).

Clerks of the Superior Courts. — This section does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of G.S. 14-92. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Person Commissioned by Clerk of Superior Court. — One who, under authority of and subject to the orders of the clerk of the superior court, is commissioned to collect, receive and handle money, and to disburse it to those entitled thereto under the law, has substantially the same status as a court-appointed receiver. Such commissioner is a fiduciary in the same sense as a receiver is a fiduciary. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Commissioner in Equity. — A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party; and where indictment charged the defendant with embezzlement of funds as commissioner, the defendant could not be convicted as agent or attorney. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1934).

As a local alcoholic beverage control board employee, defendant should have been charged with embezzlement under G.S. 14-90; a trial court lacked jurisdiction to hear the case where defendant was charged with violation of G.S. 14-92. State v. Jones, 172 N.C. App. 161, 615 S.E.2d 896, 2005 N.C. App. LEXIS 1438 (2005), cert. denied, stay denied, 360 N.C. 72, 624 S.E.2d 365 (2005), cert. dismissed, 360 N.C. 72, 624 S.E.2d 366 (2005).

Partner. — Under the common law a partner cannot be prosecuted for embezzlement. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

IV. INDICTMENT.

Necessity of Alleging Ownership. — In an indictment for embezzlement it is necessary to allege ownership of the property in a person, corporation, or other legal entity able to own property. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another, and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

Where the owner of embezzled property is an association, partnership, corporation, or other firm or organization, there must be allegations showing such organization to be a legal entity capable of owning property as such, or the individuals comprising the same and owing the property should be set out as owners. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The name of the person from whom the money was received need not be stated. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

Name of Corporation. — In an indictment for embezzlement, where the property belongs to a corporation, the name of the corporation should be given, and the fact that it is a corporation should be stated, unless the name itself imports a corporation. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Age of Defendant. — The averment that the defendant is neither an apprentice nor under the age of 16 years is a substantial compliance with the statute. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, G.S. 14-91 through 14-99, where an indictment of a bank receiver for embezzlement is drawn under this section. State v. Whitehurst, 212 N.C. 300, 193 S.E. 657 (1937).

Fatal Variance Where Only Violation of § 14-92 Charged. — The crime of embezzlement rests upon statute alone, and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of G.S. 14-92, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. State v. Grace, 196 N.C. 280, 145 S.E. 399 (1928).

Indictment Sufficient Under both This Section and § 14-92. — There was no merit to defendant city clerk's contention that her convictions for embezzlement from the city were invalid in that she was convicted for violations of this section, which is a private sector embezzlement statute, when she should have been tried for violations of G.S. 14-92, a statute applicable to public officials, since the indictments against defendant did not refer specifically to any statute and were sufficient to charge defendant with violations of either this section or G.S. 14-92, and since the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Indictment Under This Section Rather Than § 14-168.1. — It was proper for the State to elect to indict the defendant for felonious embezzlement under this section, the broader statute, rather than to indict him under G.S. 14-168.1, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Indictment Charging False Pretenses Will Support Embezzlement Conviction. — Section 14-100 clearly provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Dismissal on Unsworn Representations. — The court erred in allowing motion to dismiss indictments which on their face sufficiently alleged embezzlement, where even assuming, arguendo, that the court could consider extraneous evidence in ruling on the motion, only the unsworn representations of defense counsel at the hearing on defendant's motion, to the effect that defendant was a partner in the victimized partnership, were before the court. State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Substantial Alteration Prohibited. — Deletion by trial court of the words, "Mike Frost, president" from indictments charging defendant with embezzlement to change ownership from Mike Frost, an individual, to Petroleum World, Inc., a corporation, was a substantial alteration of the indictment prohibited by G.S. 15A-923(e). State v. Hughes, 118 N.C. App. 573, 455 S.E.2d 912 (1995).

V. EVIDENCE.

Evidence Sufficient to Survive Motion to Dismiss. — Trial court did not err when it denied defendant's motion to dismiss the embezzlement charges against defendant because the State of North Carolina presented substantial evidence of defendant's agency or fiduciary relationship with the vendors who contracted with defendant sufficient to survive a motion to dismiss on that element. Additionally, the State also presented evidence sufficient to survive the motion to dismiss on the issue of intent as the State presented evidence that defendant received money on behalf of the vendors, did not pay them when it was due, and was experiencing personal financial problems. State v. Newell, 189 N.C. App. 138, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

Evidence of Motive. — Evidence which tended to show that defendant was living far and away above the standard to be expected of one earning $265.00 a week was relevant to establish motive under this section. State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981).

Evidence of Defendant's Spending and Deposits. — Evidence that during a period in which a defendant had allegedly been guilty of embezzling money from his employer the defendant spent money considerably in excess of his known income or made large bank deposits has been held admissible. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971).

Testimony as to Signatures. — The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant, where the witness testified that he had seen defendant write her signature on thousands of occasions. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Evidence Held Insufficient. — Where the evidence tended to show witness paid defendant the sum of $363.00 while the amount due was actually $353.41, a difference of $9.59, and in his capacity of magistrate, defendant was statutorily permitted only to collect the amount of the worthless check, and any related fees or court costs. Any amount overpaid by witness rightfully remained his property and subject to return upon being claimed. Thus, the $9.59 never "belonged," to the State as defendant's principal, thereby rendering nonexistent an essential element of the crime charged. State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

Knowing and Willful Misapplication of Funds. — North Carolina State Bar presented substantial evidence that the attorney knowingly and willfully misapplied a client's settlement money for other purposes; for months the attorney was aware that not only was the attorney's trust account out of balance, but it was woefully short of the necessary funds. N.C. State Bar v. Leonard, 178 N.C. App. 432, 632 S.E.2d 183, 2006 N.C. App. LEXIS 1573 (2006).

VI. INSTRUCTIONS.

Reference to Crime of Larceny. — The trial court in an embezzlement case did not err in referring in the instructions to the crime of larceny where the court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Faulty Instructions Held Reversible Error. — Trial court committed reversible error by essentially instructing the jury that the receipts of vendors who contracted with defendant could not be commingled with other corporate funds as a matter of law. State v. Newell, 189 N.C. App. 138, 657 S.E.2d 400, 2008 N.C. App. LEXIS 427 (2008).

§ 14-91. Embezzlement of State property by public officers and employees.

If any officer, agent, or employee of the State, or other person having or holding in trust for the same any bonds issued by the State, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons knowingly and willfully aiding and abetting or otherwise assisting therein shall be guilty of a felony. If the value of the property is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the property is less than one hundred thousand dollars ($100,000), a violation of this section is a Class F felony. (1874-5, c. 52; Code, s. 1015; Rev., s. 3407; C.S., s. 4269; 1979, c. 716; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(e).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

The word "property" is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942).

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within this section, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Where defendant's alleged scheme did not misapply state funds he already possessed or could otherwise control, but instead deceived those with such control into paying those funds to his co-participants in the scheme, defendant did not misapply funds which he "held in trust" as required by a strict construction of this statute. State v. Bonner, 91 N.C. App. 424, 371 S.E.2d 773 (1988), cert. denied, 323 N.C. 705, 377 S.E.2d 227 (1989).

Collected Taxes Held in Trust. — A retailer holds sales and use taxes collected from purchasers in trust for the state within the meaning of this section. State v. Kennedy, 130 N.C. App. 399, 503 S.E.2d 133 (1998), aff'd, 350 N.C. 87, 511 S.E.2d 305 (1999).

Sufficiency of evidence. — Defendant's conviction for embezzlement of North Carolina property of a value of $100,000 or more by aiding and abetting was affirmed because the state presented substantial evidence that defendant committed the crime by testimony that defendant was the only person authorized to make withdrawals from the corporate account from which the missing funds that were withheld from employee wages for remittance to the North Carolina Department of Revenue were deposited. State v. Ross, 173 N.C. App. 569, 620 S.E.2d 33, 2005 N.C. App. LEXIS 2084 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Applied in State v. Weaver, 160 N.C. App. 613, 586 S.E.2d 841, 2003 N.C. App. LEXIS 1931 (2003).

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889); State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942); State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

§ 14-92. Embezzlement of funds by public officers and trustees.

If an officer, agent, or employee of an entity listed below, or a person having or holding money or property in trust for one of the listed entities, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of a felony. If the value of the money or property is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the value of the money or property is less than one hundred thousand dollars ($100,000), the person is guilty of a Class F felony. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county, unit or agency of local government, or local board of education shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony. If the value of the money, funds, securities, or other property is one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the value of the money, funds, securities, or other property is less than one hundred thousand dollars ($100,000), the person is guilty of a Class F felony. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. The following entities are protected by this section: a county, a city or other unit or agency of local government, a local board of education, and a penal, charitable, religious, or educational institution. (1876-7, c. 47; Code, s. 1016; 1891, c. 241; Rev., s. 3408; C.S., s. 4270; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1985, c. 509, s. 3; 1993, c. 539, s. 1177; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(f).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1981 criminal law, see 60 N.C.L. Rev. 1289 (1982).

CASE NOTES

Section 14-231 Compared. — See State v. Windley, 178 N.C. 670, 100 S.E. 116 (1919).

Section Inapplicable to Private Property. — This section does not embrace the unlawful appropriation of the property of private individuals. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Trial court lacked jurisdiction to hear the case where defendant, a local alcoholic beverage control board employee, was charged with violation of G.S. 14-92; defendant should have been charged with embezzlement under G.S. 14-90. State v. Jones, 172 N.C. App. 161, 615 S.E.2d 896, 2005 N.C. App. LEXIS 1438 (2005), cert. denied, stay denied, 360 N.C. 72, 624 S.E.2d 365 (2005), cert. dismissed, 360 N.C. 72, 624 S.E.2d 366 (2005).

Collected Taxes Held in Trust. — A retailer holds sales and use taxes collected from purchasers in trust for the county within the meaning of this section. State v. Kennedy, 130 N.C. App. 399, 503 S.E.2d 133 (1998), aff'd, 350 N.C. 87, 511 S.E.2d 305 (1999).

Meaning of "Willfully and Corruptly". — The words "willfully" and "corruptly," as they relate to misapplication of funds under this section, have been defined as "[d]one with an unlawful intent," and "the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" was not erroneous under the circumstances of the case. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

Fraudulent Intent Is Necessary. — Unless fraudulent intent is proved, the offense under this section is not proved. State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Fraudulent Intent Can Be Inferred. — The fraudulent intent required in the charge of embezzlement can be inferred from the facts proven. It is not necessary that there be direct evidence of such intent. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Evidence that defendant city clerk wrote salary checks to herself in excess of the amount authorized was sufficient to permit a reasonable inference that defendant fraudulently or knowingly and willfully misapplied the city's funds to her own use without authorization so as to support her conviction of embezzlement. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

The State need not prove embezzlement or misapplication of the entire sum alleged in the indictment. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Nor Exclusive Possession. — It is not necessary for the State to prove that defendant had exclusive possession of the funds to sustain a charge of embezzlement under this section. More than one person can have possession of the same property at the same time. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Knowledge of Supervisory Board No Excuse. — The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys, does not excuse or justify one who knowingly misapplies such funds unlawfully. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Sufficiency of Indictment Under Both This Section and § 14-90. — There was no merit to defendant city clerk's contention that her convictions for embezzlement from the city were invalid in that she was convicted for violations of G.S. 14-90, which is a private sector embezzlement statute, when she should have been tried for violations of this section, a statute applicable to public officials, since the indictments against defendant did not refer specifically to any statute, they were sufficient to charge defendant with violations of either G.S. 14-90 or this section, and the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Testimony as to Signature. — The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant where the witness testified that he had seen defendant write her signature on thousands of occasions. State v.

Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Instructions — Use of Words "Fiduciary Person". — Trial court in an embezzlement case did not commit prejudicial error in charging the jury that defendant was a fiduciary person though this section, neither contains nor refers to the words "fiduciary person," since the trial court was not restricted to using the exact words of the statute in giving instructions and the use of "fiduciary person" to define that statutory phrasing of this section has been specifically approved by the North Carolina Supreme Court. The use of the words was not an expression of trial judge's opinion contrary to the mandate of G.S. 15A-1222. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Same — Reference to Crime of Larceny. — The trial court in an embezzlement case did not err in referring in the instructions to the crime of larceny where the court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny. State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381, cert. denied, 302 N.C. 633, 280 S.E.2d 448 (1981).

Cited in State v. Hill, 91 N.C. 561 (1884); New York Indem. Co. v. Corporation Comm'n, 197 N.C. 562, 150 S.E. 16 (1929); State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980); In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007).

§ 14-93. Embezzlement by treasurers of charitable and religious organizations.

If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a felony. If the violation of this section involves money with a value of one hundred thousand dollars ($100,000) or more, the person is guilty of a Class C felony. If the violation of this section involves money with a value of less than one hundred thousand dollars ($100,000) or less, a violation of this section is a Class H felony. (1879, c. 105; Code, s. 1017; Rev., s. 3409; C.S., s. 4271; 1993, c. 539, s. 1178; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(g).)

CASE NOTES

Two Offenses Created. — Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending of their moneys without consent; the other is the failure to account for such moneys. State v. Dunn, 138 N.C. 672, 50 S.E. 772 (1905).

Association for Members Solely. — An association organized for the benefit of its members solely is not a benevolent or religious association and in indictment under this section cannot be sustained against an officer who misappropriates funds of the association. State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Cited in State v. Hill, 91 N.C. 561 (1884).

§ 14-94. Embezzlement by officers of railroad companies.

If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be punished as a felon. If the value of the money, bonds, or other valuable funds or securities is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the money, bonds, or other valuable funds or securities is less than one hundred thousand dollars ($100,000), a violation of this section is a Class H felony. (1870-1, c. 103, s. 1; Code, s. 1018; Rev., s. 3403; C.S., s. 4272; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(h).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-95: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(6).

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§§ 14-96, 14-96.1: Repealed by Session Laws 1989 (Regular Session, 1990), c. 1054, s. 6.

Cross References. — For provisions relating to embezzlement by insurance agents, brokers or administrators, and reports to the Commissioner, see now G.S. 58-2-162, 58-2-163.

§ 14-97. Appropriation of partnership funds by partner to personal use.

Any person engaged in a partnership business in the State of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to his own personal use with the fraudulent intent of depriving his copartners of the use thereof, shall be guilty of a felony. Appropriation of partnership funds with a value of one hundred thousand dollars ($100,000) or more by a partner is a Class C felony. Appropriation of partnership funds with the value of less than one hundred thousand dollars ($100,000) by a partner is a Class H felony. (1921, c. 127; C.S., s. 4274(a); 1993, c. 539, s. 1179; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(i).)

CASE NOTES

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. State v. Rawls, 202 N.C. 397, 162 S.E. 899 (1932).

Cited in State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985); State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

§ 14-98. Embezzlement by surviving partner.

If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be guilty of a felony. If the property, money, or effects has a value of one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the property, money, or effects has a value of less than one hundred thousand dollars ($100,000), a violation of this section is a Class H felony. (1901, c. 640, s. 9; Rev., s. 3405; C.S., s. 4275; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(j).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-99. Embezzlement of taxes by officers.

If any officer appropriates to his own use the State, county, school, city or town taxes, he shall be guilty of embezzlement, and shall be punished as a felon. If the value of the taxes is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the taxes is less than one hundred thousand dollars ($100,000), a violation of this section is a Class F felony. (1883, c. 136, s. 49; Code, s. 3705; Rev., s. 3410; C.S., s. 4276; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1180; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(k).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Inference of Fraudulent Intent. — While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. State v. Lancaster, 202 N.C. 204, 162 S.E. 367 (1932).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony: Provided, that if, on the trial of anyone indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony proved; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts: Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud. If the value of the money, goods, property, services, chose in action, or other thing of value is one hundred thousand dollars ($100,000) or more, a violation of this section is a Class C felony. If the value of the money, goods, property, services, chose in action, or other thing of value is less than one hundred thousand dollars ($100,000), a violation of this section is a Class H felony.

(b) Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.

(c) For purposes of this section, "person" means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; 1811, c. 814, s. 2, P.R.; R.C., c. 34, s. 67; Code, s. 1025; Rev., s. 3432; C.S., s. 4277; 1975, c. 783; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1997-443, s. 19.25(l).)

Cross References. — As to obtaining property or services by false or fraudulent use of credit cards or other means, see G.S. 14-113.1 through 14-113.7A. As to alleging intent in the indictment, see G.S. 15-151. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
III. Indictment.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Origin of Section. — This section was derived from the English statutes, 33 Henry VIII, and 30 George II. State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

Unlike larceny, which is a common-law offense, the crime of obtaining property by false pretenses is statutory. State v. Kelly, 75 N.C. App. 461, 331 S.E.2d 227, cert. denied and appeal dismissed, 315 N.C. 187, 339 S.E.2d 409 (1985).

Purpose. — The simple purpose of this section is to prevent persons from using false pretenses to obtain property. The ultimate loss to the victim, therefore, is an issue which is irrelevant to the purpose of the criminal statute and is an issue properly within the province of the civil courts. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

The gist of the offense described in this section is obtaining something of value from the owner thereof by false pretense. State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632, cert. denied and appeal dismissed, 294 N.C. 188, 241 S.E.2d 72 (1977).

The gist of obtaining property by false pretense is the false representation of a subsisting fact which is intended to and which does deceive one from whom property is obtained. State v. Linker, 309 N.C. 612, 308 S.E.2d 309 (1983).

The essence of the crime is the intentional false pretense, and not the resulting economic harm to the victim. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

Scope of Proscribed Activity Broadened by 1975 Amendment. — The legislature, by the unambiguous language of the 1975 amendment of this section, clearly intended to broaden the scope of the proscribed activity so as to make a false representation "of a past or subsisting fact or of a future fulfillment or event" punishable under the statute, and to include in the definition of the crime an attempt to obtain something of value with an intent to defraud. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Prior to the 1975 amendment to this section, criminal liability could not be imposed on someone for misrepresenting his intention to do something in the future, since his "state of mind" was not considered a subsisting fact. The statute's 1975 amendment, however, broadened the scope of proscribed activity to include, within the definition of "false pretense," cases in which someone misrepresents his present intention to perform a promise. State v. Compton, 90 N.C. App. 101, 367 S.E.2d 353 (1988).

Prosecution Under This Section Where

Other Sections More Specifically Fit Alleged Activities. — A person may be prosecuted under this section although other statutes, such as G.S. 14-106 or 14-107, more specifically fit the alleged activities, since a single act or transaction may violate different statutes. State v. Freeman, 59 N.C. App. 84, 295 S.E.2d 619, rev'd on other grounds, 308 N.C. 502, 302 S.E.2d 779 (1983).

Defendant May Be Charged But Not Convicted of Both Embezzlement and False Pretenses. — While a defendant cannot be convicted of both embezzlement and false pretenses based upon a single transaction, the State may charge the defendant with both offenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

And State Need Not Elect Between Them. — As to embezzlement and false pretenses charges, the legislature intended to give full effect to North Carolina's original common law rule against requiring the State to elect between charges, if the felonies charged allegedly arose from the same transaction. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Where There Is Substantial Evidence of Each. — Where there is substantial evidence tending to support both embezzlement and false pretenses arising from the same transaction, the State is not required to elect between the offenses. Indeed, if the evidence at trial conflicts, and some of it tends to show false pretenses but other evidence tends to show that the same transaction amounted to embezzlement, the trial court should submit both charges for the jury's consideration; in doing so, however, the trial court must instruct the jury that it may convict the defendant only of one of the offenses or the other, but not of both. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

But Court May Only Submit Charge Supported by Evidence. — If the evidence at trial tends only to show embezzlement or tends only to show false pretenses, the trial court must submit only the charge supported by evidence for the jury's consideration. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Consolidated Conviction of Both Embezzlement and False Pretenses as Error. — Separate convictions for mutually exclusive offenses, even though consolidated for a single judgment, have potentially severe adverse collateral consequences; therefore, consolidating the two convictions against defendant for embezzlement and obtaining property by false pretenses and entering a single judgment did not reduce the trial court's error to harmless error. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Collateral Estoppel Did Not Bar Trial. — Collateral estoppel under G.S. 15A-954(a)(7) did not bar trial on a second set of 10 checks that were the subject of obtaining money by false pretenses indictments since even if the victim gave permission as to the first four checks litigated in a first trial, a jury could still find that the victim did not give permission to defendant to cash the 10 checks; because of the lack of joinder and the fact that the transactions in the second case occurred at a different time, the only issues decided in the first trial were whether defendant obtained money by false pretenses when negotiating each of the first four checks. State v. Spargo, 187 N.C. App. 115, 652 S.E.2d 50, 2007 N.C. App. LEXIS 2312 (2007), review denied, appeal dismissed, 362 N.C. 370, 663 S.E.2d 858 (N.C. 2008).

Prosecution Under This Section After Dismissal of Larceny Charges. — Because the crimes of larceny and obtaining property by false pretenses are separate and distinguishable offenses, the issuance of a second indictment for false pretenses, after the dismissal of larceny charges at the close of the State's evidence, did not constitute double jeopardy. State v. Kelly, 75 N.C. App. 461, 331 S.E.2d 227, cert. denied and appeal dismissed, 315 N.C. 187, 339 S.E.2d 409 (1985).

The legislature acted within its authority in setting different punishments for offenses under this section and G.S. 14-107. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

Liability of Corporations. — See State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

Evidence of Similar Representations to Others. — Evidence that defendant previously had represented to some five other parties that he would help them obtain houses, and that they had neither obtained houses or received their money back, was relevant to show defendant's fraudulent intent in transactions which were the subject of the present prosecution, and such relevant evidence was not rendered inadmissible merely because it may have shown the commission of a separate offense. State v. Wilson, 57 N.C. App. 444, 291 S.E.2d 830, cert. denied, 306 N.C. 563, 294 S.E.2d 375 (1982).

Applied in State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975); State v. Grier, 35 N.C. App. 119, 239 S.E.2d 870 (1978); State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983); In re Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983); State v. Horton, 73 N.C. App. 107, 326 S.E.2d 54 (1985); State v. Almond, 112 N.C. App. 137, 435 S.E.2d 91 (1993).

Cited in State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980); Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981); In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982); Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923 (M.D.N.C. 1997); State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875, 2000 N.C. App. LEXIS 1103 (2000); R.J. Reynolds Tobacco Co. v. S K Everhart, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 13440 (M.D.N.C. July 31, 2003); State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006); State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

II. ELEMENTS OF OFFENSE.

Elements Generally. — The crime of obtaining property by false pretenses pursuant to this section should be defined as a false representation: (1) of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980); State v. Kilgore, 65 N.C. App. 331, 308 S.E.2d 876 (1983); State v. Hopkins, 70 N.C. App. 530, 320 S.E.2d 409 (1984), overruled on other grounds, State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997); State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

The elements of the offense of false pretenses are: (1) That the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. State v. Carlson, 171 N.C. 818, 89 S.E. 30 (1916); State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928); In re Prushinowski, 574 F. Supp. 1439 (E.D.N.C. 1983).

Obtaining property by false pretenses is defined as (1) a false representation of a past or subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which the defendant obtains or attempts to obtain anything of value from another person. State v. Compton, 90 N.C. App. 101, 367 S.E.2d 353 (1988).

Defendant Must Obtain or Attempt to Obtain Something. — An essential element of the offense proscribed by this section is that accused "obtain or attempt to obtain" something of value by means of any kind of false pretense. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

Obtaining Something of Value Is Not an Element of Soliciting Another to Commit the Offense. — Indictment against defendant for soliciting two others to commit the crime of false pretenses did not have to allege that defendant obtained something of value. While obtaining something of value is an element of the crime of false pretenses, it is not an element of the crime of soliciting another to commit that crime. State v. Polite, 79 N.C. App. 752, 340 S.E.2d 762 (1986).

A transfer of title is not necessary for commission of the offense of obtaining property by false pretenses. State v. Walston, 67 N.C. App. 110, 312 S.E.2d 676 (1984); State v. Kelly, 75 N.C. App. 461, 331 S.E.2d 227, cert. denied and appeal dismissed, 315 N.C. 187, 339 S.E.2d 409 (1985).

Knowledge and Intent Are Essential. — It is an essential element of obtaining property by false pretense that the act be done knowingly and designedly with intent to cheat or defraud. State v. Hines, 54 N.C. App. 529, 284 S.E.2d 164 (1981).

The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. State v. Blue, 84 N.C. 807 (1881); State v. Oakley, 103 N.C. 408, 9 S.E. 575 (1889).

Intent is seldom provable by direct evidence; it must ordinarily be proved by circumstances from which it may be inferred. State v. Bennett, 84 N.C. App. 689, 353 S.E.2d 690 (1987).

In determining the absence or presence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged. State v. Bennett, 84 N.C. App. 689, 353 S.E.2d 690 (1987).

Nonfulfillment of Contractual Obligation Is Not Sufficient to Show Intent. — This section recognizes the danger that juries may improperly infer criminal intent merely from a defendant's failure to carry out his promise, and provides that evidence of the nonfulfillment of a contractual obligation, standing alone, is not sufficient to show an intent to defraud. State v. Compton, 90 N.C. App. 101, 367 S.E.2d 353 (1988).

Deceit Shown. — Where defendant obtained items by having a store clerk charge them to defendant's employer's account using a false purchase order, and the store clerk testified that he believed that defendant was buying the items on account for the employer with the employer's authorization, the State sufficiently proved deceit as an element of obtaining property by false pretenses, because the clerk was deceived, even if the store owner, upon seeing the purchase order after the sale, was not deceived. State v. Edwards, 150 N.C. App. 544,

563 S.E.2d 288, 2002 N.C. App. LEXIS 589 (2002).

Evidence of conduct which shows merely that defendant was inept or that he failed to diligently pursue the accomplishment of his promise is insufficient to allow an inference that the promise was made without the present intention to comply with it. State v. Compton, 90 N.C. App. 101, 367 S.E.2d 353 (1988).

An element of the offense is that the party to whom the false representation was made was deceived by it. State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910).

If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. State v. Matthews, 91 N.C. 635 (1884).

Charges of Embezzlement and False Pretenses Mutually Exclusive. — Close scrutiny of the elements of embezzlement and obtaining property by false pretense shows that the two charges are mutually exclusive; in order to be found guilty of embezzlement, a defendant must obtain the property in question rightfully in the course of his employment by virtue of his fiduciary or agency relationship with his principal; the charge of obtaining property by false pretense requires the defendant to have wrongfully obtained the property at the outset. State v. Speckman, 92 N.C. App. 265, 374 S.E.2d 419 (1988), rev'd on other grounds, 326 N.C. 576, 391 S.E.2d 165 (1990), rev'd on other grounds, 326 N.C. 576, 391 S.E.2d 165 (1990).

Trial court did not err by finding that defendant had taken advantage of a position of trust by taking money from people who sought his help securing loans and using that finding as an aggravating factor when it imposed sentence, but because defendant's plea to a charge that he took money by false pretenses when he withdrew $22,200 from a swimming association's account was really a plea to embezzlement, the trial court should not have used the trust or confidence aggravating factor when it sentenced defendant for committing that crime. State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442, 2002 N.C. App. LEXIS 923 (2002), cert. denied, 356 N.C. 442, 573 S.E.2d (2002).

Victim's Failure to Receive Compensation Is Not an Element. — The Supreme Court never intended the victim's failure to receive compensation to be an element of the offense. Beginning with the statute codified as Potter's Revisal of 1819, Laws 1811, c. 814, s. 2, through this section, there is and has been no statutory requirement that the State must prove that the defendant obtained the goods, property, things of value, services, etc., without compensation to the victims. Research discloses no case in which the question of the victim's compensation was before the court, although in some cases the victim received nothing at all, and in some the victim did receive some compensation of a sort. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

The phrase "without compensation" has constituted obiter dictum in the cases where it has been used, and it is not an element of the offense of false pretense. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

A defendant can be convicted of obtaining goods by false pretenses in violation of this section even though some compensation is paid, if the compensation actually paid is less than the amount represented. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

And Economic Harm Is Irrelevant. — The court is not required to instruct the jury that the resulting economic harm to the defendant is not the essence of the crime. Such an economic result to the defendant is irrelevant for the purposes of this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

The false pretense may be by act or conduct without spoken words. State v. Matthews, 121 N.C. 604, 28 S.E. 469 (1897).

Caveat Emptor Is Inapplicable. — The doctrine of caveat emptor, "let the buyer beware," does not apply to actual fraud or obtaining property by false representation. By this doctrine the purchaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller cannot escape the penalty by reason of the doctrine where the facts constituting the crime are made to appear. State v. Jones, 70 N.C. 75 (1874); State v. Young, 76 N.C. 258 (1877); State v. Burke, 108 N.C. 750, 12 S.E. 1000 (1891).

Representation to Agent of Owner of Goods. — It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N.C. 711, 42 S.E. 539 (1902).

Intent to Repay Is No Defense. — The crime under this section is committed even though the borrower who obtained a loan by means of a false representation may have intended to repay and may even have honestly believed that he would be able to repay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Instruction as to "Intent to Deceive" Held Proper. — In the context of the provisions of this section, when a person obtains something of value by means of misrepresentations with intent to deceive the victim, the requisite intent to cheat or defraud exists. Therefore, an instruction to the jury that in order to find defendant guilty it must find that defendant "intended to deceive" meets the statutory requirement that there be an "intent to cheat or defraud." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

III. INDICTMENT.

The indictment must allege all of the essential elements of the offense. State v. Claudius, 164 N.C. 521, 80 S.E. 261 (1913).

Necessary Allegations — Accused "Obtained or Attempted to Obtain". — An indictment was insufficient to charge an offense under this section where the indictment failed to allege that defendant obtained or attempted to obtain anything. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

Same — "Feloniously". — The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. State v. Caldwell, 112 N.C. 854, 16 S.E. 1010 (1893).

Indictment failing to include the word "feloniously" was insufficient. State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966).

Same — Intent to Defraud. — Where the indictment upon which the defendant was charged failed to allege that the defendant acted with the intent to defraud, the omission of an essential element of this section was fatal to the indictment. State v. Moore, 38 N.C. App. 239, 247 S.E.2d 670, cert. denied, 295 N.C. 736, 248 S.E.2d 866 (1978).

Same — Causal Connection. — The indictment must show a causal connection between the false representation and the parting with the property (State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910)) but no particular form of words is necessary; an allegation that "by means of the false pretense" or "relying on the false pretense," or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. State v. Claudius, 164 N.C. 521, 80 S.E. 261 (1913).

A bill of indictment for obtaining property by false pretense must contain allegations sufficient to state a causal connection between the alleged false representation and the obtaining of the property or money. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

An allegation that money or property was obtained "by means of a false pretense" is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Same — Property Obtained. — The indictment must describe the thing alleged to have been obtained with reasonable certainty, and by the name or term usually employed to describe it. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915).

Since a superseding indictment sufficiently described the false pretense incident as the defendant representing to the store employee that he was entitled to a cash refund for a watch band, when in truth and in fact, he knew that he had unlawfully taken the watch band and was not entitled to a refund, the indictment gave him proper notice and was properly not dismissed. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Since the indictment alleged the defendant sought to exchange the watch band that he had taken from the store for cash, the indictment did not have to allege the exact amount of cash that the defendant had tried to obtain by false pretenses. State v. Ledwell, 171 N.C. App. 314, 614 S.E.2d 562, 2005 N.C. App. LEXIS 1212 (2005).

Unnecessary Allegations — Person Intended to be Cheated. — The charge as to the persons intended to be cheated is surplusage and immaterial; all that is necessary is a charge of intent. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899); State v. Salisbury Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737 (1914).

Same — Actual Deceit. — The specific allegation in the bill of indictment that the victim was in fact deceived is unnecessary when the facts alleged suggest that the false pretense was the probable motivation for the victim's conduct. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

Same — "Without compensation." — The phrase "without compensation" is not an essential element of the offense of false pretenses, and, therefore, it is not necessary to allege in a bill of indictment charging false pretenses that the accused obtained property from the victim "without compensation." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Same — Value of Property. — No averment of the value of the property obtained is necessary. State v. Gillespie, 80 N.C. 396 (1879).

Same — Present Form of Property. — It is not legally significant whether the thing gained by the party perpetrating the criminal act under this section is in the same form as it was when taken by false pretense from the owner. Thus, there was no variance in cases where the bills of indictment charged that the defendant obtained money from his employer and the evidence disclosed that he received a color television set and a clothes dryer from another party in exchange for the money pursuant to a prior agreement. State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632, cert. denied and appeal dismissed, 294 N.C. 188, 241 S.E.2d 72 (1977).

Aiding and Abetting Allegations Were Surplusage. — Because allegations of whether a defendant was acting in concert or aiding and abetting were "irrelevant and surplusage," defendant failed to show that instructing the jury on the basis of one of these theories substantially altered the charged offense, and defendant's argument that defendant was unable to prepare a defense lacked merit. Defendant had timely notice of the charges to adequately prepare a defense and was not convicted of a crime other than that alleged in the indictment. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007), review denied, appeal dismissed, 362 N.C. 365, 661 S.E.2d 883 (2008).

Variance Between Misrepresentation Alleged and That Proven. — The State must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. If the State's evidence fails to establish that defendant made this misrepresentation, but tends to show that some other misrepresentation was made, then the State's proof varies fatally from the indictments. State v. Linker, 309 N.C. 612, 308 S.E.2d 309 (1983).

Indictment Charging False Pretenses Will Support Embezzlement Conviction. — This statute now clearly provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses. State v. Speckman, 326 N.C. 576, 391 S.E.2d 165 (1990).

Sufficiency of Indictment. — Indictment, which charged that defendant committed two counts of obtaining property by false pretenses, was not fatally defective because there was no confusion as to what offenses the State of North Carolina accused defendant of committing as the use of the term "solicit" in the indictment did not necessarily imply the allegation of a separate criminal act for solicitation, and the indictment did not have to specify the alleged victim as the State of North Carolina was not required to prove an intent to defraud any particular person. State v. McBride, 187 N.C. App. 496, 653 S.E.2d 218, 2007 N.C. App. LEXIS 2418 (2007).

IV. ILLUSTRATIVE CASES.

False Representations as to Deed of Trust. — A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money was a false pretense within this section. State v. Roberts, 189 N.C. 93, 126 S.E. 161 (1925).

False representation that land is free from encumbrances, when knowingly made in order to effect a sale, or to obtain a loan, may be the subject matter of this offense. State v. Banks, 24 N.C. App. 604, 211 S.E.2d 860 (1975); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420, cert. denied, 287 N.C. 468, 215 S.E.2d 628 (1975).

One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered, when it is encumbered by a mortgage, is liable in a prosecution for obtaining goods under false pretenses. State v. Munday, 78 N.C. 460 (1878).

False Representation as to Security for Loan. — The crime of obtaining property for means of a false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given, or by falsely representing that the property pledged as security is free from liens. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

False Representation of Insurance Application. — Evidence was sufficient to support a permissible inference that defendant agent intended to cheat or defraud when without authority he submitted insurance premium and application filled out based on information taken from another company's policy and received the advance on his commission under false pretense, and there was sufficient competent evidence for the jury to determine defendant's ulterior criminal intent. State v. Melvin, 99 N.C. App. 16, 392 S.E.2d 740 (1990).

False Representations as to Standing Timber. — A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees, when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. State v. Corey, 199 N.C. 209, 153 S.E. 923 (1930).

Misrepresentation of Personal Identity. — The crime of obtaining property by means of a false pretense may be committed when one obtains goods on credit by a willful misrepresentation of his identity, quite apart from any intention of the defendant ultimately to pay or not to pay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Allegations in indictments to the effect that the property in question was obtained "by means of a false pretense which was calculated to deceive and did deceive," in that "the defendant received and accepted delivery ... by representing herself as 'Mrs. A. Johnson,'" sufficiently alleged that the defendant's misrepresentations deceived the owner of the property and that the property was obtained as a result of the misrepresentation. State v. Anthony, 74 N.C. App. 590, 328 S.E.2d 598, cert. denied, 314 N.C. 332, 333 S.E.2d 490 (1985).

Jury Instruction Failed to Allege Exact Misrepresentation Upheld. — Where the State's evidence showed that defendant obtained property (the victims' money) by false pretenses (the statements that defendant was a "broker" or "licensed broker" and that their money would be invested in stock options), even though the instruction on obtaining property by false pretenses failed to mention the exact misrepresentation alleged in the indictment, there was no fatal variance between the indictment, the proof presented at trial, and the instructions given to the jury. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

The falsification of expense records cannot in itself constitute the crime of false pretenses, since it is essential that the false pretense must have included the transfer of money or property, i.e., there must be a causal relationship between the representation alleged to have been made and the obtaining of the money or property. State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291, cert. denied and appeal dismissed, 301 N.C. 237, 283 S.E.2d 134 (1980).

False Representations Regarding Termite Treatments. — Evidence held sufficient to support conviction of obtaining money by false pretenses by false representations to homeowners that their homes were in need of treatment for termites, and by misrepresenting the nature of the treatment which was actually provided. State v. Childers, 80 N.C. App. 236, 341 S.E.2d 760, cert. denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Evidence tending to show that the defendant was not licensed to sell insurance for United American Insurance Company was not sufficient to raise an inference that the defendant intended to cheat or defraud the insurees, nor did the evidence tending to show that the defendant told them that the policies would be issued within five to six weeks raise any such inference, in light of the evidence tending to show that the insurance policies were in fact issued. State v. Bennett, 84 N.C. App. 689, 353 S.E.2d 690 (1987).

Creation of Appearance of Legitimate Business. — Where defendant opened a business account in the name of a nonexistent business and drew four checks against the account knowing there were insufficient funds in the account to cover the amount of the checks, bank employees and the investigating officer were unable to locate the business at the address printed on the check or at any other location, and there was no evidence in the record to suggest any legitimate business purpose for defendant's having opened an account in the name of that business, the jury could find the defendant had committed four separate violations of obtaining property by false pretenses by creating the identity of a business calculated to engender confidence in the inherent worth of the checks. State v. Bresse, 101 N.C. App. 519, 400 S.E.2d 73, cert. denied, 329 N.C. 272, 407 S.E.2d 842 (1991).

Worthless Checks. — The writing and passing of a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses. State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

Erroneous Charge to Jury. — The trial court erred where, although the first part of charge concerning the elements of obtaining property by false pretenses was correct, the trial court then mistakenly characterized the other person's name on the coupon as a "representation." This characterization may have misled the jury, in that the question before them was whether the tendering of the coupon bearing the other person's name and revalidation sticker was a representation that the coupon was valid. The charge was incorrect and defendant was entitled to a new trial. State v. Roth, 89 N.C. App. 511, 366 S.E.2d 486 (1988).

Evidence Held Sufficient. — Instructions under this section were proper where the State presented sufficient evidence to show that: (1) defendant falsely represented to victim that he needed money because his car had broken down and he needed to get his mother to the hospital; (2) defendant intended to deceive victim; (3) victims were, in fact, deceived; and (4) defendant thereby attempted to obtain money from them. State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569, 2000 N.C. App. LEXIS 800 (2000).

When defendant presented the victim's withdrawal slip and driver's license to the bank while holding the victim hostage in the passenger's seat, she made a false representation to the bank that the withdrawal was legitimate and had the continuing support of the victim; defendant's misrepresentation was clearly calculated to mislead and did in fact mislead. State v. Parker, 354 N.C. 268, 553 S.E.2d 885, 2001 N.C. LEXIS 1090 (2001), cert. denied, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Evidence supported conviction for obtaining property by false pretenses in violation of G.S. 14-100 where it was shown someone else owned caliper's that were pawned the defendant. State v. Hensley, 156 N.C. App. 634, 577 S.E.2d 417, 2003 N.C. App. LEXIS 234 (2003), cert. denied, 357 N.C. 167, 581 S.E.2d 64 (2003).

Evidence was sufficient to survive defendant's motion to dismiss the charge of aiding and abetting obtaining property by false pretences; defendant did not deny asking a county employee to come to defendant's residence and fix a toilet on county time, and defendant stated that the employee may have come on county time and in a county vehicle. State v. Sink, 178 N.C. App. 217, 631 S.E.2d 16, 2006 N.C. App. LEXIS 1312 (2006).

Defendant's passing of a worthless check in order to obtain the mall gift certificates was sufficient to support defendant's conviction for obtaining property by false pretenses. State v. Cagle, 182 N.C. App. 71, 641 S.E.2d 705, 2007 N.C. App. LEXIS 476 (2007).

Denial of defendant's motion to dismiss the charge of obtaining property by false pretenses was proper because the State presented sufficient evidence from which the jury could have inferred that defendant knowingly and willingly laundered money through defendant's personal and business banking accounts in aiding and abetting three others in obtaining property by false pretenses from school system. State v. Estes, 186 N.C. App. 364, 651 S.E.2d 598, 2007 N.C. App. LEXIS 2208 (2007), review denied, appeal dismissed, 362 N.C. 365, 661 S.E.2d 883 (2008).

Trial court did not err in denying defendant's motion to dismiss based on insufficiency of the evidence because the evidence was sufficient to justify sending the case to the jury in that the evidence clearly indicated that defendant made a false representation to his two victims regarding the legitimacy of the deposit of counterfeit checks by them into their banking accounts, that it was his intent to do so, and that his deception was effective as defendant obtained money in the transactions. State v. McBride, 187 N.C. App. 496, 653 S.E.2d 218, 2007 N.C. App. LEXIS 2418 (2007).

Evidence held insufficient to allow a reasonable mind to conclude that defendant made a false representation with intent to defraud so as to support a conviction under this section. State v. Compton, 90 N.C. App. 101, 367 S.E.2d 353 (1988).

False Statement of Ownership to Pawn Broker. — In a prosecution for obtaining property by false pretenses in violation of G.S. 14-100, the trial court properly granted the State's motion to join two offenses pursuant to G.S. 15A-926(a), because a transactional connection between the offenses was evidenced by a common modus operandi, the short time lapse between the criminal activity, and similar circumstances in victim, location, and motive; the trial court also properly granted the State's motion pursuant to G.S. 15A-923(e) to amend the indictment to change the date of the charged offense, as the controlling precedent held that such a change was permissible, and properly denied defendant's motion to dismiss for insufficient evidence pursuant to G.S. 15A-954, as the State produced sufficient evidence that a pawn shop owner was actually deceived by defendant's false representation that he owned stolen cameras. State v. Simpson, 159 N.C. App. 435, 583 S.E.2d 714, 2003 N.C. App. LEXIS 1531 (2003), aff'd, 357 N.C. 652, 588 S.E.2d 466 (2003).

§ 14-100.1. Possession or manufacture of certain fraudulent forms of identification.

(a) Except as otherwise made unlawful by G.S. 20-30, it shall be unlawful for any person to knowingly possess or manufacture a false or fraudulent form of identification as defined in this section for the purpose of deception, fraud, or other criminal conduct.

(b) Except as otherwise made unlawful by G.S. 20- 30, it shall be unlawful for any person to knowingly obtain a form of identification by the use of false, fictitious, or fraudulent information.

(c) Possession of a form of identification obtained in violation of subsection (b) of this section shall constitute a violation of subsection (a) of this section.

(d) For purposes of this section, a "form of identification" means any of the following or any replica thereof:

(1) An identification card containing a picture, issued by any department, agency, or subdivision of the State of North Carolina, the federal government, or any other state.

(2) A military identification card containing a picture.

(3) A passport.

(4) An alien registration card containing a picture.

(e) A violation of this section shall be punished as a Class 1 misdemeanor. (2001-461, s. 1; 2001-487, s. 42(a).)

§ 14-101. Obtaining signatures by false pretenses.

If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punished as a Class H felon. (1871-2, c. 92; Code, s. 1026; Rev., s. 3433; C.S., s. 4278; 1945, c. 635; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1181.)

Cross References. — As to forgery, see G.S. 14-119 et seq. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to uttering a false bill of lading, see G.S. 21-42.

CASE NOTES

Signing or Endorsing Note. — It is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud. State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

Indictment Must Allege Offense with Certainty. — An indictment should state with reasonable certainty the offense charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915).

§ 14-102. Obtaining property by false representation of pedigree of animals.

If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a Class 2 misdemeanor. (1891, c. 94, s. 2; Rev., s. 3307; C.S., s. 4279; 1993, c. 539, s. 40; 1994, Ex. Sess.; c. 24, s. 14(c).)

§ 14-103. Obtaining certificate of registration of animals by false representation.

If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof, the person is guilty of a Class 3 misdemeanor. (1891, c. 94, s. 1; Rev. s. 3308; C.S., s. 4280; 1993, c. 539, s. 41; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-104. Obtaining advances under promise to work and pay for same.

If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a Class 2 misdemeanor. (1889, c. 444; 1891, c. 106; 1905, c. 411; Rev., s. 3431; C.S., s. 4281; 1993, c. 539, s. 42; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to tenant or cropper willfully abandoning landlord after advances have been made, see G.S. 14-358.

CASE NOTES

Constitutionality. — The gist of the offense of procuring advances "with intent to cheat and defraud" is not the obtaining of the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This section is constitutional. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892).

Intent Must Be Shown. — To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. State v. Griffin, 154 N.C. 611, 70 S.E. 292 (1911); State v. Isley, 164 N.C. 491, 79 S.E. 1105 (1913).

And Must Be Alleged in Warrant. — A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, if fatally defective. State v. Phillips, 228 N.C. 446, 45 S.E.2d 535 (1947).

No Day of Grace. — Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday, defendant's failure was held to be a failure to begin work within the meaning of the statute. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892).

Motion to Dismiss Properly Denied. — Superior court did not err in denying defendant's motion to dismiss misdemeanor charge of failure to work after being paid, as a conflict in the evidence presented created a question for the jury to resolve; moreover, even though the $ 100 defendant received was intended for purchasing materials, his conviction was supported by the evidence presented, as he still obtained an advance of money, provisions, goods, wares or merchandise on the false promise of completing the work. State v. Octetree, 173 N.C. App. 228, 617 S.E.2d 356, 2005 N.C. App. LEXIS 1923 (2005).

Cited in State v. Moore, 38 N.C. App. 239, 247 S.E.2d 670 (1978).

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.

If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. Any person violating any provision of this section shall be guilty of a Class 2 misdemeanor. (1879, cc. 185, 186; Code, s. 1027; 1905, c. 104; Rev., s. 3434; C.S., s. 4282; 1969, c. 1224, s. 9; 1993, c. 539, s. 43; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutionality. — It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is declared constitutional. State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Representations Must Be of Existing

Facts. — An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at a subsequent date does not come within the meaning of the section. State v. Whidbee, 124 N.C. 796, 32 S.E. 318 (1899).

Indictment Should Charge Exact Terms. — The indictment should charge in the exact terms of the statute, and on failure to follow the statute it is subject to being quashed. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Section 14-114 Compared. — This section is on the same footing as G.S. 14-114 for disposing of mortgaged property. It is not the failure to pay the debt which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

§ 14-106. Obtaining property in return for worthless check, draft or order.

Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a Class 2 misdemeanor. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647; C.S., s. 4283; 1993, c. 539, s. 44; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — New Hanover: Pub. Loc. 1927, c. 636.

CASE NOTES

It is a misdemeanor for any person knowingly to utter a worthless check in this State and such act involves moral turpitude under this section if done with intent to defraud. Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933).

What Indictment Must Charge. — In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. State v. Horton, 199 N.C. 771, 155 S.E. 866 (1930).

Signing in Name of Company. — Upon trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence that he was not a partner was reversible error. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

The writing and passing of a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses. State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

A person may be prosecuted under § 14-100 although this section more specifically fits his alleged activities. A single act or transaction may violate different statutes. State v. Freeman, 59 N.C. App. 84, 295 S.E.2d 619 (1982), rev'd on other grounds, 308 N.C. 502, 302 S.E.2d 779 (1983).

Reference to § 14-107 in Judgment Is Harmless Surplusage. — The reference to

G.S. 14-107 in a judgment for violation of this section prior to amendment of judgment did not vitiate that judgment or render the sentence imposed a sentence in excess of that provided by law for the violation of this section, which the defendant was found to have committed. The reference to G.S. 14-107 in the judgment was harmless surplusage. State v. McKinnon, 35 N.C. App. 741, 242 S.E.2d 545 (1978).

This section and § 14-107 define crimes involving dishonesty or false statement, and therefore defendant's convictions under these statutes for worthless checks were properly admitted as a matter of law under Fed. R. Evid. 609(a) in an action against him for preparing false tax returns. United States v. Rogers, 853 F.2d 249 (4th Cir.), cert. denied, 488 U.S. 946, 109 S. Ct. 375, 102 L. Ed. 2d 364 (1988).

False Accusation Under This Section. — Where defendant assistant grocery store manager falsely accused plaintiff of giving a worthless check for merchandise in violation of this section, a criminal offense involving moral turpitude, the law would presume on trial for slander that actual damages were sustained, and plaintiff did not have to prove them. Harris v. Temple, 99 N.C. App. 179, 392 S.E.2d 752 (1990).

Applied in Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Cited in Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276, 162 A.L.R. 793 (1945); State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983); State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986); State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-107. Worthless checks.

(a) It is unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering the check or draft, that the maker or drawer of it has not sufficient funds on deposit in or credit with the bank or depository with which to pay the check or draft upon presentation.

(b) It is unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, the bank or depository with which to pay the check or draft upon presentation.

(c) The word "credit" as used in this section means an arrangement or understanding with the bank or depository for the payment of a check or draft.

(d) A violation of this section is a Class I felony if the amount of the check or draft is more than two thousand dollars ($2,000). If the amount of the check or draft is two thousand dollars ($2,000) or less, a violation of this section is a misdemeanor punishable as follows:

(1) Except as provided in subdivision (3) or (4) of this subsection, the person is guilty of a Class 2 misdemeanor. Provided, however, if the person has been convicted three times of violating this section, the person shall on the fourth and all subsequent convictions (i) be punished as for a Class 1 misdemeanor and (ii) be ordered, as a condition of probation, to refrain from maintaining a checking account or making or uttering a check for three years.

(2) Repealed by Session Laws 1999-408, s. 1, effective December 1, 1999.

(3) If the check or draft is drawn upon a nonexistent account, the person is guilty of a Class 1 misdemeanor.

(4) If the check or draft is drawn upon an account that has been closed by the drawer, or that the drawer knows to have been closed by the bank or depository, prior to time the check is drawn, the person is guilty of a Class 1 misdemeanor.

(e) In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with the provisions of G.S. 15A-1343, restitution to the victim for (i) the amount of the check or draft, (ii) any service charges imposed on the payee by a bank or depository for processing the dishonored check, and (iii) any processing fees imposed by the payee pursuant to G.S. 25-3-506, and each prosecuting witness (whether or not under subpoena) shall be entitled to a witness fee as provided by G.S. 7A-314 which shall be taxed as part of the cost and assessed to the defendant. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014; c. 1224, s. 10; 1971, c. 243, s. 1; 1977, c. 885; 1979, c. 837; 1983, c. 741; 1991, c. 523, s. 1; 1993, c. 374, s. 2; c. 539, ss. 45, 1182; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 742, s. 11; 1999-408, s. 1.)

Editor's Note. — Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of affected localities for Session Laws 1997-443, s. 18.22, as amended by Session Laws 1998-212, s. 16.3, Session Laws 1998-23, s. 11, and Session Laws 1999-237, s. 17.7. The provisions of Session Laws 1997-443, s. 18.22, as amended, have now been codified at G.S. 7A-308, 7A-346.2, and 14-107.2 at the direction of the Revisor of Statutes.

CASE NOTES

This Section Is Constitutional. — See Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967).

The gravamen of the offense proscribed by this section is the putting into circulation of worthless commercial paper to the public detriment, and not that of the individual payee. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949); State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955); State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

The act made criminal by this section is knowingly putting worthless commercial paper in circulation. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

A person may be prosecuted under § 14-100 although this section more specifically fits his alleged activities. A single act or transaction may violate different statutes. State v. Freeman, 59 N.C. App. 84, 295 S.E.2d 619 (1982), rev'd on other grounds, 308 N.C. 502, 302 S.E.2d 779 (1983).

The State may prosecute under G.S. 14-100 rather than this section if there is any additional misrepresentation beyond the presentation of a worthless check, even if this section more specifically fits the alleged transaction. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

This section and § 14-106 define crimes involving dishonesty or false statement, and therefore defendant's convictions under these statutes for worthless checks were properly admitted as a matter of law under Fed. R. Evid. 609(a) in an action against him for preparing false tax returns. United States v. Rogers, 853 F.2d 249 (4th Cir.), cert. denied, 488 U.S. 946, 109 S. Ct. 375, 102 L. Ed. 2d 364 (1988).

Return of a check due to insufficient funds or lack of credit did not constitute prima facie evidence that a person issuing the check had knowledge at the time of issuance that there were insufficient funds or lack of credit with which to pay the check upon presentation. Semones v. Southern Bell Tel. & Tel. Co., 106 N.C. App. 334, 416 S.E.2d 909, cert. denied, 332 N.C. 346, 421 S.E.2d 153 (1992).

The writing and passing of a worthless check in exchange for property, standing alone, is sufficient to uphold a conviction for obtaining property under false pretenses. State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

Fact that check was issued in North Carolina would support jurisdiction under G.S. 15A-134 of worthless check charge, even though an officer of defendant added the date and payee's name in Florida, and the check was physically transferred in Florida, subject to the condition that payee hold it until officer got back in touch with him. Moreover, officer's call four days later from North Carolina authorizing payee to deposit the check also supported a conclusion that some part of the delivery occurred in North Carolina. State v. First Resort Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

The legislature acted within its authority in setting different punishments for offenses under G.S. 14-100 and this section. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

Section Not Applicable to Person Signing Check Under Direction as a Clerical Task. — A person authorized to sign his name under the printed name of his employer on the employer's checks, who does so under direction merely as a clerical task to authenticate the checks, cannot be found guilty of violating this section upon the nonpayment of the checks for insufficient funds. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

But Employer Is Liable. — Persons directing their employee to issue checks on the firm's account, knowing at the time that the firm did not have sufficient funds or credits with the drawee bank to pay the checks on presentation, are guilty of knowingly putting worthless commercial paper in circulation. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

Issuance by Corporate Officer. — A corporate officer who issues a worthless check on behalf of the corporation may be guilty of violating the worthless check statute. Semones v. Southern Bell Tel. & Tel. Co., 106 N.C. App. 334, 416 S.E.2d 909, cert. denied, 332 N.C. 346, 421 S.E.2d 153 (1992).

Use of Wrong Check Form Not a Violation of This Section. — Where the evidence disclosed that the check issued by defendant was returned by the bank, not on account of insufficient funds, but because it was written on the wrong kind of check form, the court should enter a judgment of not guilty in a prosecution for issuing a worthless check. State v. Coppley, 260 N.C. 542, 133 S.E.2d 147 (1963).

Instrument Signed by Defendant Held Not a Check. — If the instrument defendant signed did not contain a promise or order to pay any sum in any amount nor state to whom it was payable and he did not authorize anyone to fill it out in any amount and he did not know by whom or when it was filled out, what he signed was not a check, and he was not guilty of the offense charged against him in the warrant under this section. State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

Drawing Out Money on Insufficient Funds. — The offense of passing a worthless check under this section may be accomplished by one who has an ordinary checking account, either personal or drawn on a legitimate business, and draws out money knowing that the funds in the account are insufficient to pay the check upon presentation. This would not involve a misrepresentation beyond the value of the check. State v. Freeman, 79 N.C. App. 177, 339 S.E.2d 56, cert. denied, 317 N.C. 338, 346 S.E.2d 144 (1986), rehearing denied, 318 N.C. 509, 349 S.E.2d 868 (1986), overruled in part by State v. Rogers, 346 N.C. 262, 485 S.E.2d 619 (1997).

The drawing and delivery of a check to a third person, without more, is a representation that drawer has funds sufficient to insure payment upon presentation, and if known to be untrue, is a false pretense. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Postdated Check. — A postdated check given for a past-due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. State v. Crawford, 198 N.C. 522, 152 S.E. 504 (1930).

Consent Not a Defense. — Regardless of the consent of anyone, the giving of a worthless check in contravention of this section is a crime. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

If at the time of delivering a check to the payee the maker knows that he has neither funds nor credit to pay the check upon presentation, the fact that the payee agrees that the check would not be presented for collection, would not constitute a defense. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Entrapment Not a Defense. — Defense of entrapment on a charge of giving a worthless check cannot be maintained where the inducement to give the worthless check came from a person unconnected with the State. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Indictment. — In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925).

Warrant. — A warrant charging that defendant, trading under a trade name, did, on a specified date, unlawfully and willfully issue a check knowing at the time that the named defendant, or the named defendant trading under the designated trade name, or the designated firm, did not have sufficient funds or credit to pay the check upon presentation, is sufficient and is not objectionable on the ground that the offense was charged disjunctively or alternately. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Prior Convictions Must Be Alleged in Warrant or Indictment. — Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty. State v. Williams, 21 N.C. App. 70, 203 S.E.2d 399 (1974).

Where there is no allegation in the warrant that defendant had been convicted three prior times of that offense, nor is there any other evidence in the record of that circumstance, a 90-day sentence exceeds the permissible statutory limit. State v. McCotter, 18 N.C. App. 411, 197 S.E.2d 50 (1973).

Fatal Variance. — An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of the statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction. State v. Corpening, 191 N.C. 751, 133 S.E. 14 (1926).

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. State v. Dowless, 217 N.C. 589, 9 S.E.2d 18 (1940).

What State Must Prove. — In a prosecution under this statute the State must prove that the maker of the check had neither sufficient funds on deposit in, nor credit with, the bank on which the check was drawn to pay it on presentation. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Right to Trial by Jury May Not Be Waived. — Where the defendant in a criminal action enters the plea of "not guilty," the requirement of N.C. Const., Art. I, § 13, (now Art. I, § 24) of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. State v. Crawford, 197 N.C. 513, 149 S.E. 729 (1929).

Instruction held proper. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

Consideration of Restitution Award Factors Under Subsection (e). — Although G.S. 15A-1340.36(a) expressly does not require the trial court to make findings of fact or conclusions of law on the restitution award factors such as defendant's resources, ability to earn, support obligations, and any other matters that pertain to defendant's ability to pay, a trial court erred when it ordered restitution without considering the required statutory factors pursuant to G.S. 15A-1340.36 and G.S. 14-107. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

There was sufficient evidence to submit charges of felonious issuing of a worthless check under G.S. 14-107(a) to the jury where there was evidence that defendant had issued the checks with insufficient funds and that other checks issued within the same time period had been returned for insufficient funds and that defendant actually requested that the payee hold the checks and not deposit them immediately. This was sufficient circumstantial evidence from which to infer that defendant knew that at the time he issued the checks they were worthless. State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411, 2004 N.C. App. LEXIS 601 (2004).

Applied in State v. Oates, 262 N.C. 532, 138 S.E.2d 139 (1964); State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965); State v. Hart, 266 N.C. 671, 146 S.E.2d 816 (1966); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969); State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973); Contemporary Plumbing, Inc. v. North Carolina, 16 Bankr. 479 (E.D.N.C. 1981).

Cited in State v. Byrd, 204 N.C. 162, 167 S.E. 626 (1933); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933); Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); State v. McKinnon, 35 N.C. App. 741, 242 S.E.2d 545 (1978); State v. Dickens, 41 N.C. App. 388, 255 S.E.2d 212 (1979); State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983); State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986); State v. Cox, 90 N.C. App. 742, 370 S.E.2d 260 (1988).

OPINIONS OF ATTORNEY GENERAL

The Consumer Finance Act applies to a check cashing company which cashes a check, and for a fee, agrees to defer presentment of the check until sufficient funds are deposited into the customer's bank account to cover the amount of the check, if the amount of the loan is $10,000 or less and if the fee charged by the company exceeds the charges permitted under Chapter 24. In this event, the company will be subject to all provisions of the Act, including the penal provisions of G.S. 53-166(c). It also appears that these transactions violate this section, and may violate Truth-in-Lending requirements regarding disclosure. See opinion of the Attorney General to Mr. George J. Franks, Attorney at Law, Cumberland County Sheriff's Office, Fayetteville, 60 N.C.A.G. 86 (1992).

§ 14-107.1. Prima facie evidence in worthless check cases.

(a) Unless the context otherwise requires, the following definitions apply in this section:

(1) Check Passer. — A natural person who draws, makes, utters, or issues and delivers, or causes to be delivered to another any check or draft on any bank or depository for the payment of money or its equivalent.

(2) Acceptor. — A person, firm, corporation or any authorized employee thereof accepting a check or draft from a check passer.

(3) Check Taker. — A natural person who is an acceptor, or an employee or agent of an acceptor, of a check or draft in a face-to-face transaction.

(b) In prosecutions under G.S. 14-107 the prima facie evidence provisions of subsections (d) and (e) apply if all the conditions of subdivisions (1) through (7) below are met. The prima facie evidence provisions of subsection (e) apply if only conditions (5) through (7) are met. The conditions are:

(1) The check or draft is delivered to a check taker.

(2) The name and mailing address of the check passer are written or printed on the check or draft, and the check taker or acceptor shall not be required to write or print the race or gender of the check passer on the check or draft.

(3) The check taker identifies the check passer at the time of accepting the check by means of a North Carolina driver's license, a special identification card issued pursuant to G.S. 20-37.7, or other reliable serially numbered identification card containing a photograph and mailing address of the person in question.

(4) The license or identification card number of the check passer appears on the check or draft.

(5) After dishonor of the check or draft by the bank or depository, the acceptor sends the check passer a letter by certified mail, to the address recorded on the check, identifying the check or draft, setting forth the circumstances of dishonor, and requesting rectification of any bank error or other error in connection with the transaction within 10 days.

An acceptor may advise the check passer in a letter that legal action may be taken against him if payment is not made within the prescribed time period. Such letter, however, shall be in a form which does not violate applicable provisions of Article 2 of Chapter 75.

(6) The acceptor files the affidavit described in subdivision (7) with a judicial official, as defined in G.S. 15A-101(5), before issuance of the first process or pleading in the prosecution under G.S. 14-107. The affidavit must be kept in the case file (attached to the criminal pleading in the case).

(7) The affidavit of the acceptor, sworn to before a person authorized to administer oaths, must:

a. State the facts surrounding acceptance of the check or draft. If the conditions set forth in subdivisions (1) through (5) have been met, the specific facts demonstrating observance of those conditions must be stated.

b. Indicate that at least 15 days have elapsed since the mailing of the letter required under subdivision (5) and that the check passer has failed to rectify any error that may have occurred with respect to the dishonored check or draft.

c. Have attached a copy of the letter sent to the check passer pursuant to subdivision (5).

d. Have attached the receipt, or a copy of it, from the United States Postal Service certifying the mailing of the letter described in subdivision (5).

e. Have attached the check or draft or a copy thereof, including any stamp, marking or attachment indicating the reason for dishonor.

(c) In prosecutions under G.S. 14-107, where the check or draft is delivered to the acceptor by mail, or delivered other than in person, the prima facie evidence rule in subsections (d) and (e) shall apply if all the conditions below are met. The prima facie evidence rule in subsection (e) shall apply if conditions (5) through (7) below are met. The conditions are:

(1) The check or draft is delivered to the acceptor by United States mail, or by some person or instrumentality other than a check passer.

(2) The name and mailing address of the check passer are recorded on the check or draft.

(3) The acceptor has previously identified the check passer, at the time of opening the account, establishing the course of dealing, or initiating the lease or contract, by means of a North Carolina driver's license, a special identification card issued pursuant to G.S. 20-37.7, or other reliable serially numbered identification card containing a photograph and mailing address of the person in question, and obtained the signature of the person or persons who will be making payments on the account, course of dealing, lease or contract, and such signature is retained in the account file.

(4) The acceptor compares the name, address, and signature on the check with the name, address, and signature on file in the account, course of dealing, lease, or contract, and notes that the information contained on the check corresponds with the information contained in the file, and the signature on the check appears genuine when compared to the signature in the file.

(5) After dishonor of the check or draft by the bank or depository, the acceptor sends the check passer a letter by certified mail to the address recorded on the check or draft identifying the check or draft, setting forth the circumstances of dishonor and requesting rectification of any bank error or other error in connection with the transaction within 10 days.

An acceptor may advise the check passer in a letter that legal action may be taken against him if payment is not made within the prescribed time period. Such letter, however, shall be in a form which does not violate applicable provisions of Article 2 of Chapter 75.

(6) The acceptor files the affidavits described in subdivision (7) of this subsection with a judicial official, as defined in G.S. 15A-101(5), before issuance of the first process or pleading in the prosecution under G.S. 14-107. The affidavit must be kept in the case file (attached to the criminal pleading in the case).

(7) The affidavit of the acceptor, sworn to before a person authorized to administer oaths, must:

a. State the facts surrounding acceptance of the check or draft. If the conditions set forth in subdivisions (1) through (5) have been met, the specific facts demonstrating observance of those conditions must be stated.

b. Indicate that at least 15 days have elapsed since the mailing of the letter required under subdivision (5) and that the check passer has failed to rectify any error that may have occurred with respect to the dishonored check or draft.

c. Have attached a copy of the letter sent to the check passer pursuant to subdivision (5).

d. Have attached the receipt, or a copy of it, from the United States Postal Service certifying the mailing of the letter described in subdivision (5).

e. Have attached the check or draft or a copy thereof, including any stamp, marking or attachment indicating the reason for dishonor.

(d) If the conditions of subsection (b) or (c) have been met, proof of meeting them is prima facie evidence that the person charged was in fact the identified check passer.

(e) If the bank or depository dishonoring a check or draft has returned it in the regular course of business stamped or marked or with an attachment indicating the reason for dishonor ("insufficient funds," "no account," "account closed" or words of like meaning), the check or draft and any attachment may be introduced in evidence and constitute prima facie evidence of the facts of dishonor if the conditions of subdivisions (5) through (7) of subsection (b) or subdivisions (5) through (7) of subsection (c) have been met. The fact that the check or draft was returned dishonored may be received as evidence that the check passer had no credit with the bank or depository for payment of the check or draft.

(f) An affidavit by an employee of a bank or depository who has personal knowledge of the facts stated in the affidavit sworn to and properly executed before an official authorized to administer oaths is admissible in evidence without further authentication in a hearing or trial pursuant to a prosecution under G.S. 14-107 in the District Court Division of the General Court of Justice with respect to the facts of dishonor of the check or draft, including the existence of an account, the date the check or draft was processed, whether there were sufficient funds in an account to pay the check or draft, and other related matters. If the defendant requests that the bank or depository employee personally testify in the hearing or trial, the defendant may subpoena the employee. The defendant shall be provided a copy of the affidavit prior to trial and shall have the opportunity to subpoena the affiant for trial. (1979, c. 615, s. 1; 1985, c. 650, s. 1; 1989, c. 421; 1997-149, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

CASE NOTES

Return of a check due to insufficient funds or lack of credit did not constitute prima facie evidence that a person issuing the check had knowledge at the time of issuance that there were insufficient funds or lack of credit with which to pay the check upon presentation. Semones v. Southern Bell Tel. & Tel. Co., 106 N.C. App. 334, 416 S.E.2d 909, cert. denied, 332 N.C. 346, 421 S.E.2d 153 (1992).

Cited in State v. Freeman, 308 N.C. 502, 302 S.E.2d 779 (1983).

OPINIONS OF ATTORNEY GENERAL

This section does not provide the exclusive method of proving a violation of § 14-107. See opinion of Attorney General to Ed McClearen, Assistant District Attorney, 10th Judicial District, 49 N.C.A.G. 168 (1980).

§ 14-107.2. Program for collection in worthless check cases.

(a) As used in this section, the terms "check passer" and "check taker" have the same meaning as defined in G.S. 14-107.1.

(a1) The Administrative Office of the Courts may authorize the establishment of a program for the collection of worthless checks in any prosecutorial district where economically feasible. The Administrative Office of the Courts may consider the following factors when making a feasibility determination:

(1) The population of the district.

(2) The number of worthless check prosecutions in the district.

(3) The availability of personnel and equipment in the district.

(b) Upon authorization by the Administrative Office of the Courts, a district attorney may establish a program for the collection of worthless checks in cases that may be prosecuted under G.S. 14-107. The district attorney may establish a program for the collection of worthless checks in cases that would be punishable as misdemeanors, in cases that would be punishable as felonies, or both. The district attorney shall establish criteria for the types of worthless check cases that will be eligible under the program.

(c) If a check passer participates in the program by paying the fee under G.S.7A-308(c) and providing restitution to the check taker for (i) the amount of the check or draft, (ii) any service charges imposed on the check taker by a bank or depository for processing the dishonored check, and (iii) any processing fees imposed by the check taker pursuant to G.S. 25-3-506, then the district attorney shall not prosecute the worthless check case under G.S. 14-107.

(d) The Administrative Office of the Courts shall establish procedures for remitting the fee and providing restitution to the check taker.

(e) Repealed by Session Laws 2003-377, s. 3, effective August 1, 2003. (1997-443, s. 18.22(b); 1998-23, s. 11(a); 1998-212, s. 16.3(a); 1999-237, s. 17.7; 2000-67, s. 15.3A(a); 2001-61, s. 1; 2003-377, ss. 1, 2, 3.)

Cross References. — As to the Collection of Worthless Checks Fund, see G.S. 7A-308(c). As to report on implement of the worthless check collection program, see G.S. 7A-346.2.

Editor's Note. — Session Laws 1997-443, s. 18.22(b) has been codified as this section at the direction of the Revisor of Statutes. Initially, Session Laws 1997-443, s. 18.22(d) provided that s. 18.22(b) would apply to Columbus, Durham and Rockingham Counties only, and s. 18.22(e) provided that the act would become effective October 1, 1997, and would expire June 30, 1998. Session Laws 1998-23, s. 11(a) amended Session Laws 1997-443, s. 18.22(e) to provide that s. 18.22 would expire when the 1998 Appropriations Act became law; however, this provision was repealed by Session Laws 1998-212, s. 16.3(d). Section 16.3(a) of Session Laws 1998-212 provided that Session Laws 1997-443, s. 18.22 would expire June 30, 1999, and s. 16.3(d) of that act added Wake to the list of counties to which Session Laws 1997-443, s. 18.22 was applicable. Session Laws 1999-237, s. 17.7(a) deleted the sunset for Session Laws 1997-443, s. 18.22, as amended, and added Brunswick, Bladen, New Hanover, and Pender to the list of counties. Session Laws 2000-67, s. 15.3A, added Cumberland, Edgecombe, Nash, Onslow, and Wilson to the list of counties.

Session Laws 2003-377, s. 4 [5], provides: "As soon as practicable, the Administrative Office of the Courts shall determine the economic feasibility of establishing a worthless check collection program in Prosecutorial Districts 1, 3A, 18, 25, 28, and 29. The Administrative Office of the Courts shall authorize the establishment of a worthless check collection program in any or all of the prosecutorial districts identified in this section that are determined to be economically feasible before it authorizes a worthless check collection program in any other prosecutorial district."

§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.

Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee, of such machine, coin-box telephone or receptacle, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a Class 2 misdemeanor. (1927, c. 68, s. 1; 1969, c. 1224, s. 3; 1993, c. 539, s. 46; c. 553, s. 8; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.

Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a Class 2 misdemeanor. (1927, c. 68, s. 2; 1969, c. 1224, s. 3; 1993, c. 539, s. 47; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-110. Defrauding innkeeper or campground owner.

No person shall, with intent to defraud, obtain food, lodging, or other accommodations at a hotel, inn, boardinghouse, eating house, or campground. Whoever violates this section shall be guilty of a Class 2 misdemeanor. Obtaining such lodging, food, or other accommodation by false pretense, or by false or fictitious show of pretense of baggage or other property, or absconding without paying or offering to pay therefor, or surreptitiously removing or attempting to remove such baggage, shall be prima facie evidence of such fraudulent intent, but this section shall not apply where there has been an agreement in writing for delay in such payment. (1907, c. 816; C.S., s. 4284; 1969, c. 947; c. 1224, s. 3; 1985, c. 391; 1993, c. 539, s. 48; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Buncombe, Franklin, Jackson: 1933, c. 531; Lee: 1937, c. 168; Martin: 1931, c. 9; Pitt: 1929, c. 103; Rockingham: 1939, c. 53; Wake, Watauga: 1931, c. 9.

CASE NOTES

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by N.C. Const., Art. I, § 16 (now Art. I, § 28) as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

Boardinghouse Defined. — One who has not been licensed to keep a boardinghouse, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boardinghouse. State v. McRae, 170 N.C. 712, 86 S.E. 1039 (1915).

Prosecution of Guest for Refusing to

Pay without Deduction for Unwarranted Charges. — Evidence tending to show that the general manager of a motel in complete charge of its operations had a car towed from its premises under the mistaken belief that the owner of the car was not a guest, and that when the guest refused to pay his bill without deducting the unwarranted towing charges, instituted a prosecution of the guest under this section, is held sufficient to be submitted to the jury on the issue of respondeat superior in an action against the motel for malicious prosecution, the acts of the manager having been performed in furtherance of the motel's business. Ross v. Dellinger, 262 N.C. 589, 138 S.E.2d 226 (1964).

Evidence Sufficient to Convict. — Where there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. State v. Hill, 166 N.C. 298, 81 S.E. 408 (1914).

Evidence Insufficient for Conviction. — In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boardinghouse, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boardinghouse to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

§ 14-111: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(4).

§ 14-111.1. Obtaining ambulance services without intending to pay therefor — Buncombe, Haywood and Madison Counties.

Any person who with the intent to defraud shall obtain ambulance services for himself or other persons without intending at the time of obtaining such services to pay a reasonable charge therefor, shall be guilty of a Class 2 misdemeanor. If a person or persons obtaining such services willfully fails to pay for the services within a period of 90 days after request for payment, such failure shall raise a presumption that the services were obtained with the intention to defraud, and with the intention not to pay therefor.

This section shall apply only to the Counties of Buncombe, Haywood and Madison. (1965, c. 976, s. 1; 1969, c. 1224, s. 4; 1993, c. 539, s. 49; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a Class 2 misdemeanor. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

The section shall apply to Alamance, Anson, Ashe, Beaufort, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Clay, Cleveland, Cumberland, Davie, Duplin, Durham, Forsyth, Gaston, Graham, Guilford, Halifax, Haywood, Henderson, Hoke, Hyde, Iredell, Macon, Mecklenburg, Montgomery, New Hanover, Onslow, Orange, Pasquotank, Pender, Person, Polk, Randolph, Robeson, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Washington, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753; c. 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144; 1983, c. 42, s. 1; 1985, c. 335, s. 1; 1987 (Reg. Sess., 1988), c. 910, s. 1; 1993, c. 539, s. 50; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 2; 1999-64, s. 1; 2000-15, s. 1; 2001-106, s. 1.)

§ 14-111.3. Making unneeded ambulance request in certain counties.

It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall be guilty of a Class 3 misdemeanor.

This section shall apply only to the Counties of Alamance, Ashe, Buncombe, Cabarrus, Camden, Carteret, Cherokee, Clay, Cleveland, Davie, Duplin, Durham, Graham, Greene, Halifax, Haywood, Hoke, Macon, Madison, New Hanover, Onslow, Pender, Polk, Robeson, Rockingham, Washington, Wilkes and Yadkin. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96; 1983, c. 42, s. 2; 1985, c. 335, s. 2; 1987 (Reg. Sess., 1988), c. 910, s. 2; 1989, c. 514; 1989 (Reg. Sess., 1990), c. 834; 1993, c. 539, s. 51; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 9, s. 3; 1999-64, s. 2; 2000-15, s. 2; 2001-106, s. 2.)

§ 14-111.4. Misuse of 911 system.

It is unlawful for an individual who is not seeking public safety assistance, is not providing 911 service, or is not responding to a 911 call to access or attempt to access the 911 system for a purpose other than an emergency communication. A person who knowingly violates this section commits a Class 3 misdemeanor. If a person knowingly accesses or attempts to access the 911 system for the purpose of avoiding a charge for voice communications service, as defined in G.S. 62A-40, and the value of the charge exceeds one hundred dollars ($100.00), the person commits a Class 1 misdemeanor. (2007-383, s. 1(b).)

Editor's Note. — Session Laws 2007-383, s. 8, made this section effective January 1, 2008, and applicable to offenses committed on or after January 1, 2008.

§ 14-112. Obtaining merchandise on approval.

If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a Class 2 misdemeanor. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 185; C.S., s. 4285; 1941, c. 242; 1969, c. 1224, s. 2; 1993, c. 539, s. 52; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-112.1: Repealed by Session Laws 1967, c. 1088, s. 2.

§ 14-112.2. Exploitation of an elder adult or disabled adult.

(a) The following definitions apply in this section:

(1) Disabled adult. — A person 18 years of age or older or a lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated as defined in G.S. 108A-101(d).

(2) Elder adult. — A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person's rights and resources and to maintain the person's physical and mental well-being.

(b) It is unlawful for a person: (i) who stands in a position of trust and confidence with an elder adult or disabled adult, or (ii) who has a business relationship with an elder adult or disabled adult to knowingly, by deception or intimidation, obtain or use, or endeavor to obtain or use, an elder adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elder adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elder adult or disabled adult.

(c) It is unlawful for a person, who knows or reasonably should know that an elder adult or disabled adult lacks the capacity to consent, to obtain or use, endeavor to obtain or use, or conspire with another to obtain or use an elder adult's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elder adult or disabled adult of the use, benefit, or possession of the funds, assets, or property, or benefit someone other than the elder adult or disabled adult. This subsection shall not apply to a person acting within the scope of that person's lawful authority as the agent for the elder adult or disabled adult.

(d) A violation of subsection (b) of this section is punishable as follows:

(1) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at one hundred thousand dollars ($100,000) or more, then the offense is a Class F felony.

(2) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at twenty thousand dollars ($20,000) or more but less than one hundred thousand dollars ($100,000), then the offense is a Class G felony.

(3) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at less than twenty thousand dollars ($20,000), then the offense is a Class H felony.

(e) A violation of subsection (c) of this section is punishable as follows:

(1) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at one hundred thousand dollars ($100,000) or more, then the offense is a Class G felony.

(2) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at twenty thousand dollars ($20,000) or more but less than one hundred thousand dollars ($100,000), then the offense is a Class H felony.

(3) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at less than twenty thousand dollars ($20,000), then the offense is a Class I felony. (2005-272, s. 2; 2006-264, s. 99.)

§ 14-113. Obtaining money by false representation of physical defect.

It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a Class 2 misdemeanor. (1919, c. 104; C.S., s. 4286; 1969, c. 1224, s. 1; 1993, c. 539, s. 53; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to defrauding the North Carolina governmental employees' retirement system for counties, cities, and towns, see G.S. 128-32.

Article 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

§ 14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation.

It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, or counterfeit telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued or he has knowledge or reason to believe that such revocation has occurred. (1961, c. 223, s. 1; 1965, c. 1147; 1967, c. 1244, s. 1; 1971, c. 1213, s. 1.)

CASE NOTES

Applied in State v. Franks, 20 N.C. App. 160, 200 S.E.2d 828 (1973).

§ 14-113.2. Notice defined; prima facie evidence of receipt of notice.

The word "notice" as used in G.S. 14-113.1 shall be construed to include either notice given in person or notice given in writing to the person to whom the number or device was issued. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie evidence that such notice was duly received after five days from the date of the deposit in the mail. (1961, c. 223, s. 3; 1965, c. 1147; 1967, c. 1244, s. 1.)

§ 14-113.3. Use of credit device as prima facie evidence of knowledge.

The presentation or use of a revoked, false, fictitious or counterfeit telephone number, credit number, or other credit device for the purpose of obtaining credit or the privilege of making a deferred payment for the article or service purchased shall be prima facie evidence of knowledge that the said credit device is revoked, false, fictitious or counterfeit; and the unauthorized use of any telephone number, credit number or other credit device of another shall be prima facie evidence of knowledge that such use was without the authority of the person to whom such number or device was issued. (1961, c. 223, s. 4; 1965, c. 1147; 1967, c. 1244, s. 1.)

§ 14-113.4. Avoiding or attempting to avoid payment for telecommunication services.

It shall be unlawful for any person to avoid or attempt to avoid, or to cause another to avoid, the lawful charges, in whole or in part, for any telephone or telegraph service or for the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities by the use of any fraudulent scheme, device, means or method. (1961, c. 223, s. 2; 1965, c. 1147.)

§ 14-113.5. Making, distributing, possessing, transferring, or programming device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.

(a) It shall be unlawful for any person knowingly to:

(1) Make, distribute, possess, use, or assemble an unlawful telecommunications device or modify, alter, program, or reprogram a telecommunication device designed, adapted, or which is used:

a. For commission of a theft of telecommunication service or to acquire or facilitate the acquisition of telecommunications service without the consent of the telecommunication service provider in violation of this Article, or

b. To conceal, or assist another to conceal, from any supplier of a telecommunication service provider or from any lawful authority the existence or place of origin or of destination of any telecommunication, or

(2) Sell, possess, distribute, give, transport, or otherwise transfer to another or offer or advertise for sale any:

a. Unlawful telecommunication device, or plans or instructions for making or assembling the same under circumstances evincing an intent to use or employ the unlawful telecommunication device, or to allow the same to be used or employed, for a purpose described in (1)a or (1)b above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling the unlawful telecommunication device; or

b. Material, including hardware, cables, tools, data, computer software or other information or equipment, knowing that the purchaser or a third person intends to use the material in the manufacture of an unlawful telecommunication device; or

(3) Publish plans or instructions for making or assembling or using any unlawful telecommunication device, or

(4) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device,

or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have the telephone number, credit number, credit device or method of numbering or coding so used.

(5) Repealed by Session Laws 1995, c. 425, s. 1.

(b) Any unlawful telecommunication device, plans, instructions, or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section. Upon the conviction of a person for a violation of this section, the court may order the sheriff of the county in which the person was convicted to destroy as contraband or to otherwise lawfully dispose of the unlawful telecommunication device, plans, instructions, or publication.

(c) The following definitions apply in this section and in G.S. 14-113.6:

(1) Manufacture of an unlawful telecommunication device. — The production or assembly of an unlawful telecommunication device or the modification, alteration, programming or reprogramming of a telecommunication device to be capable of acquiring or facilitating the acquisition of telecommunication service without the consent of the telecommunication service provider.

(2) Publish. — The communication or dissemination of information to any one or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book.

(3) Telecommunication device. — Any type of instrument, device, machine or equipment that is capable of transmitting or receiving telephonic, electronic or radio communications, or any part of such instrument, device, machine or equipment, or any computer circuit, computer chip, electronic mechanism or other component that is capable of facilitating the transmission or reception of telephonic, electronic or radio communications.

(4) Telecommunication service. — Any service provided for a charge or compensation to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images, sounds or intelligence of any nature of telephone, including cellular or other wireless telephones, wire, radio, electromagnetic, photoelectronic or photo-optical system.

(5) Telecommunication service provider. — A person or entity providing telecommunication service, including, a cellular, paging or other wireless communications company or other person or entity which, for a fee, supplies the facility, cell site, mobile telephone switching office or other equipment or telecommunication service.

(6) Unlawful telecommunication device. — Any telecommunication device that is capable, or has been altered, modified, programmed or reprogrammed alone or in conjunction with another access device or other equipment so as to be capable, of acquiring or facilitating the acquisition of any electronic serial number, mobile identification number, personal identification number or any telecommunication service without the consent of the telecommunication service provider. The term includes, telecommunications devices altered to obtain service without the consent of the telecommunication service provider, tumbler phones, counterfeit or clone microchips, scanning receivers of wireless telecommunication service of a telecommunication service provider and other instruments capable of disguising their identity or

location or of gaining access to a communications system operated by a telecommunication service provider. This section shall not apply to any device operated by a law enforcement agency in the normal course of its activities. (1965, c. 1147; 1971, c. 1213, s. 2; 1995, c. 425, s. 1.)

CASE NOTES

Cited in DIRECTV, Inc. v. Breedlove, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 24694 (E.D.N.C. Mar. 16, 2003); Directv, Inc. v. Jarman, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 9523 (W.D.N.C. May 11, 2005).

§ 14-113.6. Penalties for violation; civil action.

(a) Any person violating any of the provisions of this Article shall be guilty of a Class 2 misdemeanor. However, if the offense is a violation of G.S. 14-113.5 and involves five or more unlawful telecommunication devices the person shall be guilty of a Class G felony.

(b) The court may, in addition to any other sentence authorized by law, order a person convicted of violating G.S. 14-113.5 to make restitution for the offense.

(c) Any person or entity aggrieved by a violation of G.S. 14-113.5 may, in a civil action in any court of competent jurisdiction, obtain appropriate relief, including preliminary and other equitable or declaratory relief, compensatory and punitive damages, reasonable investigation expenses, costs of suit and any attorney fees as may be provided by law. (1961, c. 223, s. 5; 1965, c. 1147; 1969, c. 1224, s. 6; 1993, c. 539, s. 54; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 425, s. 2.)

§ 14-113.6A. Venue of offenses.

(a) Any of the offenses described in Article 19A which involve the placement of telephone calls may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(b) An offense under former G.S. 14-113.5(3) or 14-113.5(4) (see now G.S. 14-113.5(a)(3) or 14-113.5(a)(4)) may be deemed to have been committed at either the place at which the publication was initiated or at which the publication was received or at which the information so published was utilized to avoid or attempt to avoid the payment of any lawful telephone or telegraph toll charge. (1971, c. 1213, s. 3.)

§ 14-113.7. Article not construed as repealing § 14-100.

This Article shall not be construed as repealing G.S. 14-100. (1961, c. 223, s. 6; 1065, c. 1147.)

§ 14-113.7A. Application of Article to credit cards.

This Article shall not be construed as being applicable to any credit card as the term is defined in G.S. 14-113.8. (1967, c. 1244, s. 1.)

ARTICLE 19B.

Financial Transaction Card Crime Act.

§ 14-113.8. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Acquirer. — "Acquirer" means a business organization, financial institution, or an agent of a business organization or financial institution that authorizes a merchant to accept payment by financial transaction card for money, goods, services or anything else of value.

(1a) Automated Banking Device. — "Automated banking device" means any machine which when properly activated by a financial transaction card and/or personal identification code may be used for any of the purposes for which a financial transaction card may be used.

(2) Cardholder. — "Cardholder" means the person or organization named on the face of a financial transaction card to whom or for whose benefit the financial transaction card is issued by an issuer.

(3) Expired Financial Transaction Card. — "Expired financial transaction card" means a financial transaction card which is no longer valid because the term shown on it has elapsed.

(4) Financial Transaction Card. — "Financial transaction card" or "FTC" means any instrument or device whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

a. In obtaining money, goods, services, or anything else of value on credit; or

b. In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

c. In providing the cardholder access to a demand deposit account or time deposit account for the purpose of:

1. Making deposits of money or checks therein; or
2. Withdrawing funds in the form of money, money orders, or traveler's checks therefrom; or
3. Transferring funds from any demand deposit account or time deposit account to any other demand deposit account or time deposit account; or
4. Transferring funds from any demand deposit account or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein; or
5. For the purchase of goods, services or anything else of value; or
6. Obtaining information pertaining to any demand deposit account or time deposit account;

d. But shall not include a telephone number, credit number, or other credit device which is covered by the provisions of Article 19A of this Chapter.

(5) Issuer. — "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(6) Personal Identification Code. — "Personal identification code" means a numeric and/or alphabetical code assigned to the cardholder of a financial transaction card by the issuer to permit authorized electronic use of that FTC.

(7) Presenting. — "Presenting" means, as used herein, those actions taken by a cardholder or any person to introduce a financial transaction card into an automated banking device, including utilization of a personal identification code, or merely displaying or showing a financial transaction card to the issuer, or to any person or organization

providing money, goods, services, or anything else of value, or any other entity with intent to defraud.

(8) Receives. — "Receives" or "receiving" means acquiring possession or control or accepting a financial transaction card as security for a loan.

(9) Revoked Financial Transaction Card. — "Revoked financial transaction card" means a financial transaction card which is no longer valid because permission to use it has been suspended or terminated by the issuer.

(10) Scanning Device. — "Scanning device" means a scanner, reader, or any other device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on a financial transaction card. (1967, c. 1244, s. 2; 1971, c. 1213, s. 4; 1979, c. 741, s. 1; 1989, c. 161, s. 1; 2002-175, s. 2.)

Legal Periodicals. — For article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Cited in State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971); State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

§ 14-113.9. Financial transaction card theft.

(a) A person is guilty of financial transaction card theft when the person does any of the following:

(1) Takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder.

(2) Receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder.

(3) Not being the issuer, sells a financial transaction card or buys a financial transaction card from a person other than the issuer.

(4) Not being the issuer, during any 12-month period, receives financial transaction cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of G.S. 14-113.13(a)(3) and subdivision (3) of subsection (a) of this section.

(5) With the intent to defraud any person, either (i) uses a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on another person's financial transaction card, or (ii) receives the encoded information from another person's financial transaction card.

(b) Credit card theft is punishable as provided by G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 2002-175, s. 3.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Subdivision (a)(1) may be violated in four ways: one may (1) take, (2) obtain, or (3) withhold a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or one may (4) receive a financial transaction card with intent to use it or sell it or transfer it to a person other than the issuer or cardholder, knowing at the time that the card has been so taken, obtained or withheld, i.e., knowing at the time he received it that another person had taken, obtained or withheld the card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Elements of Receiving Under Subdivision (a)(1). — The necessary implication from the use of the qualifier "so" in subdivision (a)(1) is that when a defendant is charged with a violation of the receiving portion of the statute, he must have received a card from a third party who also intended to use it. Although this interpretation hinges upon a linguistic technicality, criminal laws must be strictly construed in favor of the defendant. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Indictment for Receiving Under Subdivision (a)(1). — In order to charge receiving under the present wording of subdivision (a)(1), it must be alleged, among other elements, that at the time of receipt the defendant knew that the financial transaction card had been taken, obtained or withheld from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

An indictment attempting to charge a defendant under the receiving portion of subdivision (a)(1) of this section which failed to allege that the defendant knew that the card had been taken, obtained or withheld with the intent to use it, an essential element of the crime for which defendant was tried, failed to charge a crime, and defendant's motion to dismiss should have been allowed. State v. Brunson, 51 N.C. App. 413, 276 S.E.2d 455 (1981).

Sufficiency of Description of Credit Card. — No defect appears on the face of an indictment for violation of this section where the credit card allegedly withheld is sufficiently described to inform the accused with certainty as to the crime he allegedly committed. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

The date upon which an allegedly stolen credit card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Evidence Held Insufficient. — There was insubstantial evidence from which the jury could find that the defendant did not have his mother's permission to use her credit card. State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996).

Evidence Sufficient. — Motion to dismiss financial card theft charges was properly denied under circumstances in which the evidence showed that one of the two stolen cards was used two days after the last time the owner knew he was in possession of the cards, and the second card was found in defendant's possession three days after that; further, a security tape from the store where the card was used showed defendant shopping there, making a purchase at the time of the unauthorized charge on the card and apparently paying for it with a credit card and register receipts showed purchases made with the card corresponding to the time of defendant's purchases. State v. Fraley, 182 N.C. App. 683, 643 S.E.2d 39, 2007 N.C. App. LEXIS 806 (2007).

Cited in State v. Mann, 355 N.C. 294, 560 S.E.2d 776, 2002 N.C. LEXIS 332 (2002).

§ 14-113.10. Prima facie evidence of theft.

When a person has in his possession or under his control financial transaction cards issued in the names of two or more other persons other than members of his immediate family, such possession shall be prima facie evidence that such financial transaction cards have been obtained in violation of G.S. 14-113.9(a). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

CASE NOTES

Evidence of Possession of Other Credit Cards. — The admission of evidence, over objection, that defendant had three other credit cards in his possession which had been issued in the names of persons other than defendant or members of his immediate family was competent (1) to make out a prima facie case as provided in this section that defendant had obtained all credit cards in his possession in violation of G.S. 14-113.9(a); (2) to establish a common plan or scheme to commit credit-card crimes so related to each other that proof of one or more tends to prove the crime charged and to connect defendant with its commission; and (3) to show criminal intent and guilty knowledge. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Necessity for Instruction. — In light of the provisions of this section, it is the duty of the court to instruct the jury regarding the legal significance of the State's evidence tending to show that defendant had in his possession or under his control credit cards issued in the name of two or more persons other than defendant and members of his immediate family. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 14-113.11. Forgery of financial transaction card.

(a) A person is guilty of financial transaction card forgery when:

(1) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported financial transaction card or utters such a financial transaction card; or

(2) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely encodes, duplicates or alters existing encoded information on a financial transaction card or utters such a financial transaction card; or

(3) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a financial transaction card.

(b) A person falsely makes a financial transaction card when he makes or draws, in whole or in part, a device or instrument which purports to be the financial transaction card of a named issuer but which is not such a financial transaction card because the issuer did not authorize the making or drawing, or alters a financial transaction card which was validly issued.

(c) A person falsely embosses a financial transaction card when, without authorization of the named issuer, he completes a financial transaction card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder.

(d) A person falsely encodes a financial transaction card when, without authorization of the purported issuer, he records magnetically, electronically, electro-magnetically or by any other means whatsoever, information on a financial transaction card which will permit acceptance of that card by any automated banking device. Conviction of financial transaction card forgery shall be punishable as provided in G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

Legal Periodicals. — For article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Applied in State v. Hudson, 11 N.C. App. 712, 182 S.E.2d 198 (1971).

§ 14-113.12. Prima facie evidence of forgery.

(a) When a person, other than the purported issuer, possesses two or more financial transaction cards which are falsely made or falsely embossed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11(a)(1) or 14-113.11(a)(2).

(b) When a person, other than the cardholder or a person authorized by him possesses two or more financial transaction cards which are signed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11(a)(3). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.13. Financial transaction card fraud.

(a) A person is guilty of financial transaction card fraud when, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he

(1) Uses for the purpose of obtaining money, goods, services or anything else of value a financial transaction card obtained or retained, or which was received with knowledge that it was obtained or retained, in violation of G.S. 14-113.9 or 14-113.11 or a financial transaction card which he knows is forged, altered, expired, revoked or was obtained as a result of a fraudulent application in violation of G.S. 14-113.13(c); or

(2) Obtains money, goods, services, or anything else of value by:
  a. Representing without the consent of the cardholder that he is the holder of a specified card; or
  b. Presenting the financial transaction card without the authorization or permission of the cardholder; or
  c. Representing that he is the holder of a card and such card has not in fact been issued; or
  d. Using a financial transaction card to knowingly and willfully exceed:
    1. The actual balance of a demand deposit account or time deposit account; or
    2. An authorized credit line in an amount which exceeds such authorized credit line in the amount of five hundred dollars ($500.00), or fifty percent (50%) of such authorized credit line, whichever is greater; or

(3) Obtains control over a financial transaction card as security for debt; or

(4) Deposits into his account or any account, by means of an automated banking device, a false, fictitious, forged, altered or counterfeit check, draft, money order, or any other such document not his lawful or legal property; or

(5) Receives money, goods, services or anything else of value as a result of a false, fictitious, forged, altered, or counterfeit check, draft, money order or any other such document having been deposited into an account via an automated banking device, knowing at the time of receipt of the money, goods, services, or item of value that the document so deposited was false, fictitious, forged, altered or counterfeit or that the above deposited item was not his lawful or legal property.

(b) A person who is authorized by an issuer to furnish money, goods, services or anything else of value upon presentation of a financial transaction card by the cardholder, or any agent or employee of such person is guilty of a financial transaction card fraud when, with intent to defraud the issuer or the cardholder, he

(1) Furnishes money, goods, services or anything else of value upon presentation of a financial transaction card obtained or retained in violation of G.S. 14-113.9, or a financial transaction card which he knows is forged, expired or revoked; or

(2) Fails to furnish money, goods, services or anything else of value which he represents in writing to the issuer that he has furnished.

Conviction of financial transaction card fraud as provided in subsection (a) or (b) of this section is punishable as provided in G.S. 14-113.17(a) if the value of all money, goods, services and other things of value furnished in violation of this section, or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period. Conviction of financial transaction card fraud as provided in subsection (a) or (b) of this section is punishable as provided in G.S. 14-113.17(b) if such value exceeds five hundred dollars ($500.00) in any six-month period.

(c) A person is guilty of financial transaction card fraud when, upon application for a financial transaction card to an issuer, he knowingly makes or causes to be made a false statement or report relative to his name, occupation, financial condition, assets, or liabilities; or willfully and substantially overvalues any assets, or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction card.

Conviction of financial transaction card fraud as provided in this subsection is punishable as provided in G.S. 14-113.17(a).

(c1) A person authorized by an acquirer to furnish money, goods, services or anything else of value upon presentation of a financial transaction card or a financial transaction card account number by a cardholder, or any agent or employee of such person, who, with intent to defraud the issuer, acquirer, or cardholder, remits to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such person, his agent or employee, is guilty of financial transaction card fraud.

Conviction of financial transaction card fraud as provided in this subsection is punishable as provided in G.S. 14-113.17(a).

(d) A cardholder is guilty of financial transaction card fraud when he willfully, knowingly, and with an intent to defraud the issuer, a person or organization providing money, goods, services, or anything else of value, or any other person, submits, verbally or in writing, to the issuer or any other person, any false notice or report of the theft, loss, disappearance, or nonreceipt of his financial transaction card.

Conviction of financial transaction card fraud as provided in this subsection is punishable as provided in G.S. 14-113.17(a).

(e) In any prosecution for violation of G.S. 14-113.13, the State is not required to establish and it is no defense that some of the acts constituting the crime did not occur in this State or within one city, county, or local jurisdiction.

(f) For purposes of this section, revocation shall be construed to include either notice given in person or notice given in writing to the person to whom the financial transaction card and/or personal identification code was issued. Notice of revocation shall be immediate when notice is given in person. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie evidence that such notice was duly received after seven days from the date of the deposit in the mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone and Canada, notice shall be presumed to have been received 10 days after mailing by registered or certified mail. (1967, c. 1244, s. 2; 1979, c. 741, s. 1; 1989, c. 161, s. 2.)

Legal Periodicals. — For article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Evidence Held Insufficient. — There was insubstantial evidence from which the jury could find that the defendant did not have his mother's permission to use her financial transaction card. State v. McLemore, 343 N.C. 240, 470 S.E.2d 2 (1996).

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

§ 14-113.14. Criminal possession of financial transaction card forgery devices.

(a) A person is guilty of criminal possession of financial transaction card forgery devices when:

(1) He is a person other than the cardholder and possesses two or more incomplete financial transaction cards, with intent to complete them without the consent of the issuer; or

(2) He possesses, with knowledge of its character, machinery, plates, or any other contrivance designed to reproduce instruments purporting to be financial transaction cards of an issuer who has not consented to the preparation of such financial transaction cards.

(b) A financial transaction card is incomplete if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder, has not yet been stamped, embossed, imprinted, encoded or written upon it.

Conviction of criminal possession of financial transaction card forgery devices is punishable as provided in G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.15. Criminal receipt of goods and services fraudulently obtained.

A person is guilty of criminally receiving goods and services fraudulently obtained when he receives money, goods, services or anything else of value obtained in violation of G.S. 14-113.13(a) with the knowledge or belief that the same were obtained in violation of G.S. 14-113.13(a). Conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17(a) if the value of all the money, goods, services and anything else of value, obtained in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period; conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17(b) if such value exceeds five hundred dollars ($500.00) in any six-month period. (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

Legal Periodicals. — For article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

§ 14-113.15A. Criminal factoring of financial transaction card records.

Any person who, without the acquirer's express authorization, employs or solicits an authorized merchant, or any agent or employee of such merchant, to remit to an issuer or acquirer, for payment, a financial transaction card record of a sale, which sale was not made by such merchant, his agent or employee, is guilty of a felony punishable as provided in G.S. 14-113.17(b). (1989, c. 161, s. 3.)

§ 14-113.16. Presumption of criminal receipt of goods and services fraudulently obtained.

A person who obtains at a discount price a ticket issued by an airline, railroad, steamship or other transportation company from other than an authorized agent of such company which was acquired in violation of G.S. 14-113.13(a) without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it shall be presumed to know that such ticket was acquired under circumstances constituting a violation of G.S. 14-113.13(a). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.17. Punishment and penalties.

(a) A person who is subject to the punishment and penalties of this Article shall be guilty of a Class 2 misdemeanor.

(b) A crime punishable under this Article is punishable as a Class I felony. (1967, c. 1244, s. 2; 1979, c. 741, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 55, 1183; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

§§ 14-113.18, 14-113.19: Reserved for future codification purposes.

Article 19C.

Identity Theft.

§ 14-113.20. Identity theft.

(a) A person who knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences is guilty of a felony punishable as provided in G.S. 14-113.22(a).

(b) The term "identifying information" as used in this Article includes the following:

(1) Social security or employer taxpayer identification numbers.

(2) Drivers license, State identification card, or passport numbers.
(3) Checking account numbers.
(4) Savings account numbers.
(5) Credit card numbers.
(6) Debit card numbers.
(7) Personal Identification (PIN) Code as defined in G.S. 14-113.8(6).
(8) Electronic identification numbers, electronic mail names or addresses, Internet account numbers, or Internet identification names.
(9) Digital signatures.
(10) Any other numbers or information that can be used to access a person's financial resources.
(11) Biometric data.
(12) Fingerprints.
(13) Passwords.
(14) Parent's legal surname prior to marriage.

(c) It shall not be a violation under this Article for a person to do any of the following:

(1) Lawfully obtain credit information in the course of a bona fide consumer or commercial transaction.
(2) Lawfully exercise, in good faith, a security interest or a right of offset by a creditor or financial institution.
(3) Lawfully comply, in good faith, with any warrant, court order, levy, garnishment, attachment, or other judicial or administrative order, decree, or directive, when any party is required to do so. (1999-449, s. 1; 2000-140, s. 37; 2002-175, s. 4; 2005-414, s. 6.)

Cross References. — As to damages for identity fraud, see G.S. 1-539.2C.

Editor's Note. — Session Laws 2005-414, s. 7(1), effective December 1, 2005, substituted "Identity Theft" for "Financial Identity Fraud" in the Article heading.

CASE NOTES

Instruction Was Proper. — Trial court properly denied defendant's request to instruct the jury concerning consent by another to the falsification of that person's identification documents, where defendant was being prosecuted for financial identity fraud under G.S. 14-113.20; trial court properly instructed the jury that it was the State's burden to show that defendant's use of the identification documents was without consent. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Dismissal Properly Denied. — Trial court did not err in denying defendant's motion to dismiss pursuant to G.S. 15A-954 in defendant's prosecution for financial identity fraud under G.S. 14-113.20(a), where the indictment alleged that defendant misrepresented defendant's identity for the purpose of avoiding legal consequences; the indictment alleged proper grounds for the charge, the State presented substantial evidence in support of the grounds, and there was no fatal variance between the indictment and the evidence at trial. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Lesser Included Offense Instruction Properly Denied. — Defendant was not entitled to a jury instruction on a lesser included offense, where defendant was prosecuted for financial identity fraud under G.S. 14-113.20, and defendant sought a lesser included offense instruction for obstruction or delay of an officer under G.S. 14-223; because all of the elements of the offense of obstructing or delay an officer were not included in financial identity fraud, obstructing or delaying an officer was not a lesser included offense. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Applied in Hyshaw v. State, 893 So. 2d 1239, 2003 Ala. Crim. App. LEXIS 194 (Ala. Crim. App. 2003).

§ 14-113.20A. Trafficking in stolen identities.

(a) It is unlawful for a person to sell, transfer, or purchase the identifying information of another person with the intent to commit identity theft, or to assist another person in committing identity theft, as set forth in G.S. 14-113.20.

(b) A violation of this section is a felony punishable as provided in G.S. 14-113.22(a1). (2002-175, s. 5; 2005-414, s. 7(2).)

Cross References. — As to damages for identity fraud, see G.S. 1-539.2C.

§ 14-113.21. Venue of offenses.

In any criminal proceeding brought under G.S. 14-113.20, the crime is considered to be committed in the county where the victim resides, where the perpetrator resides, where any part of the identity theft took place, or in any other county instrumental to the completion of the offense, regardless of whether the defendant was ever actually present in that county. (1999-449, s. 1; 2005-414, ss. 2, 7.)

§ 14-113.21A. Investigation of offenses.

(a) A person who has learned or reasonably suspects that the person has been the victim of identity theft may contact the local law enforcement agency that has jurisdiction over the person's actual residence. Notwithstanding the fact that jurisdiction may lie elsewhere for investigation and prosecution of a crime of identity theft, the local law enforcement agency may take the complaint, issue an incident report, and provide the complainant with a copy of the report and may refer the report to a law enforcement agency in that different jurisdiction.

(b) Nothing in this section interferes with the discretion of a local law enforcement agency to allocate resources for investigations of crimes. A complaint filed or report issued under this section is not required to be counted as an open case for purposes of compiling open case statistics. (2005-414, s. 3.)

§ 14-113.22. Punishment and liability.

(a) A violation of G.S.14-113.20(a) is punishable as a Class G felony, except it is punishable as a Class F felony if: (i) the victim suffers arrest, detention, or conviction as a proximate result of the offense, or (ii) the person is in possession of the identifying information pertaining to three or more separate persons.

(a1) A violation of G.S. 14-113.20A is punishable as a Class E felony.

(a2) The court may order a person convicted under G.S. 14-113.20 or G.S. 14-113.20A to pay restitution pursuant to Article 81C of Chapter 15A of the General Statutes for financial loss caused by the violation to any person. Financial loss included under this subsection may include, in addition to actual losses, lost wages, attorneys' fees, and other costs incurred by the victim in correcting his or her credit history or credit rating, or in connection with any criminal, civil, or administrative proceeding brought against the victim resulting from the misappropriation of the victim's identifying information.

(b) Notwithstanding subsection (a), (a1), or (a2) of this section, any person who commits an act made unlawful by G.S. 14-113.20 or G.S. 14-113.20A may also be liable for damages under G.S. 1-539.2C.

(c) In any case in which a person obtains identifying information of another person in violation of this Article, uses that information to commit a crime in addition to a violation of this Article, and is convicted of that additional crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime. (1999-449, s. 1; 2002-175, ss. 6, 7; 2003-206, s. 3.)

Cross References. — As to trafficking in stolen identities, see G.S. 14-113.20A.

§ 14-113.23. Authority of the Attorney General.

The Attorney General may investigate any complaint regarding identity theft under this Article. In conducting these investigations, the Attorney General has all the investigative powers available to the Attorney General under Article 1 of Chapter 75 of the General Statutes. The Attorney General shall refer all cases of identity theft under G.S. 14-113.20 to the district attorney in the county where the crime was deemed committed in accordance with G.S. 14-113.21. (1999-449, s. 1; 2005-414, s. 7(2).)

§ 14-113.24. Credit, charge, or debit card numbers on receipts.

(a) For purposes of this section, the word "person" means the person that owns or leases the cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions.

(b) Except as provided in this section, no person that accepts credit, charge, or debit cards for the transaction of business shall print more than five digits of the credit, charge, or debit card account number or the expiration date upon any receipt with the intent to provide the receipt to the cardholder at the point of sale. This section applies to a person who employs a cash register or other machine or device that electronically prints receipts for credit, charge, or debit card transactions. This section does not apply to a person whose sole means of recording a credit, charge, or debit card number for the transaction of business is by handwriting or by an imprint or copy of the credit, charge, or debit card.

(c) A person who violates this section commits an infraction as defined in G.S. 14-3.1 and is subject to a penalty of up to five hundred dollars ($500.00) per violation, not to exceed five hundred dollars ($500.00) in any calendar month or two thousand dollars ($2,000) in any calendar year. A person who receives a citation for violation of this section is not subject to the penalty provided in this subsection if the person establishes in court that the person came into compliance with this section within 30 days of the issuance of the citation and the person has remained in compliance with this section. (2003-206, s. 1; 2003-206, s. 2.)

§ 14-113.25. Sale of certain cash registers and other receipt printing machines.

(a) No person shall sell or offer to sell a cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions that cannot be programmed or operated to produce a receipt with five or fewer digits of the credit, charge, or debit card account number and no expiration date printed on the receipt. This subsection applies to cash registers or other machines or devices sold or offered for sale for use in the ordinary course of business in this State.

(b) A person who violates this section commits an infraction as defined in G.S. 14-3.1 and is subject to a penalty of up to five hundred dollars ($500.00) per violation. For purposes of assessing penalties pursuant to this subsection, the sale or offer for sale of each individual cash register or other machine or device that electronically prints receipts of credit, charge, or debit card transactions in violation of this section is treated as a separate violation. (2003-206, s. 1.)

§§ 14-113.26 through 14-113.29: Reserved for future codification purposes.

ARTICLE 19D.

Telephone Records Privacy Protection Act.

§ 14-113.30. Definitions.

The following definitions apply in this Article:

(1) Caller identification record. — A record collected and retained by or on behalf of a customer utilizing caller identification or similar technology that is delivered electronically to the recipient of a telephone call simultaneously with the reception of the telephone call and that indicates the telephone number from which the telephone call was initiated or similar information regarding the telephone call.

(2) Customer. — A person or the legal guardian of a person or a representative of a business to whom a telephone service provider provides telephone service to a number subscribed or listed in the name of the person or business.

(3) Person. — An individual, business association, partnership, limited partnership, corporation, limited liability company, or other legal entity.

(4) Telephone record. — A record in written, electronic, or oral form, except a caller identification record, Directory Assistance information, and subscriber list information, that is created by a telephone service provider and that contains any of the following information with respect to a customer:

a. Telephone numbers that have been dialed by the customer.
b. Telephone numbers that pertain to calls made to the customer.
c. The time when calls were made by the customer or to the customer.
d. The duration of calls made by the customer or to the customer.
e. The charges applied to calls, if any.

(5) Telephone service. — The conveyance of two-way communication in analog, digital, or other form by any medium, including wire, cable, fiber optics, cellular, broadband personal communications services, or other wireless technologies, satellite, microwave, or at any frequency over any part of the electromagnetic spectrum. The term also includes the conveyance of voice communication over the Internet and telephone relay service.

(6) Telephone service provider. — A person who provides telephone service to a customer without regard to the form of technology used, including traditional wire-line or cable communications service; cellular, broadband PCS, or other wireless communications service; microwave, satellite, or other terrestrial communications service; or voice over Internet communications service. (2007-374, s. 1.)

Editor's Note. — Session Laws 2007-374, s. 2, made this Article effective December 1, 2007, and applicable to acts and offenses committed on or after that date.

§ 14-113.31. Prohibition of falsely obtaining, selling, or soliciting telephone records.

(a) No person shall obtain, or attempt to obtain, by any means, whether electronically, in writing, or in oral form, with or without consideration, a telephone record that pertains to a customer who is a resident of this State without the customer's consent by doing any of the following:

(1) Making a false statement or representation to an agent, representative, or employee of a telephone service provider.

(2) Making a false statement or representation to a customer of a telephone service provider.

(3) Knowingly providing to a telephone service provider a document that is fraudulent, that has been lost or stolen, or that has been obtained by fraud, or that contains a false, fictitious, or fraudulent statement or representation.

(4) Accessing customer accounts of a telephone service provider via the Internet without prior authorization from the customer to whom the telephone records relate.

(b) No person shall knowingly purchase, receive, or solicit another to purchase or receive a telephone record that pertains to a customer without the prior authorization of that customer, or if the purchaser or receiver knows or has reason to know that the record has been obtained fraudulently.

(c) No person shall sell or offer to sell a telephone record that was obtained without the customer's prior consent, or if the person knows or has reason to know that the telephone record was obtained fraudulently. (2007-374, s. 1.)

§ 14-113.32. Exceptions.

(a) The provisions of G.S. 14-113.31 shall not apply to any of the following:

(1) Any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency in connection with the official duties of the law enforcement agency.

(2) A disclosure by a telephone service provider if the telephone service provider reasonably believes the disclosure is necessary to: (i) provide telephone service to a customer, including sharing telephone records with one of the provider's affiliates or (ii) protect an individual or service provider from fraudulent, abusive, or unlawful use of telephone service or a telephone record.

(3) A disclosure by a telephone service provider to the National Center for Missing and Exploited Children.

(4) A disclosure by a telephone service provider that is authorized by State or federal law or regulation.

(5) A disclosure by a telephone service provider to a governmental entity if the provider reasonably believes there is an emergency involving immediate danger of death or serious physical injury.

(6) Testing of a telephone service provider's security procedures or systems for maintaining the confidentiality of customers' telephone records.

(b) Nothing in this Article shall be construed to expand the obligation or duty of a telephone service provider to maintain the confidentiality of telephone records beyond the requirements of this Article or federal law or regulation. Any telephone service provider or agent, employee, or representative of a telephone service provider who reasonably and in good faith discloses telephone records shall not be criminally or civilly liable if the disclosure is later determined to be in violation of this Article. (2007-374, s. 1.)

§ 14-113.33. Punishment; liability.

(a) Unless the conduct is covered under some other provision of law providing greater punishment, any person who violates this Article is guilty of a Class H felony. In any criminal proceeding brought under this Article, the crime is considered to be committed in the county where the customer resides, where the defendant resides, where any part of the offense took place, or in any other county instrumental to the completion of the offense, regardless of whether the defendant was ever actually present in that county.

(b) A violation of G.S. 14-331.31 is a violation of G.S. 75-1.1, except that a customer whose telephone records were obtained, sold, or solicited in violation of this Article shall be entitled to damages pursuant to G.S. 75-16, or one thousand dollars ($1,000), whichever is greater. (2007-374, s. 1.)

ARTICLE 20.

Frauds.

§ 14-114. Fraudulent disposal of personal property on which there is a security interest.

(a) If any person, after executing a security agreement on personal property for a lawful purpose, shall make any disposition of any property embraced in such security agreement, with intent to defeat the rights of the secured party, every person so offending and every person with a knowledge of the security interest buying any property embraced in which security agreement, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to defeat the rights of any secured party in such security agreement, shall be guilty of a Class 2 misdemeanor.

A person's refusal to turn over secured property to a secured party who is attempting to repossess the property without a judgment or order for possession shall not, by itself, be a violation of this section.

(b) Intent to commit the crime as set forth in subsection (a) may be presumed from proof of possession of the property embraced in such security agreement by the grantor thereof after execution of the security agreement, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for its seizure, for the satisfaction of such security agreement. However, this presumption may be rebutted by evidence that the property has, through no fault of the defendant, been stolen, lost, damaged beyond repair, or otherwise disposed of by the defendant without intent to defeat the rights of the secured party. (1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; Code, s. 1089; 1887, c. 14; Rev., s. 3435; C.S., s. 4287; 1969, c. 984, s. 2; c. 1224, s. 4; 1987 (Reg. Sess., 1988), c. 1065, s. 1; 1993, c. 539, s. 56; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Editor's Note. — *The cases were decided under this section and its predecessors prior to the 1969 amendments to this section, when the section referred to chattel mortgages, deeds of trust or other liens rather than to security agreements.*

Three Classes of Offenders. — The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien; and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Intent Necessary. — Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the legislature. State v. Manning, 107 N.C. 910, 12 S.E. 248 (1890).

The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897).

In a trial under this section, the burden is upon the defendant to disprove the criminal intent. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895); State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897).

Result of Sale Must Injure. — If the property included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudicial result as is contemplated by the statute. State v. Manning, 107 N.C. 910, 12 S.E. 248 (1890).

Infant's Liability. — An indictment under this section for disposing of crops under mortgage could not be sustained, where it appeared that the defendant was an infant. The alleged disposition was a disaffirmance of the contract and rendered it void. State v. Howard, 88 N.C. 650 (1883).

Indictment Must Charge Maker, Buyer or Assistant. — If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Indictment Must Charge Lien and Manner of Sale. — An indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. State v. Pickens, 79 N.C. 652 (1878); State v. Burns, 80 N.C. 376 (1879).

Indictment Must Identify Transaction and Point to Offense Charged. — In a prosecution under this section, the bill of indictment must allege the facts and circumstances so as to identify the transaction and point with reasonable certainty to the offense charged. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

Indictment in Two Counts. — Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895).

Prior Lien as Defense. — It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property — a crop of tobacco — to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien. State v. Ellington, 98 N.C. 749, 4 S.E. 534 (1887).

Evidence of Other Sales Inadmissible. — On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. State v. Jeffries, 117 N.C. 727, 23 S.E. 163 (1895).

Applied in State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Cited in State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905).

§ 14-115. Secreting property to hinder enforcement of lien or security interest.

Any person who, with intent to prevent or hinder the enforcement of a lien or security interest after a judgment or order has been issued for possession for that personal property subject to said lien or security interest, either refuses to surrender such personal property in his possession to a law enforcement officer, or removes, or exchanges, or secretes such personal property, shall be guilty of a Class 2 misdemeanor. (1887, c. 14; Rev., s. 3436; C.S., s. 4288; 1969, c. 984, s. 3; c. 1224, s. 1; 1987 (Reg. Sess., 1988), c. 1065, s. 2; 1989, c. 401; 1993, c. 539, s. 57; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Pitt: 1941, c. 284.

§ 14-116: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(1).

§ 14-117. Fraudulent and deceptive advertising.

It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a Class 2 misdemeanor. (1915, c. 218; C.S., s. 4290; 1993, c. 539, s. 59; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

CASE NOTES

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

§ 14-117.1: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(5).

§ 14-117.2. Gasoline price advertisements.

(a) Advertisements by any person or firm of the price of any grade of motor fuel must clearly so indicate if such price is dependent upon purchaser himself drawing or pumping the fuel.

(b) Any person or firm violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (1971, c. 324, ss. 1, 2; 1993, c. 539, s. 60; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-118. Blackmailing.

If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the State's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a Class 1 misdemeanor. (R.C., c. 34, s. 110; Code, s. 989; Rev., s. 3428; C.S., s. 4291; 1993, c. 539, s. 61; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Indictment Held Sufficient. — Where the offense charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defendant threatened to indict the prosecutor for an offense punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offense is sufficiently charged. State v. Harper, 94 N.C. 936 (1886).

Circumstantial Evidence Held Sufficient to Sustain Conviction. — Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N.C. 978, 90 S.E. 802 (1916).

Circumstantial evidence held to sustain conviction of blackmail. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

§ 14-118.1. Simulation of court process in connection with collection of claim, demand or account.

It shall be unlawful for any person, firm, corporation, association, agent or employee in any manner to coerce, intimidate, or attempt to coerce or intimidate any person in connection with any claim, demand or account, by the issuance, utterance or delivery of any matter, printed, typed or written, which (i) simulates or resembles a summons, warrant, writ or other court process or pleading; or (ii) by its form, wording, use of the name of North Carolina or any officer, agency or subdivision thereof, use of seals or insignia, or general appearance has a tendency to create in the mind of the ordinary person the false impression that it has judicial or other official authorization, sanction or approval. Any violation of the provisions of this section shall be a Class 2 misdemeanor. (1961, c. 1188; 1979, c. 263; 1993, c. 539, s. 62; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in State v. Watts, 38 N.C. App. 561, 248 S.E.2d 354 (1978).

§ 14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.

(a) It shall be unlawful for any person, firm, corporation or association to assist any student, or advertise, offer or attempt to assist any student, in obtaining or in attempting to obtain, by fraudulent means, any academic credit, grade or test score, or any diploma, certificate or other instrument purporting to confer any literary, scientific, professional, technical or other degree in any course of study in any university, college, academy or other educational institution. The activity prohibited by this subsection includes, but is not limited to, preparing or advertising, offering, or attempting to prepare a term paper, thesis, or dissertation for another; impersonating or advertising, offering or attempting to impersonate another in taking or attempting to take an examination; and the giving or changing of a grade or test score or offering to give or change a grade or test score in exchange for an article of value or money.

(b) Any person, firm, corporation or association violating any of the provisions of this section shall be guilty of a Class 2 misdemeanor. This section includes the acts of a teacher or other school official; however, the provisions of this section shall not apply to the acts of one student in assisting another student as herein defined if the former is duly registered in an educational institution in North Carolina and is subject to the disciplinary authority thereof. (1963, c. 781; 1969, c. 1224, s. 7; 1989, c. 144; 1993, c. 539, s. 63; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra L. Rev. 359 (1969).

§ 14-118.3. Acquisition and use of information obtained from patients in hospitals for fraudulent purposes.

It shall be unlawful for any person, firm or corporation, or any officer, agent or other representative of any person, firm or corporation to obtain or seek to obtain from any person while a patient in any hospital information concerning any illness, injury or disease of such patient, other than information concerning the illness, injury or disease for which such patient is then hospitalized and being treated, for a fraudulent purpose, or to use any information so obtained in regard to such other illness, injury or disease for a fraudulent purpose.

Any person, firm or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1967, c. 974; 1969, c. 1224, s. 5; 1993, c. 539, s. 64; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-118.4. Extortion.

Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class F felon. (1973, c. 1032; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1184; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Section 14-118.4 supersedes § 14-118 since later penal statute repeals former one when it covers the same acts but fixes different penalty or substantially redefines offense. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

Elements of Offense. — To prove a violation of extortion under 18 U.S.C. § 1951 or this section, plaintiffs had to show an attempt to obtain the property of another, with his consent, where such consent was induced by the wrongful use of actual or threatened force, violence or fear. Tryco Trucking Co. v. Belk Stores Servs., Inc., 634 F. Supp. 1327 (W.D.N.C. 1986).

Necessity of Threat. — In order to satisfy claim of extortion, there must be a threat or a communication of a threat. Tryco Trucking Co. v. Belk Store Servs., Inc., 608 F. Supp. 812 (W.D.N.C. 1985).

Communication of Threat by Conduct. — A threat is as effectively communicated through conduct as it is communicated by language. Tryco Trucking Co. v. Belk Store Servs., Inc., 608 F. Supp. 812 (W.D.N.C. 1985).

Fear of economic harm satisfies the definition that extortion is the obtaining of property from another with his consent induced by wrongful use of fear. Tryco Trucking Co. v. Belk Stores Servs., Inc., 634 F. Supp. 1327 (W.D.N.C. 1986).

Defendant's Belief He Was Entitled to Money Was No Defense. — Where defendant argued that, because he believed he was entitled to money he sought to obtain, he did not communicate threat with intent to "wrongfully" obtain property, defendant's belief did not constitute a valid defense; defendant's entitlement to any money from victim would depend upon defendant's ability to prevail in civil action for damages, and amount of damages he would recover was matter of speculation. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

Wrongful Intent Refers to Obtaining of Property and Not to Threat Itself. — Where defendant contended that he lacked requisite intent because he reasonably believed that victim was guilty of crime upon which defendant's threat was based and he was entitled to money he sought to obtain as compensation for discomfort resulting from harassing phone calls, defendant's intent was "wrongful" within meaning of statute since defendant's belief in victim's guilt was not relevant; wrongful intent required by statute refers to obtaining of property and not to threat itself. State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

Threat of Criminal Prosecution Falls Within Statute. — Defendant's action in making telephone call in which he offered to refrain from pressing criminal charges in exchange for money amounted to threatening criminal prosecution and clearly came within purview of broad language, "a threat." State v. Greenspan, 92 N.C. App. 563, 374 S.E.2d 884 (1989).

§ 14-118.5. Theft of cable television service.

(a) Any person, firm or corporation who, after October 1, 1984, knowingly and willfully attaches or maintains an electronic, mechanical or other connection to any cable, wire, decoder, converter, device or equipment of a cable television system or removes, tampers with, modifies or alters any cable, wire, decoder, converter, device or equipment of a cable television system for the purpose of intercepting or receiving any programming or service transmitted by such cable television system which person, firm or corporation is not authorized by the cable television system to receive, is guilty of a Class 3 misdemeanor which may include a fine not exceeding five hundred dollars ($500.00). Each unauthorized connection, attachment, removal, modification or alteration shall constitute a separate violation.

(b) Any person, firm or corporation who knowingly and willfully, without the authorization of a cable television system, distributes, sells, attempts to sell or possesses for sale in North Carolina any converter, decoder, device, or kit, that is designed to decode or descramble any encoded or scrambled signal transmitted by such cable television system, is guilty of a Class 3 misdemeanor which may include a fine not exceeding five hundred dollars ($500.00). The term "encoded or scrambled signal" shall include any signal or transmission that is not intended to produce an intelligible program or service without the aid of a decoder, descrambler, filter, trap or other electronic or mechanical device.

(c) Any cable television system may institute a civil action to enjoin and restrain any violation of this section, and in addition, such cable television system shall be entitled to civil damages in the following amounts:

(1) For each violation of subsection (a), three hundred dollars ($300.00) or three times the amount of actual damages, if any, sustained by the plaintiff, whichever amount is greater.

(2) For each violation of subsection (b), one thousand dollars ($1,000) or three times the amount of actual damages, if any, sustained by the plaintiff, whichever amount is greater.

(d) It is not a necessary prerequisite to a civil action instituted pursuant to this section that the plaintiff has suffered or will suffer actual damages.

(e) Proof that any equipment, cable, wire, decoder, converter or device of a cable television system was modified, removed, altered, tampered with or connected without the consent of such cable system in violation of this section shall be prima facie evidence that such action was taken knowingly and willfully by the person or persons in whose name the cable system's equipment, cable, wire, decoder, converter or device is installed or the person or persons regularly receiving the benefits of cable services resulting from such unauthorized modification, removal, alteration, tampering or connection.

(f) The receipt, decoding or converting of a signal from the air by the use of a satellite dish or antenna shall not constitute a violation of this section.

(g) Cable television systems may refuse to provide service to anyone who violates subsection (a) of this section whether or not the alleged violator has been prosecuted thereunder. (1977, 2nd Sess., c. 1185, s. 1; 1983 (Reg. Sess., 1984), c. 1088, s. 1; 1993, c. 539, s. 65; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For 1984 survey, "North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry," see 63 N.C.L. Rev. 1296 (1985).

§§ 14-118.6 through 14-118.9: Reserved for future codification purposes.

Article 20A.

Residential Mortgage Fraud Act.

§ 14-118.10. Title.

This Article shall be known and cited as the "Residential Mortgage Fraud Act." (2007-163, s. 1.)

Editor's Note. — Session Laws 2007-163, s. 2, makes this Article effective December 1, 2007, and applicable to offenses committed on or after that date.

§ 14-118.11. Definitions.

Unless otherwise provided in this Article, the following definitions apply in this Article:

(1) Mortgage lending process. — The process through which a person seeks or obtains a mortgage loan including solicitation, application, origination, negotiation of terms, underwriting, signing, closing, and funding of a mortgage loan and services provided incident to a mortgage loan, including the appraisal of the residential real property. Documents involved in the mortgage lending process include (i) uniform residential loan applications or other loan applications, (ii) appraisal reports, (iii) settlement statements, (iv) supporting personal documentation for loan applications, including W-2 or other earnings or income statements, verifications of rent, income, and employment, bank statements, tax returns, and payroll stubs, and (v) any required mortgage-related disclosures.

(2) Mortgage loan. — A loan primarily secured by either (i) a mortgage or a deed of trust on residential real property or (ii) a security interest in a manufactured home (as defined by G.S. 143-145(7)) located or to be located on residential real property.

(3) Pattern of residential mortgage fraud. — Residential mortgage fraud that involves five or more mortgage loans, which have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics.

(4) Person. — An individual, partnership, limited liability company, limited partnership, corporation, association, or other entity, however organized.

(5) Residential real property. — Real property located in the State of North Carolina upon which there is located or is to be located a structure or structures designed principally for residential purposes, including, but not limited to, individual units of townhouses, condominiums, and cooperatives. (2007-163, s. 1.)

Editor's Note. — This section was enacted by Session Laws 2007-163, s. 1, with a subsection (a) designation, but no subsection (b). In addition, the definitions contained in subdivisions (1) and (2) as they appeared on the act were not in alphabetical order. The subsection (a) designation has been deleted, and the order of subdivisions (1) and (2) has been reversed, at the direction of the Revisor of Statutes.

§ 14-118.12. Residential mortgage fraud.

(a) A person is guilty of residential mortgage fraud when, for financial gain and with the intent to defraud, that person does any of the following:

(1) Knowingly makes or attempts to make any material misstatement, misrepresentation, or omission within the mortgage lending process with the intention that a mortgage lender, mortgage broker, borrower, or any other person or entity that is involved in the mortgage lending process relies on it.

(2) Knowingly uses or facilitates or attempts to use or facilitate the use of any misstatement, misrepresentation, or omission within the mortgage lending process with the intention that a mortgage lender, borrower, or any other person or entity that is involved in the mortgage lending process relies on it.

(3) Receives or attempts to receive proceeds or any other funds in connection with a residential mortgage closing that the person knew, or should have known, resulted from a violation of subdivision (1) or (2) of this subsection.

(4) Conspires or solicits another to violate any of the provisions of subdivision (1), (2), or (3) of this subsection.

(b) It shall be sufficient in any prosecution under this Article for residential mortgage fraud to show that the party accused did the act with the intent to deceive or defraud. It shall be unnecessary to show that any particular person or entity was harmed financially in the transaction or that the person or entity to whom the deliberate misstatement, misrepresentation, or omission was made relied upon the misstatement, misrepresentation, or omission. (2007-163, s. 1.)

§ 14-118.13. Venue.

In any criminal proceeding brought under this Article, the crime shall be construed to have been committed:

(1) In the county in which the residential real property for which a mortgage loan is being sought is located;

(2) In any county in which any act was performed in furtherance of the violation;

(3) In any county in which any person alleged to have violated this Article had control or possession of any proceeds of the violation;

(4) If a closing occurred, in any county in which the closing occurred; or

(5) In any county in which a document containing a deliberate misstatement, misrepresentation, or omission is filed with the official registrar of deeds or with the Division of Motor Vehicles. (2007-163, s. 1.)

§ 14-118.14. Authority to investigate and prosecute.

Upon its own investigation or upon referral by the Office of the Commissioner of Banks, the North Carolina Real Estate Commission, the Attorney General, the North Carolina Appraisal Board, or other parties, of available evidence concerning violations of this Article, the proper district attorney may institute the appropriate criminal proceedings under this Article. (2007-163, s. 1.)

§ 14-118.15. Penalty for violation of Article.

(a) Unless the conduct is prohibited by some other provision of law providing for greater punishment, a violation of this Article involving a single mortgage loan is a Class H felony.

(b) Unless the conduct is prohibited by some other provision of law providing for greater punishment, a violation of this Article involving a pattern of residential mortgage fraud is a Class E felony. (2007-163, s. 1.)

§ 14-118.16. Forfeiture.

(a) All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Article shall be subject to forfeiture to the State as set forth in G.S. 14-2.3 and G.S. 14-7.20. However, the forfeiture of any real or personal property shall be subordinate to any security interest in the property taken by a lender in good faith as collateral for the extension of credit and recorded as provided by law, and no real or personal property shall be forfeited under this section against an owner who made a bona fide purchase of the property without knowledge of a violation of this Article.

(b) In addition to the provisions of subsection (a) of this section, courts may order restitution to any person that has suffered a financial loss due to violation of this Article. (2007-163, s. 1.)

§ 14-118.17. Liability for reporting suspected mortgage fraud.

In the absence of fraud, bad faith, or malice, a person shall not be subject to an action for civil liability for filing reports or furnishing other information regarding suspected residential mortgage fraud to a regulatory or law enforcement agency. (2007-163, s. 1.)

Article 21.

Forgery.

§ 14-119. Forgery of notes, checks, and other securities; counterfeiting of instruments.

(a) It is unlawful for any person to forge or counterfeit any instrument, or possess any counterfeit instrument, with the intent to injure or defraud any person, financial institution, or governmental unit. Any person in violation of this subsection is guilty of a Class I felony.

(b) Any person who transports or possesses five or more counterfeit instruments with the intent to injure or defraud any person, financial institution, or governmental unit is guilty of a Class G felony.

(c) As used in this Article, the term:

(1) "Counterfeit" means to manufacture, copy, reproduce, or forge an instrument that purports to be genuine, but is not, because it has been falsely copied, reproduced, forged, manufactured, embossed, encoded, duplicated, or altered.

(2) "Financial institution" means any mutual fund, money market fund, credit union, savings and loan association, bank, or similar institution, either foreign or domestic.

(3) "Governmental unit" means the United States, any United States territory, any state of the United States, any political subdivision, agency, or instrumentality of any state, or any foreign jurisdiction.

(4) "Instrument" means (i) any currency, bill, note, warrant, check, order, or similar instrument of or on any financial institution or governmental unit, or any cashier or officer of the institution or unit; or (ii) any security issued by, or on behalf of, any corporation, financial institution, or governmental unit. (1819, c. 994, s. 1, P.R.; R.C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C.S., s. 4293; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 397, s. 1; 2002-175, s. 1.)

Cross References. — As to alleging intent in the indictment, see G.S. 15-151. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

I. General Consideration.
II. Forgery, Generally.
III. Evidence.
IV. Indictment.
V. Instructions.
VI. Sentencing.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases below were decided prior to the 1983 and 2002 amendments, each of which rewrote this section.*

Applied in State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953); State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975); State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458 (1975); State v. Freeman, 28 N.C. App. 346, 220 S.E.2d 844 (1976).

Cited in State v. Peter, 53 N.C. 19 (1860); Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809 (1950); State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983); State v. Locklear, 61 N.C. App. 594, 301 S.E.2d 437 (1983); State v. Martin, 67 N.C. App. 265, 313 S.E.2d 15 (1984).

II. FORGERY, GENERALLY.

The common-law definition of forgery obtains in this State, the statute not attempting to define it. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery Defined. — Forgery, at common law, denotes a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Uttering Distinct from Forgery. — By virtue of G.S. 14-120, uttering is an offense distinct from that of forgery, which is defined in this section. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of G.S. 14-120, it was not necessary to allege or to prove forgery of the face of money orders, which would have been separate felonies under this section. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Elements of Offense. — To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud. Barnes v. Crawford, 115 N.C. 76, 20 S.E. 386 (1894).

The essentials to the completion of the offense of forgery are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy, "apparently capable of effecting a fraud;" (b) the fraudulent intent. Peoples Bank

& Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Keller, 268 N.C. 522, 151 S.E.2d 56 (1968); State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Bauguess, 13 N.C. App. 457, 186 S.E.2d 185 (1972); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Two essential elements of forgery are the false making of an instrument and the appearance of the instrument as genuine. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

Intent to defraud is an essential element of the crime of forgery. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

But It Is Not Essential That Anyone Actually Be Defrauded. — While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889); State v. Hall, 108 N.C. 776, 13 S.E. 189 (1891); State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

Time is not of the essence in the crimes of forgery and uttering a forged check. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

Forging Signature of Another. — An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdrawing from the bank the funds of such other person, is guilty of forgery. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Real and Forged Signatures Need Not Be Identical. — An instrument is nonetheless a forgery where the signature is not identical with that of the person whose signature it is intended to simulate, if they are sufficiently similar for the doctrine of idem sonans to apply, and the insertion of a middle initial not in the signature simulated is not a fatal variance. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

The fact that the drawer of a check lacks authority is one characteristic which renders an instrument false. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Presumption of Authority. — Where defendant signs the name of another person to an instrument, there is no presumption of want of authority; on the contrary, where it appears that accused signed the name of another to an instrument, it is presumed that he did so with authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

State Must Show Want of Authority. — If the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but that it was made by defendant without authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Shipman, 77 N.C. App. 650, 335 S.E.2d 912 (1985).

Constitutionality of Presumption of Forgery. — In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing else appearing, the defendant would be presumed guilty of forgery, described a mere permissive inference, which did not violate due process, since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Refusal to Charge on Presumption of Authority. — In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority, where the defendant offered no evidence that he signed the checks with authority, but testified that he had never seen the checks. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Signing Fictitious Name. — If the name signed to a negotiable instrument or other instrument requiring a signature is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud, the instrument being sufficient in form to import legal liability, an indictable forgery is committed. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980); State v. Shipman, 77 N.C. App. 650, 335 S.E.2d 912 (1985).

Proof of Fictitious Name. — In a prosecution for forgery it was not necessary for the State to prove that the name "B. Hansely" signed by defendant to three checks was that of a fictitious person or a real person, since the evidence showed that the instrument was executed without authority, as neither "B. Hansely" nor the name of defendant appeared on the signature card of the S & M Paint Company account, upon which the checks in question were written; moreover, proof that no person bearing the name signed to a check has any right to draw on the party to whom it is directed is prima facie evidence that the name is fictitious. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Evidence Held Sufficient. — Evidence that defendant signed the name of another in endorsing a check payable to such other person and negotiating it, that such other person had not authorized anyone to sign his name on the check, and that such person was not owed the amount of the check, was held sufficient to overrule nonsuit in a prosecution for violation of this section and G.S. 14-120. State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961).

Evidence that two checks had been forged and that defendant cashed them was sufficient circumstantial evidence for the jury to find that defendant forged the checks, even without eyewitness testimony that defendant wrote the checks and without expert testimony that his handwriting was on the checks. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

III. EVIDENCE.

There is no requirement that the check upon which an endorsement was allegedly forged be in evidence. State v. Nicholson, 78 N.C. App. 398, 337 S.E.2d 654 (1985).

Evidence of Former Acts. — Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. State v. Twitty, 9 N.C. 248 (1822).

In a prosecution for forgery and issuing a forged instrument under this section and G.S. 14-120, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Evidence of Related Offenses. — In a prosecution of defendant for conspiracy to commit forgery and conspiracy to utter forged instruments, the trial court did not err in admitting testimony by a State's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried, since the other offense was a break-in during which a check writer and checks were taken from a cabinet shop, and this was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses; therefore, defendant himself opened the door to such testimony by inquiring further into charges pending against the State's witness. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

Teller's Identification of Defendant. — In a prosecution of defendant for uttering a forged check, the trial court properly admitted a bank teller's identification of defendant from a photographic display, since the procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

Signing Name Other Than Name on Signature Authorization Card. — Where checks were drawn on a name other than the sole name on the signature authorization card of the checking account, there was evidence that the checks were falsely made. See State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Evidence Sufficient. — Motion to dismiss forgery charge was properly denied under circumstances in which the state presented evidence in the form of testimony by a witness that defendant brought to her house a check made out to her on an account bearing the victim's name, and that defendant told her it belonged to his uncle and asked her to cash it for him, signing the check or entering her name as payee in her presence. State v. Fraley, 182 N.C. App. 683, 643 S.E.2d 39, 2007 N.C. App. LEXIS 806 (2007).

Evidence Insufficient to Support Convictions. — Trial court erred in failing to dismiss all but three of the forgery and uttering convictions because defendant signed her own name to the withdrawal slips on the other ten occasions. State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

IV. INDICTMENT.

Indictment Must Set Forth All Essential Elements. — Even though the offense of forgery is charged in statutory language in the bill of indictment, in order to be a valid bill of indictment it is necessary that the statutory words be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

Alleged Alteration Should Be Indicated. — Where the alteration of a genuine instrument is charged, an indictment for forgery must clearly set forth the alteration alleged, with the proper allegations showing alteration of a material part of the instrument. Thus, in an indictment for forgery effected by interpolating words in a genuine instrument, as by raising the amount of a note, the added words should be quoted and their position in the instrument shown, so that it may appear how they affect its meaning. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

Tendency to Prejudice Rights of Another Must Be Shown. — The false instrument must be such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the court, either from the face of the writing itself, or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment, alleging the false and fraudulent intent; but where such tendency does not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the court to see in the record, that the indictment charges a complete offense. State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Allegation of Existence of Bank Which Issued Note. — In an indictment concerning the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. State v. Twitty, 9 N.C. 248 (1822).

V. INSTRUCTIONS.

An instruction including the requirement that there be a false making encompasses the requirement that the instrument be drawn by one who lacks authority. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

An instruction that executing a check on a bank account by signing a name not authorized by the signature card would be a false making of a check is a proper charge on the element that the instrument be false. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

The sentence "the check appeared to be genuine" in a jury instruction adequately states the third element of forgery, that the check as made was apparently capable of defrauding. State v. Monds, 36 N.C. App. 510, 245 S.E.2d 369, cert. denied, 295 N.C. 556, 248 S.E.2d 733 (1978).

VI. SENTENCING.

Violation as Felony. — A contention that the punishment for forging and uttering a check in violation of this section and G.S. 14-120, by analogy to G.S. 14-72, should be limited to the punishment imposed for a misdemeanor is untenable, since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

Sentences Within Prescribed Limits. — Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and G.S. 14-120, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A sentence of five years' imprisonment imposed upon defendant's plea of guilty to the charge of forging a check in the amount of $45.00 was within the maximum authorized by this section. State v. Bolder, 8 N.C. App. 343, 174 S.E.2d 139 (1970).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited instrument as is mentioned in G.S. 14-119, or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited) the person so offending shall be punished as a Class I felon. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a Class I felony. (1819, c. 994, s. 2, P.R.; R.C., c. 34, s. 61; Code, s. 1031; Rev., s. 3427; 1909, c. 666; C.S., s. 4294; 1961, c. 94; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 397, s. 2; 1993, c. 539, s. 1185; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Section 90-108(a)(10) Distinguished. — This section is distinguishable from G.S. 90-108(a)(10), as this section specifically states that a person violates the statute if he publishes or utters a forged instrument "knowing the same to be falsely forged or counterfeited," and no such language appears in G.S. 90-108(a)(10). State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Elements of the Offense. — The mere offer of the false instrument with fraudulent intent constitutes an uttering or publishing, the essence of the offense being, as in the case of forgery, the fraudulent intent regardless of its successful consummation. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Seraphem, 90 N.C. App. 368, 368 S.E.2d 643 (1988).

Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Jackson, 19 N.C. App. 749, 200 S.E.2d 199 (1973).

The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another. State v. Hill, 31 N.C. App. 248, 229 S.E.2d 810 (1976); State v. Thompson, 62 N.C. App. 585, 303 S.E.2d 85 (1983).

Uttering is accomplished either when an individual passes or delivers a forged instrument or attempts to pass or deliver a forged instrument. State v. Kirkpatrick, 343 N.C. 285, 470 S.E.2d 54 (1996).

Pecuniary Gain. — It is error for a trial court to consider pecuniary gain as a factor in aggravation of a sentence for feloniously uttering a check, since pecuniary gain is inherent in the offense of felonious uttering. State v. Thompson, 62 N.C. App. 585, 303 S.E.2d 85 (1983).

To convict a defendant of uttering a check with a forged endorsement, the State is required to prove beyond a reasonable doubt that (1) defendant passed a check, (2) such check contained an endorsement which was forged, (3) defendant knew that such endorsement was forged and (4) defendant acted for the sake of gain or with the intent to defraud or injure any other person. State v. Forte, 80 N.C. 701, 343 S.E.2d 261, cert. denied, 316 N.C. 735, 345 S.E.2d 400 (1986).

Time is not of the essence in the crimes of forgery and uttering a forged check. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

"Directly or Indirectly." — A check filled out by the payee at the direction of the drawer falls within the meaning of the words "directly or indirectly" as used in this section. State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953).

Delivering to Agent. — It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the state has in view. Hence, upon a similar statute, it was held that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. State v. Harris, 27 N.C. 287 (1844).

Uttering Distinct from Forgery. — By virtue of this section, uttering is an offense distinct from that of forgery which is defined in G.S. 14-119. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of this section, it was not necessary to allege or prove forgery of the face of money orders, which would have been separate felonies under G.S. 14-119. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Evidence of Former Acts. — In a prosecution for forgery and issuing a forged instrument under this section and G.S. 14-119, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Evidence of Related Offenses. — In a prosecution of defendant for conspiracy to commit forgery, and conspiracy to utter forged instruments, the trial court did not err in admitting testimony by a State's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried, since the other offense was a break-in during which a check writer and checks were taken from a cabinet shop, and this was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses; therefore, defendant himself opened the door to such testimony by inquiring further into charges pending against the State's witness. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

Evidence Held Sufficient. — Direct evidence was sufficient to go to the jury for its consideration of whether defendant possessed the requisite knowledge that the endorsement on a check which he passed was forged, where the jury could reasonably infer from established facts that defendant removed check from file, endorsed the check himself or had someone else do it, and presented the check with knowledge of the forged endorsement. State v. Forte, 80 N.C. App. 701, 343 S.E.2d 261, cert. denied, 316 N.C. 735, 345 S.E.2d 400 (1986).

State presented substantial circumstantial evidence that the defendant knew she possessed and uttered forged instruments; central to the State's case were the conflicting stories which the defendant presented regarding the checks' origins and if a jury were to view these changes as evidence of prefabrication, it could infer that the defendant knew the checks were forged; additionally, the State showed the defendant, when negotiating each check, lied to the recipient about the check's origin and from this the jury could infer that the defendant doubted the legitimacy of these transactions. State v. Sanders, 95 N.C. App. 494, 383 S.E.2d 409, cert. denied, 325 N.C. 712, 388 S.E.2d 470 (1989).

Trial court erred in failing to dismiss all but three of the forgery and uttering convictions because defendant signed her own name to the withdrawal slips on the other ten occasions. State v. King, 178 N.C. App. 122, 630 S.E.2d 719, 2006 N.C. App. LEXIS 1307 (2006).

There is no requirement that the check upon which an endorsement was allegedly forged be in evidence. State v. Nicholson, 78 N.C. App. 398, 337 S.E.2d 654 (1985).

Instructions as to Forgery — Presumption of Authority. — In a prosecution for forgery and uttering forged checks, the trial court did not err in refusing to charge that when a defendant signs the name of another to an instrument it is presumed he did so with authority where the defendant offered no evidence that he signed the checks with authority but testified that he had never seen the checks. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Same — Inference Arising from Attempt to Obtain Money. — In a prosecution for forging and uttering forged checks, the trial court's instruction that when a person in possession of a forged check attempts to obtain money or advances upon it, a presumption is raised that the defendant either forged or consented to the forging of such check and, nothing appearing, the defendant would be presumed guilty of forgery described a mere permissive inference which did not violate due process since (1) there was a rational connection between the basic and elemental facts such that upon proof of the basic facts (possession of a forged check and attempting to obtain money from it), the elemental facts (either forged or consented to forging of such check) are more likely to exist, and (2) there was other evidence in the case which, taken together with the inference, was sufficient for a jury to find the elemental facts beyond a reasonable doubt. State v. Roberts, 51 N.C. App. 221, 275 S.E.2d 536, cert. denied, 303 N.C. 318, 281 S.E.2d 657 (1981).

Punishment. — Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and G.S. 14-119, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A contention that the punishment for forging and uttering a check in violation of this section and G.S. 14-119, by analogy to G.S. 14-72, should be limited to the punishment imposed for a misdemeanor is untenable since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

Status as Habitual Felon. — Trial court did not err in considering defendant's prior adjudication as an habitual felon as a nonstatutory aggravating factor when sentencing defendant for uttering an instrument bearing a forged endorsement. State v. Kirkpatrick, 123 N.C. App. 86, 472 S.E.2d 371 (1996), aff'd, 346 N.C. 451, 480 S.E.2d 400 (1997).

Applied in State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Keller, 268 N.C. 522, 151 S.E.2d 56 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967); State v. Mosteller, 3 N.C. App. 67, 164 S.E.2d 27 (1968); State v. Hall, 8 N.C. App. 101, 173 S.E.2d 627 (1970); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); State v. Cruse, 14 N.C. App. 295, 187 S.E.2d 883 (1972); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Sutton, 14 N.C. App. 612, 188 S.E.2d 599 (1972); State v. Thompson, 16 N.C. App. 62, 190 S.E.2d 877 (1972); State v. Wallace, 16 N.C. App. 645, 192 S.E.2d 585 (1972); State v. Faulkner, 18 N.C. App. 296, 196 S.E.2d 566 (1973); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458 (1975).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970); State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971); State v. Locklear, 61 N.C. App. 594, 301 S.E.2d 437 (1983); State v. Martin, 67 N.C. App. 265, 313 S.E.2d 15 (1984); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985); State v. Shipman, 77 N.C. App. 650, 335 S.E.2d 912 (1985); State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996); State v. Kirkpatrick, 345 N.C. 451, 480 S.E.2d 400 (1997).

§ 14-121. Selling of certain forged securities.

If any person shall sell, by delivery, endorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a magistrate, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished as a Class H felon. (R.C., c. 34, s. 63; Code, s. 1033; Rev., s. 3425; C.S., s. 4295; 1973, c. 108, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1186; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-122. Forgery of deeds, wills and certain other instruments.

If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished as a Class H felon. (5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26; 1801, c. 572, P.R.; R.C., c. 34, s. 59; Code, s. 1029; Rev., s. 3424; C.S., s. 4296; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1187; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to uttering a false bill of lading, see G.S. 21-42. As to forgery of certificate of discharge from the armed forces of the United States, see G.S. 47-112.

CASE NOTES

Intent to Deceive Is Sufficient. — Differing from false pretenses, it is not an element of this offense that the forgery was "calculated to deceive and did deceive"; intent alone suffices to constitute the crime. State v. Hall, 108 N.C. 776, 13 S.E. 189 (1891); State v. Collins, 115 N.C. 716, 20 S.E. 452 (1894).

It is immaterial to whom the advantages of the forgery would accrue. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889).

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. Barnes v. Crawford, 115 N.C. 76, 20 S.E. 386 (1894).

To constitute an "order for the delivery of goods," a forgery within the meaning of this section, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paper writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, State v. Lamb, 65 N.C. 419 (1871); but in such case a conviction will be sustained for the offense at common law. State v. Leak, 80 N.C. 403 (1879).

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the validity of the bond, and is not forgery. State v. Gherkin, 29 N.C. 206 (1847).

Erasure of Obliteration Not a Forgery. — Obliterating by erasure, or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. State v. Thornburg, 28 N.C. 79 (1845).

Forgery of One of Two Names. — Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd on other grounds, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889).

Misspelled Signature. — An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, State v. Covington, 94 N.C. 913 (1886), or the names of a firm are in reverse order if it is clear who the parties intended to be designated are. State v. Lane, 80 N.C. 407 (1879).

Possession Raises Presumption of Guilt. — In State v. Britt, 14 N.C. 122 (1831), Ruffin, J., says: "That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done until he showed the actual perpetrator and that he himself was not privy." To the same effect is State v. Morgan, 19 N.C. 348 (1837). It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same. State v. Lane, 80 N.C. 407 (1879).

One possessing a forged instrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

Where defendant signs the name of another person to an instrument, there is no presumption of want of authority. State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

Proof of Signature of Another Name to Instrument Without Authority Is Required. — To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that the person who signed another's name did so without authority. State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

Charge in Indictment Where Instrument Is Lost. — If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

Instrument Partly Printed and Partly in Writing. — An indictment for forging "a certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and party in writing. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899).

Description in Indictment Held Insufficient. — A description of the forged instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N.C. 836 (1886).

§ 14-122.1. Falsifying documents issued by a secondary school, postsecondary educational institution, or governmental agency.

(a) It shall be unlawful for any person knowingly and willfully:

(1) To make falsely or alter falsely, or to procure to be made falsely or altered falsely, or to aid or assist in making falsely or altering falsely, a diploma, certificate, license, or transcript signifying merit or

achievement in an educational program issued by a secondary school, a postsecondary educational institution, or a governmental agency;

(2) To sell, give, buy, or obtain, or to procure to be sold, given, bought, or obtained, or to aid or assist in selling, giving, buying, or obtaining, a diploma, certificate, license, or transcript, which he knows is false, signifying merit or achievement in an educational program issued by a secondary school, a postsecondary educational institution, or a governmental agency;

(3) To use, offer, or present as genuine a falsely made or falsely altered diploma, certificate, license, or transcript signifying merit or achievement in an educational program issued by a secondary school, a postsecondary educational institution, or a governmental agency, which he knows is false; or

(4) To make a false written representation of fact that he has received a degree or other certification signifying merit, achievement, or completion of an educational program involving study, experience, or testing from a secondary school, a postsecondary educational institution or governmental agency in an application for:
   (a) Employment;
   (b) Admission to an educational program;
   (c) Award; or
   (d) For the purpose of inducing another to issue a diploma, certificate, license, or transcript signifying merit or achievement in an educational program of a secondary school, postsecondary educational institution, or a governmental agency.

(b) As used in this section, "postsecondary educational institution" means a technical college, community college, junior college, college, or university. As used in this section, "governmental agency" means any agency of a State or local government or of the federal government. As used in this section, "secondary school" means grades 9 through 12.

(c) Any person who violates a provision of this section shall be guilty of a Class 1 misdemeanor. (1981, c. 146, s. 1; 1987, c. 388, s. 1; 1993, c. 539, s. 66; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-123. Forging names to petitions and uttering forged petitions.

If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be punished as a Class I felon; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (1883, c. 275; Code, s. 1034; Rev., s. 3426; C.S., s. 4297; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.

If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be punished as a Class I felon. (R.C., c. 34, s. 62; Code, s. 1032; Rev., s. 3421; C.S., s. 4298; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

§ 14-125. Forgery of bank notes and other instruments by connecting genuine parts.

If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (R.C., c. 34, s. 66; Code, s. 1037; Rev., s. 3420; C.S., s. 4299.)

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Damages and Other Offenses to Land and Fixtures.

§ 14-126: Repealed by Session Laws 1987, c. 700, s. 2.

Cross References. — As to the offenses of first degree trespass and second degree trespass, see now G.S. 14-159.12 and 14-159.13.

§ 14-127. Willful and wanton injury to real property.

If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a Class 1 misdemeanor. (R.C., c. 34, s. 111; 1873-4, c. 176, s. 5; Code, s. 1081; Rev., s. 3677; C.S., s. 4301; 1967, c. 1083; 1993, c. 539, s. 67; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617

(1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Intent. — This section requires, as an essential element of the offenses set forth, a showing that defendant "willfully" or "wantonly" caused the damage. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

Count Charging Violation of § 14-49 as Embracing a Charge Under This Section. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Variance in Indictment Held Not Fatal. — Indictment for injury to real property which incorrectly described the lessee of the real property as its owner, did not vary fatally from the evidence at trial; the indictment was sufficient because it properly identified the lawful possessor of the damaged property. State v. Lilly, — N.C. App. —, 673 S.E.2d 718, 2009 N.C. App. LEXIS 260 (2009).

Evidence that the lessee and the lessee's brother heard defendant outside a window just before the shooting, and that defendant was able describe what the lessee was wearing, suggesting that defendant could see the lessee was sufficient to allow the jury to infer that defendant fired the shots that entered the townhome; while defendant contended defendant could not have fired from 20 to 25 feet away and be heard just outside the window, any issues as to credibility were for the jury to decide. State v. Lilly, — N.C. App. —, 673 S.E.2d 718, 2009 N.C. App. LEXIS 260 (2009).

Evidence Held Sufficient. — Conviction for willful damage to real property under this section would be affirmed where the evidence was sufficient to allow the jury to infer that defendant put paper towels in museum toilet intending to create a serious water problem, as the resulting damage to the toilet (as an attached fixture, part of the real property) and water damage to the floor of the museum were natural and foreseeable consequences of clogging the constantly-running toilet. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

There was sufficient evidence to support juvenile delinquency adjudication based on violation of statute prohibiting injury to real property. In re Pineault, 152 N.C. App. 196, 566 S.E.2d 854, 2002 N.C. App. LEXIS 896 (2002), cert. denied, 356 N.C. 302, 570 S.E.2d 728 (2002).

Applied in State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

Cited in State v. Oxendine, 305 N.C. 126, 286 S.E.2d 546 (1982); United States v. Ward, 676 F.2d 94 (4th Cir. 1982); In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983); State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); In re R.D.L., 191 N.C. App. 526, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (2008).

§ 14-128. Injury to trees, crops, lands, etc., of another.

Any person, not being on his own lands, who shall without the consent of the owner thereof, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower, shall be guilty of a Class 1 misdemeanor: Provided, however, that this section shall not apply to the officers, agents, and employees of the Department of Transportation while in the discharge of their duties within the right-of-way or easement of the Department of Transportation. (Ex. Sess. 1924, c. 54; 1957, c. 65, s. 11; c. 754; 1965, c. 300, s. 1; 1969, c. 22, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1993, c. 539, s. 68; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to double damages for injury to agricultural commodities or production systems, see G.S. 1-539.2B.

Legal Periodicals. — For discussion of legislative intent in enacting this section, see 3 N.C.L. Rev. 25 (1925).

§ 14-128.1: Repealed by Session Laws 1979, c. 964, s. 2.

§ 14-129. Taking, etc., of certain wild plants from land of another.

No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any Venus flytrap (Dionaea muscipula), trailing arbutus, Aaron's Rod (Thermopsis caroliniana), Bird-foot Violet (Viola pedata), Bloodroot (Sanguinaria canadensis), Blue Dogbane (Amsonia tabernaemontana), Cardinal-flower (Lobelia cardinalis), Columbine (Aquilegia canadensis), Dutchman's Breeches (Dicentra cucullaria), Maidenhair Fern (Adiantum pedatum), Walking Fern (Camptosorus rhizophyllus), Gentians (Gentiana), Ground Cedar, Running Cedar, Hepatica (Hepatica americana and acutiloba), Jack-in-the-Pulpit (Arisaema triphyllum), Lily (Lilium), Lupine (Lupinus), Monkshood (Aconitum uncinatum and reclinatum), May Apple (Podophyllum peltatum), Orchids (all species), Pitcher Plant (Sarracenia), Shooting Star (Dodecatheon meadia), Oconee Bells (Shortia galacifolia), Solomon's Seal (Polygonatum), Trailing Christmas (Greens-Lycopodium), Trillium (Trillium), Virginia Bluebells (Mertensia virginica), and Fringe Tree (Chionanthus virginicus), American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be guilty of a Class 3 misdemeanor only punished by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the Counties of Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan and Swain. (1941, c. 253; 1951, c. 367, s. 1; 1955, cc. 251, 962; 1961, c. 1021; 1967, c. 355; 1971, c. 951; 1993, c. 539, s. 69; c. 553, s. 9; 1994, Ex. Sess., c. 24, s. 14(c); 2001-93, s. 1; 2001-487, s. 43(a).)

Local Modification. — Avery, Mitchell and Watauga: 1967, c. 355.

Cross References. — For provision making it unlawful to take sea oats without consent from the land of another or the public domain, see G.S. 14-129.2.

§ **14-129.1:** Repealed by Session Laws 1979, c. 964, s. 2.

§ 14-129.2. Unlawful to take sea oats.

(a) It is unlawful to dig up, pull up, or take from the land of another or from any public domain the whole or any part of any Sea Oats (Uniola paniculata) without the consent of the owner of that land.

(b) Any person convicted of violating the provisions of this section shall be guilty of a Class 3 misdemeanor and shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00) for each offense. (2001-93, s. 2.)

§ 14-130. Trespass on public lands.

If any person shall erect a building on any state-owned lands, or cultivate or remove timber from any such lands, without the permission of the State, he shall be guilty of a Class 1 misdemeanor. Moreover, the State can recover from any person cutting timber on its land three times the value of the timber which is cut. (1823, c. 1190, P.R.; 1842, c. 36, s. 4; R.C., c. 34, s. 42; Code, s. 1121; Rev., s. 3746; 1909, c. 891; C.S., s. 4302; 1979, c. 15; 1993, c. 539, s. 70; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Eastern Carolina Land, Lumber & Mfg. Co. v. State Bd. of Educ., 101 N.C. 35, 7 S.E. 573 (1888); Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896).

§ 14-131. Trespass on land under option by the federal government.

On lands under option which have formally or informally been offered to and accepted by the North Carolina Department of Environment and Natural Resources by the acquiring federal agency and tentatively accepted by said Department for administration as State forests, State parks, State game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a Class 3 misdemeanor.

The Department of Environment and Natural Resources through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law-enforcement officers in the enforcement of this section. (1935, c. 317; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(2); 1993, c. 539, s. 71; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

§ 14-132. Disorderly conduct in and injuries to public buildings and facilities.

(a) It is a misdemeanor if any person shall:

(1) Make any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility; or

(2) Unlawfully write or scribble on, mark, deface, besmear, or injure the walls of any public building or facility, or any statue or monument situated in any public place; or

(3) Commit any nuisance in or near any public building or facility.

(b) Any person in charge of any public building or facility owned or controlled by the State, any subdivision of the State, or any other public agency shall have authority to arrest summarily and without warrant for a violation of this section.

(c) The term "public building or facility" as used in this section includes any building or facility which is:

(1) One to which the public or a portion of the public has access and is owned or controlled by the State, any subdivision of the State, any other public agency, or any private institution or agency of a charitable, educational, or eleemosynary nature; or

(2) Dedicated to the use of the general public for a purpose which is primarily concerned with public recreation, cultural activities, and other events of a public nature or character.

(3) Designated by the Attorney General in accordance with G.S. 114-20.1.

The term "building or facility" as used in this section also includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(d) Any person who violates any provision of this section is guilty of a Class 2 misdemeanor. (1829, c. 29, ss. 1, 2; 1842, c. 47; R.C., c. 103, ss. 7, 8; Code, s. 2308; Rev., s. 3742; 1915, c. 269; C.S., s. 4303; 1969, c. 869, s. 7½; c. 1224, s. 2; 1981, c. 499, s. 2; 1993, c. 539, s. 72; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to regulations promulgated by the Secretary of Human Resources concerning the suppression of nuisances and disorder at State-owned institutions, see G.S. 143-116.6.

CASE NOTES

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Cited in State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

§ 14-132.1: Repealed by Session Laws 1987, c. 700, s. 2.

Cross References. — As to the offenses of first degree trespass and second degree trespass, see now G.S. 14-159.12 and 14-159.13.

§ 14-132.2. Willfully trespassing upon, damaging, or impeding the progress of a public school bus.

(a) Any person who shall unlawfully and willfully demolish, destroy, deface, injure, burn or damage any public school bus or public school activity bus shall be guilty of a Class 1 misdemeanor.

(b) Any person who shall enter a public school bus or public school activity bus after being forbidden to do so by the authorized school bus driver in charge thereof, or the school principal to whom the public school bus or public school activity bus is assigned, shall be guilty of a Class 1 misdemeanor.

(c) Any occupant of a public school bus or public school activity bus who shall refuse to leave said bus upon demand of the authorized driver in charge thereof, or upon demand of the principal of the school to which said bus is assigned, shall be guilty of a Class 1 misdemeanor.

(c1) Any person who shall unlawfully and willfully stop, impede, delay, or detain any public school bus or public school activity bus being operated for public school purposes shall be guilty of a Class 1 misdemeanor.

(d) Subsections (b) and (c) of this section shall not apply to a child less than 12 years of age, or authorized professional school personnel. (1975, c. 191, s. 1; 1993, c. 539, s. 73; 1994, Ex. Sess., c. 24, s. 14(c); 2001-26, s. 1.)

§ 14-133: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(2).

§ 14-134: Repealed by Session Laws 1987, c. 700, s. 2.

Cross References. — As to the offenses of first degree trespass and second degree trespass, see now G.S. 14-159.12 and 14-159.13.

§ 14-134.1: Repealed by Session Laws 1977, c. 887, s. 2.

Cross References. — For present provisions as to littering, see G.S. 14-399.

§ 14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so.

If any person, without permission, shall ride, drive or operate a minibike, motorbike, motorcycle, jeep, dune buggy, automobile, truck or any other motor vehicle, other than a motorized all terrain vehicle as defined in G.S. 14-159.3,

upon a utility easement upon which the owner or holder of the easement or agent of the owner or holder of the easement has posted on the easement a "no trespassing" sign or has otherwise given oral or written notice to the person not to so ride, drive or operate such a vehicle upon the said easement, he shall be guilty of a Class 3 misdemeanor, provided, however, neither the owner of the property nor the holder of the easement or their agents, employees, guests, invitees or permittees shall be guilty of a violation under this section. (1975, c. 636, s. 1; 1993, c. 539, s. 75; 1994, Ex. Sess., c. 24, s. 14(c); 1997-487, s. 2.)

§ 14-134.3. Domestic criminal trespass.

(a) Any person who enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse or by a person with whom the person charged has lived as if married, shall be guilty of a misdemeanor if the complainant and the person charged are living apart; provided, however, that no person shall be guilty if said person enters upon the premises pursuant to a judicial order or written separation agreement which gives the person the right to enter upon said premises for the purpose of visiting with minor children. Evidence that the parties are living apart shall include but is not necessarily limited to:

(1) A judicial order of separation;
(2) A court order directing the person charged to stay away from the premises occupied by the complainant;
(3) An agreement, whether verbal or written, between the complainant and the person charged that they shall live separate and apart, and such parties are in fact living separate and apart; or
(4) Separate places of residence for the complainant and the person charged.

Except as provided in subsection (b) of this section, upon conviction, said person is guilty of a Class 1 misdemeanor.

(b) A person convicted of a violation of this section is guilty of a Class G felony if the person is trespassing upon property operated as a safe house or haven for victims of domestic violence and the person is armed with a deadly weapon at the time of the offense. (1979, c. 561, s. 2; 1993, c. 539, s. 76; 1994, Ex. Sess., c. 24, s. 14(c); 1998-212, s. 17.19(a).)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Prior Contempt Adjudication And Double Jeopardy. — Defendant's convictions for kidnapping, non-felonious breaking or entering, and domestic criminal trespass did not violate the Double Jeopardy Clause where several elements contained within the applicable statutory language were not set out in the protective order that defendant had previously been held in contempt for violating. State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111, 1999 N.C. App. LEXIS 1177 (1999).

Defendant wife's previous "conviction" in a criminal contempt proceeding barred her subsequent prosecution for domestic criminal trespass under this section; the phrase "shall not come to the residence" contained in the civil consent order was equivalent to the domestic criminal trespass element of "entering . . . upon the premises," for purposes of double jeopardy. State v. Dye, 139 N.C. App. 148, 532 S.E.2d 574, 2000 N.C. App. LEXIS 797 (2000).

§ 14-135. Cutting, injuring, or removing another's timber.

If any person not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log off the property of another, the person shall be punished the same as in G.S. 14-72. (1889, c. 168; Rev., s. 3687; C.S., s. 4306; 1957, c. 1437, s. 1; 1993, c. 539, s. 77; 1994, Ex. Sess., c. 24, s. 14(c); 2009-508, s. 1.)

Local Modification. — Burke, Caldwell, Cherokee: C.S. 4307, 4308; Duplin: 1929, c. 174; Granville: 1965, c. 570; McDowell, Mitchell, Watauga, Wilkes, Yadkin: C.S. 4307, 4308.

Editor's Note. — This section, as amended by Session Laws 2009-508, s. 1, contained a subsection (a) but no subsection (b). The subsection (a) designation has been deleted at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-508, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, substituted "or log off the property of another, the person shall be punished the same as in G.S. 14-72" for "or log, the property of another, he shall be guilty of a Class 1 misdemeanor" at the end.

CASE NOTES

Prosecutor's Ownership of Land Essential. — The crime of unlawfully cutting, injuring or removing another's timber as defined by this section is an offense against the freehold rather than the possession, and ownership of the property by the prosecutor is a sine qua non to conviction. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Cited in State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

§ 14-136. Setting fire to grass and brushlands and woodlands.

If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a Class 2 misdemeanor for the first offense, and for a second or any subsequent similar offense shall be guilty of a Class 1 misdemeanor. If intent to damage the property of another shall be shown, said person shall be punished as a Class I felon. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the State, evidence sufficient for the conviction of a violation of this section shall receive the sum of five hundred dollars ($500.00) to be paid from the State Fire Suppression Fund. (1777, c. 123, ss. 1, 2, P.R.; R.C., c. 16, ss. 1, 2; Code, ss. 52, 53; Rev., s. 3346; 1915, c. 243, ss. 8, 11; 1919, c. 318; C.S., s. 4309; 1925, c. 61, s. 1; 1943, c. 661; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 78, 1188; c. 892; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Graham: Pub. Loc. 1933, c. 301; Onslow: 1929, c. 185; 1939, c. 160.

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

The primary purpose of this section is to protect property from fire damage. But the enactment is broad enough to include setting fire to a grass-covered field. Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

The primary purpose of this section is to protect property. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of its provisions constitutes negligence. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

Care No Defense Where Notice Not Given. — If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the cause of action is complete, no matter what degree of care may have been shown. Lamb v. Sloan, 94 N.C. 534 (1886); Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

Waiver of Notice Bars Damages. — A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. Roberson v. Kirby, 52 N.C. 477 (1860); Lamb v. Sloan, 94 N.C. 534 (1886).

Waiver when made by a tenant in common while in possession is also a sufficient defense. See Stanland v. Rourk, 168 N.C. 568, 84 S.E. 845 (1915).

Waiver by Adjoining Owner No Bar to Penalty. — When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the landowner's right of action for damages to his land caused by the spreading of the fire. Lamb v. Sloan, 94 N.C. 534 (1886).

Liability to One Not an Adjoining Owner. — The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See Roberson v. Morgan, 118 N.C. 991, 24 S.E. 667 (1896).

No Evidence to Show Fire Started by Defendant. — Where the evidence tended only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there was neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment of nonsuit was proper. Sutton v. Herrin, 202 N.C. 599, 163 S.E. 578 (1932).

Burning Off Railroad Rights-of-Way. — In case of Mizzell v. Branning Mfg. Co., 158 N.C. 265, 73 S.E. 802 (1912), it was held under a prior statute, similar in some respects to this except that it did not provide against burning grassland and brushland, that the statute did not apply to railroads burning off their rights-of-way that were covered with grass and tree tops.

Defendant was properly charged and convicted under former § 14-138 where defendant set two fires: the first one intentionally, and the second by leaving a smoldering stump. State v. Hewitt, 126 N.C. App. 366, 484 S.E.2d 844 (1997).

Cited in State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-137. Willfully or negligently setting fire to woods and fields.

If any person, firm or corporation shall willfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender shall be guilty of a Class 2 misdemeanor. This section shall apply only in those counties under the protection of the Department of Environment and Natural Resources in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, nonwooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; C.S., s. 4310; 1925, c. 61, s. 2; 1941, c. 258; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(3); 1993, c. 539, s. 79; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

CASE NOTES

Evidence Held Sufficient. — Evidence that the county in which defendant negligently or willfully started forest fires was in charge of the State forest service and that this section was applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942).

Cited in Caldwell Land & Lumber Co. v. Hayes, 157 N.C. 333, 72 S.E. 1078 (1911); Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

§ 14-138: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(6).

Cross References. — For present similar provisions, see G.S. 14-138.1.

§ 14-138.1. Setting fire to grassland, brushland, or woodland.

Any person, firm, corporation, or other legal entity who shall in any manner whatsoever start any fire upon any grassland, brushland, or woodland without fully extinguishing the same, shall be guilty of a Class 3 misdemeanor which may include a fine of not less than ten dollars ($10.00) or more than fifty dollars ($50.00). For the purpose of this section, the term "woodland" includes timber and cutover land and all second growth stands on areas that were once cultivated. (1995, c. 210, s. 1.)

§ 14-139: Repealed by Session Laws 1981, c. 1100, s. 1.

Cross References. — For present statute regulating open fires, see § 113-60.21 et seq.

§ 14-140: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(3).

Cross References. — For present similar provisions, see G.S. 14-140.1.

§ 14-140.1. Certain fire to be guarded by watchman.

Any person, firm, corporation, or other legal entity who shall burn any brush, grass, or other material whereby any property may be endangered or destroyed, without keeping and maintaining a careful watchman in charge of the burning, shall be guilty of a Class 3 misdemeanor which may include a fine of not less than ten dollars ($10.00) or more than fifty dollars ($50.00). Fire escaping from the brush, grass, or other material while burning shall be prima facie evidence of violation of this provision. (1995, c. 210, s. 2.)

§ 14-141. Burning or otherwise destroying crops in the field.

Any person who shall willfully burn or destroy any other person's lawfully grown crop, pasture, or provender shall be punished as follows:

(1) If the damage is two thousand dollars ($2,000) or less, the person is guilty of a Class 1 misdemeanor.

(2) If the damage is more than two thousand dollars ($2,000), the person is guilty of a Class I felony. (1874-5, c. 133; Code, s. 985, subsec. 2; 1885, c. 42; Rev., s. 3339; C.S., s. 4313; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1991, c. 534, s. 1; 1993, c. 539, s. 81; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to arson, see G.S. 14-58 et seq. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Out of Doors. — One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N.C. 798, 13 S.E. 931 (1891), decided prior to 1991 amendment.

Indictment. — An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder, without charging the burning, is defective. State v. Hall, 93 N.C. 571 (1885), decided prior to 1991 amendment.

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v. Huskins, 126 N.C. 1070, 35 S.E. 608 (1900), decided prior to 1991 amendment.

§ 14-142. Injuries to dams and water channels of mills and factories.

If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall be guilty of a Class 2 misdemeanor. (1866, c. 48; Code, s. 1087; Rev., s. 3678; C.S., s. 4315; 1969, c. 1224, s. 13; 1993, c. 539, s. 82; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Obstruction Below Dam or Channel. — This section only applies to obstructions and damages to the dam or channel, and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N.C. 528 (1877).

Cited in State v. Suttle, 115 N.C. 784, 20 S.E. 725 (1894).

§ 14-143: Repealed by Session Laws 1987, c. 700, s. 2.

Cross References. — As to the offenses of first-degree trespass and second-degree trespass, see now G.S. 14-159.12 and 14-159.13.

§ 14-144. Injuring houses, churches, fences and walls.

If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in Article 15 (Arson and Other Burnings) of this Chapter; or shall by any other means than burning or attempting to burn unlawfully and willfully demolish, pull down, destroy, deface, damage or injure any church, uninhabited house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other enclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be punished as follows:

(1) If the damage is five thousand dollars ($5,000) or less, the person is guilty of a Class 2 misdemeanor.

(2) If the damage is more than five thousand dollars ($5,000), the person is guilty of a Class I felony. (R.C., c. 34, s. 103; Code, s. 1062; Rev., s. 3673; C.S., s. 4317; 1957, c. 250, s. 2; 1969, c. 1224, s. 1; 1993, c. 539, s. 83; 1994, Ex. Sess., c. 24, s. 14(c); 2008-15, s. 1; 2009-570, s. 3.)

Cross References. — As to injuring buildings or fences, see G.S. 14-159. As to willful destruction by a tenant, see G.S. 42-11.

Editor's Note. — The article of this chapter entitled "Arson and Other Burnings," referred to in this section, is Article 15 (G.S. 14-58 et seq.).

This section was amended by Session Laws 2008-15, s. 1, in the coded bill drafting format provided by G.S. 120-20.1. In the first sentence, the bracketed words "[uninhabited]" and "[enclosure]" were inserted at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws

2008-15, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "punished as follows:" for "guilty of a Class 2 misdemeanor." at the end of the introductory paragraph and added subdivisions (1) and (2).

Session Laws 2009-570, s. 3, effective August 28, 2009, in the introductory paragraph, substituted "Article 15 (Arson and Other Burnings) of this Chapter" for "this Chapter in the Article entitled Arson and Other Burnings" and substituted "uninhabited house" for "uninhabitated house" and "or other enclosure" for "or other inclosure."

CASE NOTES

I. General Consideration.
II. Houses and Other Buildings.
III. Fences, etc.

I. GENERAL CONSIDERATION.

Trespass Is a Necessary Part of This Offense. — It was held that to constitute a criminal offense under this section, there must be a trespass. State v. Williams, 44 N.C. 197 (1853); State v. Watson, 86 N.C. 626 (1882); State v. McCracken, 118 N.C. 1240, 24 S.E. 530 (1896).

And a party in lawful possession cannot commit a trespass upon the property of which he is in possession. Dobbs v. Gullidge, 20 N.C. 197 (1838); State v. Reynolds, 95 N.C. 616 (1886); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890).

If defendant was shown to have been in the actual lawful possession of house at the time he tore it down, he committed no criminal offense under this section. State v. Jones, 129 N.C. 508, 39 S.E. 795 (1901).

Tenant's and Landlord's Liability to One Another. — A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offenses against possession. State v. Mason, 35 N.C. 341 (1852); State v. Whitener, 92 N.C. 798 (1885).

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890).

Same — Tenant at Sufferance. — If a building is torn down by a landlord while it is in the possession of a tenant at sufferance, an indictment under this section cannot be supported, for this section was intended to protect property in which the tenant at sufferance has no interest in. State v. Mace, 65 N.C. 344 (1871).

Cited in Fowler v. Graves, 83 N.C. App. 403, 350 S.E.2d 155 (1986); Brooks v. Pembroke City Jail, 722 F. Supp. 1294 (E.D.N.C. 1989).

II. HOUSES AND OTHER BUILDINGS.

An "uninhabited house" within the purview of this section is a house fit for human habitation, but which is uninhabited at the time. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Where the evidence disclosed that the structure in question was not fit for human habitation at the time of the alleged offense, the evidence was insufficient to be submitted to the jury in a prosecution for burning an uninhabited house in violation of this section. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

An indictment which charged that the defendant unlawfully, willfully and feloniously set fire to and burned the dwelling house of named person, the same being unoccupied at the time of the burning, charged the burning of an "uninhabited house" in violation of this section, and not a violation of G.S. 14-67. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

"Other Houses". — It is manifest that the words "other house or building" embrace a jail, a jailhouse or building. State v. Bryan, 89 N.C. 531 (1883).

Houses Erected Through Mistake and Subsequently Removed. — One who peaceably enters upon lands believing at the time that he has the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. State v. Reynolds, 95 N.C. 616 (1886).

Schoolhouses Held by Adverse Possession. — If defendants are in the adverse possession of a schoolhouse and are bona fide claiming it as their own, it is not a crime in them to pull it down. State v. Roseman, 66 N.C. 634 (1872).

Dynamiting a Crib. — An indictment will lie under this section for injury to a crib by an explosion of dynamite. See State v. Martin, 173 N.C. 808, 92 S.E. 597 (1917).

Proof of defacement by either bullets or paint would be sufficient to sustain a conviction under this section. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

III. FENCES, ETC.

Fence Must Enclose Something. — It is necessary under this section that the fence destroyed or injured surround or enclose something, and a fence along a road, erected to prevent passersby from turning into the field to avoid mud in the road, when not connected with any other fence, is not within the meaning of this section. See State v. Roberts, 101 N.C. 744, 7 S.E. 714 (1888).

Wire Fences. — An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891).

Cultivated Field Defined. — Where a piece or tract of land has been cleared and fenced and cultivated, or is proposed to be cultivated, and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a "cultivated field" within the description of the statute. State v. Allen, 35 N.C. 36 (1851); State v. McMinn, 81 N.C. 585 (1879).

The ruling in State v. Allen, 35 N.C. 36 (1851), was cited and approved in State v. McMinn, 81 N.C. 585 (1879), in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903).

"Cultivated Field" and "Pasture" Are Not Synonymous. — Where in a criminal prosecution for the violation of this section, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the word "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. State v. Cornett, 199 N.C. 634, 155 S.E. 451 (1930).

Agency No Defense. — Under an indictment for tearing down a fence, the defendant cannot avoid liability by showing that he acted as agent for another. State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903).

Title to Land No Defense. — It is well settled that where the State, in an indictment under this section, for unlawfully and willfully removing a fence, shows actual possession in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. State v. Graham, 53 N.C. 397 (1861); State v. Hovis, 76 N.C. 117 (1877); State v. Marsh, 91 N.C. 632 (1884); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899); State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903); State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

Question of Title Cannot Be Raised. — Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N.C. 397 (1861).

Destroying Fence When Line Is in Dispute. — Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line, if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. State v. Watson, 86 N.C. 626 (1882); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899). Nor is a quasi-tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. State v. Williams, 44 N.C. 197 (1853).

Fence Made from Rails Taken from Another. — Although rails of which a fence around an enclosure was made were taken from the land of another, no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken, as the fence is a part of the realty, and such a trespass comes within the meaning of this section. State v. McMinn, 81 N.C. 585 (1879).

Removal by Officer of Fence Erected Across a Street. — A fence erected across a public street is a public nuisance, and a city marshal will not be liable for abating the nuisance by pulling it down. State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907).

Defective Bill of Indictment. — A motion in arrest of judgment after conviction for removal of fences on the ground that the bill of indictment is defective will not be granted, unless it appears that the bill is so defective that judgment cannot be pronounced upon it. State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

§ 14-145. Unlawful posting of advertisements.

Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile, building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, milestone, danger-sign, danger-signal, guide-sign, guide-post, automobile, building or other object within the limits of a public highway, shall be guilty of a Class 3 misdemeanor. (Ex. Sess. 1924, c. 109; 1993, c. 539, s. 84; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to injuring, defacing, or destroying notices and advertisements, see G.S. 14-384 and 14-385.

Legal Periodicals. — For comment on application of this section, see 3 N.C.L. Rev. 25 (1925).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 14-146. Injuring bridges.

If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the State, he shall be guilty of a Class 1 misdemeanor. (1883, c. 271; Code, s. 993; Rev., s. 3771; C.S., s. 4318; 1993, c. 539, s. 85; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-147. Removing, altering or defacing landmarks.

If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a Class 2 misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (1858-9, c. 17; Code, s. 1063; Rev., s. 3674; 1915, c. 248; C.S., s. 4319; 1993, c. 539, s. 86; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Removal of Stakes. — As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. State v. Jenkins, 164 N.C. 527, 80 S.E. 231 (1913).

Indictment. — An indictment charging that one A. B., with force and arms, etc., willfully and unlawfully did alter, deface, and remove a corner tree, the property of C., against the form of the statute, was good without a negative averment of the matter contained in the proviso to the act creating the offense. State v. Bryant, 111 N.C. 693, 16 S.E. 326 (1892).

Applied in Suhre v. Haywood County, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

§ 14-148. Defacing or desecrating grave sites.

(a) It is unlawful to willfully:

(1) Throw, place or put any refuse, garbage or trash in or on any cemetery.

(2) Take away, disturb, vandalize, destroy or change the location of any stone, brick, iron or other material or fence enclosing a cemetery without authorization of law or consent of the surviving spouse or next of kin of the deceased.

(3) Take away, disturb, vandalize, destroy, or tamper with any shrubbery, flowers, plants or other articles planted or placed within any cemetery to designate where human remains are interred or to preserve and perpetuate the memory and name of any person, without authorization of law or the consent of the surviving spouse or next of kin.

(b) The provisions of this section shall not apply to:

(1) Ordinary maintenance and care of a cemetery by the owner, caretaker, or other person acting to facilitate cemetery operations by keeping the cemetery free from accumulated debris or other signs of neglect.

(2) Conduct that is punishable under G.S. 14-149.

(3) A professional archaeologist as defined in G.S. 70-28(4) acting pursuant to the provisions of Article 3 of Chapter 70 of the General Statutes.

(c) Violation of this section is a Class I felony if the damage caused by the violation is one thousand dollars ($1,000) or more. Any other violation of this section is a Class 1 misdemeanor. In passing sentence, the court shall consider the appropriateness of restitution or reparation as a condition of probation under G.S. 15A-1343(b)(9) as an alternative to actual imposition of a fine, jail term, or both. (1840, c. 6; R.C., c. 34, s. 102; Code, s. 1088; Rev., s. 3680; C.S., s. 4320; 1969, c. 987; 1981, c. 752, s. 1; c. 853, s. 4; 1993, c. 539, s. 87; 1994, Ex. Sess., c. 24, s. 14(c); 2007-122, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2007-122, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

CASE NOTES

This section creates a misdemeanor not defined as larceny. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Interment of Body Required. — The presence of a deceased body is an essential element of the crime of defacing or desecrating a grave under subdivision (a)(2) of this section, and to prove a violation of this section, the state must prove not only that the defendant willfully performed an act proscribed by the section, but that a deceased person was interred in the cemetery at the time the proscribed act was committed. State v. Phipps, 112 N.C. App. 626, 436 S.E.2d 280 (1993), aff'd, 338 N.C. 305, 449 S.E.2d 450 (1994).

Where the evidence showed there was not a body buried on the lot and there was no evidence that the lot would be used in the future for the burial of the dead, the lot was not a cemetery and subdivision (a)(2) does not apply. State v. Phipps, 338 N.C. 305, 449 S.E.2d 450 (1994).

Right of Landowner to Remove Bodies or Monuments. — Where the owner of land consents, either expressly or by implication, to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their memory. State v. Wilson, 94 N.C. 1015 (1886).

Indictment. — It is not necessary to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular named person, or a person unknown, was interred. State v. Wilson, 94 N.C. 1015 (1886).

Applied in State v. Schultz, 294 N.C. 281, 240 S.E.2d 451 (1978).

Cited in Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

§ 14-149. Desecrating, plowing over or covering up graves; desecrating human remains.

(a) It is a Class I felony, without authorization of law or the consent of the surviving spouse or next of kin of the deceased, to knowingly and willfully:

(1) Open, disturb, destroy, remove, vandalize or desecrate any casket or other repository of any human remains, by any means including

plowing under, tearing up, covering over or otherwise obliterating or removing any grave or any portion thereof.

(2) Take away, disturb, vandalize, destroy, tamper with, or deface any tombstone, headstone, monument, grave marker, grave ornamentation, or grave artifacts erected or placed within any cemetery to designate the place where human remains are interred or to preserve and perpetuate the memory and the name of any person. This subdivision shall not apply to the ordinary maintenance and care of a cemetery.

(3) Repealed by Session Laws 2007-122, s. 2, effective December 1, 2007, and applicable to offenses committed on or after that date.

(a1) It is a Class H felony, without authorization of law or the consent of the surviving spouse or next of kin of the deceased, to knowingly and willfully disturb, destroy, remove, vandalize, or desecrate any human remains that have been interred in a cemetery.

(b) The provisions of this section shall not apply to a professional archaeologist as defined in G.S. 70-28(4) acting pursuant to the provisions of Article 3 of Chapter 70 of the General Statutes. (1889, c. 130; Rev., s. 3681; 1919, c. 218; C.S., s. 4321; 1981, c. 752, s. 2; c. 853, s. 5; 2007-122, s. 2.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Editor's Note. — This section, as amended by Session Laws 2007-122, s. 2, effective December 1, 2007, is applicable to offenses committed on or after that date.

CASE NOTES

Intent. — The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

Persons Liable. — The mayor or other town officers counseling their subordinates to remove bodies were liable under this section although they were honestly mistaken as to the scope of their official power. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

When Lot Is Not Paid For. — The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

Damages. — While desecrating grave sites in violation of this section requires a showing that damage of more than $1,000 resulted from the desecration, it does not require an additional showing of great monetary loss, and where the damages were $10,000, the same evidence was not used to prove both an element of the offense and the aggravating factor. State v. Sammartino, 120 N.C. App. 597, 463 S.E.2d 307 (1995).

Aggravating Factors. — Where the trial court found as an aggravating factor that defendants' conduct was intended to show disrespect to law enforcement in a manner calculated to be highly publicized and the trial court found that defendants' conduct additionally was meant to show disrespect for law enforcement in general, because evidence was necessary to prove this portion of the factor which was not necessary to prove an element of the offense, that portion of the factor was proper. State v. Sammartino, 120 N.C. App. 597, 463 S.E.2d 307 (1995).

§§ 14-150, 14-150.1: Repealed by Session Laws 1981, c. 752, s. 3.

Cross References. — As to defacing or desecrating grave sites, see G.S. 14-148. As to desecrating, plowing over or covering up graves, see G.S. 14-149.

§ 14-151. Interfering with gas, electric and steam appliances.

If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subdivisions, he shall be guilty of a Class 2 misdemeanor:

(1) Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

(2) Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

(3) In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

(4) Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stopcock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifices of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stopcock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires or other appliances of such, as the case may be; or,

(5) Retain possession of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

(6) Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gateboxes, valves, stopcocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

(7) Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or

(8) Turn on steam or cause it to be turned on or to reenter any premises when the same has been lawfully stopped from entering such premises. (1901, c. 735; Rev., s. 3666; C.S., s. 4323; 1993, c. 539, s. 88; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; unlawful reconnection of electricity, gas, or water; civil liability.

(a) It shall be unlawful for any unauthorized person to alter, tamper with or bypass a meter which has been installed for the purpose of measuring the use of electricity, gas or water or knowingly to use electricity, gas or water passing through any such tampered meter or use electricity, gas or water bypassing a meter provided by an electric, gas or water supplier for the purpose of measuring and registering the quantity of electricity, gas or water consumed.

(b) Any meter or service entrance facility found to have been altered, tampered with, or bypassed in a manner that would cause such meter to inaccurately measure and register the electricity, gas or water consumed or which would cause the electricity, gas or water to be diverted from the recording apparatus of the meter shall be prima facie evidence of intent to violate and of the violation of this section by the person in whose name such meter is installed or the person or persons so using or receiving the benefits of such unmetered, unregistered or diverted electricity, gas or water.

(b1) It is unlawful for any unauthorized person to reconnect electricity, gas, or water connections or otherwise turn back on one or more of those utilities when they have been lawfully disconnected or turned off by the provider of the utility.

(b2) It is unlawful for any unauthorized person to alter, bypass, interfere with, or cut off any load management device, equipment, or system which has been installed by the electricity supplier for the purpose of limiting the use of electricity at peak-load periods, provided, however, if there has been a written request to remove the load management device, equipment or system to the electric supplier and the electric supplier has not removed the device within two working days, there shall be no violation of this section.

(c) Any person violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor.

(d) Whoever is found in a civil action to have violated any provision hereof shall be liable to the electric, gas or water supplier in triple the amount of losses and damages sustained or five hundred dollars ($500.00), whichever is greater.

(e) Nothing in this section shall be construed to apply to licensed contractors while performing usual and ordinary services in accordance with recognized customs and standards. (1977, c. 735, s. 1; 1983, c. 508, ss. 1, 2; 1989, c. 119; 1993, c. 539, s. 89; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979).

§ 14-152. Injuring fixtures and other property of gas companies; civil liability.

If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a Class 3 misdemeanor. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (1889 (Pr.), c. 35, s. 3; Rev., s. 3671; C.S., s. 4324; 1993, c. 539, s. 90; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-153. Tampering with engines and boilers.

If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a Class 2 misdemeanor. (1901, c. 733; Rev., s. 3667; C.S., s. 4325; 1993, c. 539, s. 91; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929).

§ 14-154. Injuring wires and other fixtures of telephone, telegraph, and electric-power companies.

If any person shall willfully injure, destroy or pull down any telegraph, telephone, cable telecommunications, or electric-power-transmission pedestal or pole, or any telegraph, telephone, cable telecommunications, or electric power line, wire or fiber insulator, power supply, transformer, transmission or other apparatus, equipment or fixture used in the transmission of telegraph, telephone, cable telecommunications, or electrical power service or any equipment related to wireless communications regulated by the Federal Communications Commission, that person shall be guilty of a Class I Felony. (1881, c. 4; 1883, c. 103; Code, s. 1118; Rev., s. 3847; 1907, c. 827, s. 1; C.S., s. 4326; 1993, c. 539, s. 92; 1994, Ex. Sess., c. 24, s. 14(c); 2007-301, s. 2.)

Editor's Note. — At the direction of the Revisor of Statutes, a comma was inserted following "telegraph" in the section heading.

This section, as amended by Session Laws 2007-301, s. 2, effective December 1, 2007, is applicable to offenses committed on or after that date.

§ 14-155. Unauthorized connections with telephone or telegraph.

It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating this section shall be guilty of a Class 3 misdemeanor. Each day's continuance of such unlawful connection shall be a separate offense. No connection approved by the Federal Communications Commission or the North Carolina Utilities Commission shall be a violation of this section. (1911, c. 113; C.S., s. 4327; 1973, c. 648; 1977, 2nd Sess., c. 1185, s. 2; 1993, c. 539, s. 93; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to theft of cable television service, see G.S. 14-118.5.

Legal Periodicals. — For 1984 survey, "North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry," see 63 N.C.L. Rev. 1296 (1985).

CASE NOTES

Right to Be Free of Unauthorized Wiretapping Nonnegotiable. — Where employee claimed that on various occasions both her work and home telephones were monitored without her consent and the issue of whether employee telephone was monitored at work was a dispute that fell under the terms of collective bargaining agreement, employee could pursue her invasion of privacy claim based on alleged wiretapping under state law, since employee's right to be free of unauthorized wiretapping of her telephone was in the nature of a nonnegotiable right. Binkley v. Loughran, 714 F. Supp. 768 (M.D.N.C. 1988), aff'd, 940 F.2d 651 (4th Cir. 1991).

For admissibility of tape recordings

made in violation of this section in a prosecution under former G.S. 14-196.1, see State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966).

§ 14-156. Injuring fixtures and other property of electric-power companies.

It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a Class 2 misdemeanor. (1907, c. 919; C.S., s. 4328; 1993, c. 539, s. 94; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-157. Felling trees on telephone and electric-power wires.

If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a Class 3 misdemeanor, and shall also be liable to penalty of fifty dollars ($50.00) for each and every offense. (1903, c. 616; Rev., s. 3849; 1907, c. 827, s. 2; C.S., s. 4329; 1969, c. 1224, s. 9; 1993, c. 539, s. 95; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-158. Interfering with telephone lines.

If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a telephone line, he shall be guilty of a Class 2 misdemeanor. (1901, c. 318; Rev., s. 3845; C.S., s. 4330; 1969, c. 1224, s. 3; 1993, c. 539, s. 96; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Civil Action for Damages. — The willful cutting of a telephone wire in public use for hire is made a misdemeanor by this section, and where such act has caused damages to another the action sounds in tort, making the tort-feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920).

§ 14-159. Injuring buildings or fences; taking possession of house without consent.

If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a Class 3 misdemeanor. (1929, c. 192, s. 1; 1993, c. 539, s. 97; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to taking unlawful possession of another's house, see G.S. 14-143. As to injuring houses, churches, fences and walls, see G.S. 14-144. As to willful destruction by a tenant, see G.S. 42-11.

§ 14-159.1. Contaminating a public water system.

(a) A person commits the offense of contaminating a public water system, as defined in G.S. 130A-313(10), if he willfully or wantonly:

(1) Contaminates, adulterates or otherwise impurifies or attempts to contaminate, adulterate or otherwise impurify the water in a public water system, including the water source, with any toxic chemical, biological agent or radiological substance that is harmful to human health, except those added in approved concentrations for water treatment operations; or

(2) Damages or tampers with the property or equipment of a public water system with the intent to impair the services of the public water system.

(b) Any person who commits the offense defined in this section is guilty of a Class C felony. (1983, c. 507, s. 1; 1985, c. 509, s. 4; c. 689, s. 5; 1993, c. 539, s. 1189; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.2. Interference with animal research.

(a) It is unlawful for a person willfully to commit any of the following acts:

(1) The unauthorized entry into any research facility where animals are kept within the facility for research in the advancement of medical, veterinary, dental, or biological sciences, with the intent to (i) disrupt the normal operation of the research facility, or (ii) damage the research facility or any personal property located thereon, or (iii) release from any enclosure or restraining device any animal kept within the research facility, or (iv) interfere with the care of any animal kept within the research facility;

(2) The damaging of any such research facility or any personal property located thereon;

(3) The unauthorized release from any enclosure or restraining device of any animal kept within any research facility; or

(4) The interference with the care of any animal kept within any research facility.

(b) Any person who commits an offense under subsection (a) of this section shall be guilty of a Class 1 misdemeanor.

(c) Any person who commits an offense under subsection (a) of this section that involves the release from any enclosure or restraining device of any animal having an infectious disease shall be guilty of a Class I felony.

(d) As a condition of probation, the court may order a person convicted under this section to make restitution to the owner of the animal for damages, including the cost of restoring the animal to confinement and of restoring the animal to its health condition prior to any release, and for damages to personal property, including materials, equipment, data, and records, and real property caused by the interference. If the interference causes the failure of an experiment, the restitution may include all costs of repeating the experiment, including replacement of the animals, labor, and materials.

(e) Nothing in this section shall be construed to affect any rights or causes of action of a person damaged through interference with animal research. (1991, c. 203, s. 1; 1993, c. 539, ss. 98, 1190; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.3. Trespass to land on motorized all terrain vehicle.

(a) No person shall operate any motorized all terrain vehicle:

(1) On any private property not owned by the operator, without the consent of the owner; or

(2) Within the banks of any stream or waterway, but excluding a sound or the Atlantic Ocean, the adjacent lands of which are not owned by the operator, without the consent of the owner or outside the restrictions imposed by the owner.

(b) A "motorized all terrain vehicle", as used in this section, is a two or more wheeled vehicle designed for recreational off-road use.

(c) A violation of this section shall be a Class 2 misdemeanor. (1997-456, s. 56.8; 1997-487, s. 1.)

CASE NOTES

Definition of "Recreational Vehicle". — North Carolina statutes do not preclude the definition of a "recreational vehicle" including an ATV. Halter v. J.C. Penney Life Ins. Co., — F. Supp. 2d —, 1999 U.S. Dist. LEXIS 21386 (M.D.N.C. Nov. 30, 1999).

§§ 14-159.4, 14-159.5: Reserved for future codification purposes.

ARTICLE 22A.

Trespassing upon "Posted" Property to Hunt, Fish, Trap, or Remove Pine Needles/Straw.

§ 14-159.6. Trespass for purposes of hunting, etc., without written consent a misdemeanor.

(a) Any person who willfully goes on the land, waters, ponds, or a legally established waterfowl blind of another upon which notices, signs or posters prohibiting hunting, fishing or trapping have been placed in accordance with the provisions of G.S. 14-159.7, or upon which "posted" notices have been placed in accordance with the provisions of G.S. 14-159.7, to hunt, fish or trap without the written consent of the owner or his agent shall be guilty of a Class 2 misdemeanor. Provided, further, that no arrests under authority of this subsection shall be made without the consent of the owner or owners of said land, or their duly authorized agents in the following counties: Halifax and Warren.

(b) Any person who willfully goes on the land of another upon which notices, signs, or posters prohibiting raking or removing pine needles or pine straw have been placed in accordance with the provisions of G.S. 14-159.7, or upon which "posted" notices have been placed in accordance with the provisions of G.S. 14-159.7, to rake or remove pine needles or pine straw without the written consent of the owner or his agent shall be guilty of a Class 1 misdemeanor. (1949, c. 887, s. 1; 1953, c. 1226; 1965, c. 1134; 1975, c. 280, s. 1; 1979, c. 830, s. 11; 1991, c. 435, s. 4; 1993, c. 539, s. 99; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(z).)

Local Modification. — Avery, Mitchell and Watauga: 1967, c. 644.

Legal Periodicals. — For note, "Hunting and Posting on Private Land in America," see 54 Duke L.J. 549 (2004).

CASE NOTES

Prohibited Activities. — This section prohibits hunting, fishing or trapping on properly posted lands or waters without the written consent of the owner or his agent, provided that in designated counties, including Halifax County, no arrest may be made for such violation without consent of the owner or his agent. State v. Manning, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.

Term "Owner" Does Not Include Lessee. — In a prosecution in Halifax County under this section for a trespass by fishing on properly posted lands and waters of a private club without the written consent of the owner or his agent, defendants' motion for nonsuit should have been allowed where the State's evidence disclosed that the private club was the lessee of the land under and around the lake upon which defendants were fishing, a lessee not being included within the term "owner" as used in G.S. 113-130, and there being no showing that defendants were fishing without the written consent of the actual owner, or that the owner consented to their arrest, or that the private club was the agent of the owner for these purposes. State v. Manning, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.

Whether a body of water is a "private pond" is not relevant to a prosecution for trespass under this section, there being no requirement that a pond must be a "private pond" in order to post the notices and signs described in G.S. 113-120.2 (now G.S. 14-159.7). State v. Manning, 3 N.C. App. 451, 165 S.E.2d 13 (1969), decided under former § 113-120.1.

§ 14-159.7. Regulations as to posting of property.

The notices, signs or posters described in G.S. 14-159.6 shall measure not less than 120 square inches and shall be conspicuously posted on private lands not more than 200 yards apart close to and along the boundaries. At least one such notice, sign, or poster shall be posted on each side of such land, and one at each corner thereof, provided that said corner can be reasonably ascertained. For the purpose of prohibiting fishing, or the taking of fish by any means, in any stream, lake, or pond, it shall only be necessary that the signs, notices, or posters be posted along the stream or shoreline of a pond or lake at intervals of not more than 200 yards apart. (1949, c. 887, s. 2; 1953, c. 1226; 1965, c. 923; 1975, c. 280, ss. 2, 3; 1979, c. 830, s. 11.)

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-159.8. Mutilation, etc., of "posted" signs; posting signs without consent of owner or agent.

Any person who shall mutilate, destroy or take down any "posted," "no hunting" or similar notice, sign or poster on the lands, waters, or legally established waterfowl blind of another, or who shall post such sign or poster on the lands, waters or legally established waterfowl blind of another, without the consent of the owner or his agent, shall be deemed guilty of a Class 3 misdemeanor and only punished by a fine of not more than one hundred dollars ($100.00). (1949, c. 887, s. 3; 1953, c. 1226; 1969, c. 51; 1979, c. 830, s. 11; 1993, c. 539, s. 100; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.9. Entrance on navigable waters, etc., for purpose of fishing, hunting or trapping not prohibited.

Nothing in this Article shall be construed to prohibit the entrance of any person upon navigable waters and the bays and sounds adjoining such waters for the purpose of fishing, hunting or trapping. (1949, c. 887, s. 4; 1953, c. 1226; 1979, c. 830, s. 11.)

§ 14-159.10. Enforcement of Article by peace officers; wildlife protectors authorized to execute process.

This Article may be enforced by deputy sheriffs and other peace officers with general subject matter jurisdiction. Law-enforcement officers of the North Carolina Wildlife Resources Commission may execute process issued by the court for violations of this Article. (1979, c. 830, s. 11.)

ARTICLE 22B.

First and Second Degree Trespass.

§ 14-159.11. Definition.

As used in this Article, "building" means any structure or part of a structure, other than a conveyance, enclosed so as to permit reasonable entry only through a door and roofed to protect it from the elements. (1987, c. 700, s. 1.)

§ 14-159.12. First degree trespass.

(a) Offense. — A person commits the offense of first degree trespass if, without authorization, he enters or remains:

(1) On premises of another so enclosed or secured as to demonstrate clearly an intent to keep out intruders; or

(2) In a building of another.

(b) Classification. — First degree trespass is a Class 2 misdemeanor. (1987, c. 700, s. 1; 1993, c. 539, s. 101; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Editor's Note. — *Most of the cases annotated below were decided under former G.S. 14-126, which described the crime of forcible entry and detainer, and former G.S. 14-134, which pertained to the crime of trespass on land after being forbidden.*

Actual Possession Necessary. — The essential element of the offense of forcible entry was that the lands, etc., had to be in the actual possession of him whose possession was charged to have been interfered with. To constitute actual possession, there must have been an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to have been in possession. He need not have at all times been personally present on the premises. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889).

Former G.S. 14-126 was designed to protect actual possession only, and it was no defense that the accused had title to the locus in quo if the prosecutor was in actual possession of it. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

It was necessary to allege and establish actual possession in the prosecutor. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

The element of actual possession must be charged in the indictment. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889).

It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." State v. Eason, 70 N.C. 88 (1874).

Where the possession of the prosecutor in forcible entry and detainer was only by sufferance, the prosecution could not be sustained. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904).

Title Is Not Involved. — The right or title to land could not be vindicated with the bludgeon, but the party who claimed the better title could, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elected to use violence, the law held him criminally responsible for his act. State v. Webster, 121 N.C. 586, 28 S.E. 254 (1897), where it was said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

The offense of forcible trespass under former G.S. 14-126 did not involve title to the premises, but was directed against the possession, and when the possession was in the prosecuting witness, and the entry was made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tended to a breach of the peace, it was sufficient for conviction. State v. Earp, 196 N.C. 164, 145 S.E. 23 (1928).

Forcible trespass and trespass were not lesser included offenses of attempted first-degree burglary. Attempted first-degree burglary did not require a commandment forbidding entry or an order to leave as did trespass under former G.S. 14-134. It also did not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as did forcible trespass under former G.S. 14-126. State v. McAlister, 59 N.C. App. 58, 295 S.E.2d 501 (1982), cert. denied, 307 N.C. 471, 299 S.E.2d 226 (1983).

First-degree trespass is a lesser included offense of felony breaking or entering. State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

Forcible Trespass Not a Lesser Included Offense of Kidnapping. — Since forcible trespass required proof of an element not essential to kidnapping, i.e., entry into a person's premises, it could not be a lesser included offense of kidnapping. State v. McRae, 58 N.C. App. 225, 292 S.E.2d 778 (1982).

Forcible Trespass Was Not a Lesser Included Offense of Common-Law Robbery. — Since the statute on forcible trespass to real property contained the different element of "entry into lands and tenements," the statutory offense of forcible trespass to real property therefore could not be a lesser included offense of common-law robbery. Similarly, common-law forcible trespass to real property by definition required an unlawful invasion of or threat to premises possessed by another, and this involved an element separate and distinct from those of common-law robbery. State v. Bates, 70 N.C. App. 477, 319 S.E.2d 683, aff'd, 313 N.C. 580, 330 S.E.2d 200 (1984).

Entry after being forbidden did not involve an assault or entry with a strong hand as did forcible entry and detainer, and it did not require actual occupancy of the land by the complaining party, but it did require the complaining party to have legal title to the land. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

A peaceful entry negatived liability under former G.S. 14-126. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

One Who Remained After Being Directed to Leave Was Guilty of Wrongful Entry. — In applying this section, one who remained after being directed to leave was guilty of a wrongful entry even though the original entrance was peaceful and authorized. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958). But see State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

One who remained in a home after being directed to leave was guilty of a wrongful entry and became a trespasser, even though the original entry was peaceful and authorized, and a householder could use such force as was reasonably necessary to eject him. State v. Kelly, 24 N.C. App. 670, 211 S.E.2d 854 (1975).

As Were Those Who Abused Possessor. — In order to convict of a misdemeanor under the provisions of former G.S. 14-126, it was not necessary that the act of going on the lands was unlawful, if the accused thereafter had in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language. State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927).

The unlatching and opening of the screen and the attempt to open the door, as shown by the State's evidence, was enough to constitute entry. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Staging Sit-In. — Where defendants acted in concert with approximately 20 other persons in staging a sit-in, and their number was of such a magnitude that only by yielding to their continued presence could a breach of the peace be avoided, once they refused to leave as requested, in such a situation, the original entry, though peaceful, became unlawful, though no other force was used. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

In a prosecution of defendants under former G.S. 14-126 for forcible entry, the multitude of persons entering the property was sufficient to constitute the required force and the only force required was the force necessary to remain on the premises after having been requested to leave, where defendants acted in concert with approximately 20 other persons in staging a sit-in at the premises of a utility company. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

Entry Under Void Warrant. — Where four or more men entered upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which were a nullity, and ejected such person and his family from the house they were occupying, they were guilty of a forcible trespass. State v. Yarborough, 70 N.C. 250 (1874); Atlantic T. & O.R.R. v. Johnston, 70 N.C. 348 (1874).

No Accessories. — In misdemeanors there were no accessories, and those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

Alleging Expulsion of Possession. — While expulsion of possession must be alleged where actual ouster has occurred, such an allegation was not essential when the basis for charging defendants with violation of former G.S. 14-126 was because of a refusal to leave, thus distinguishing the decision in State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889); State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

Sufficiency of Warrant. — A warrant charging an offense under former G.S. 14-126 was sufficient even though it did not charge occupancy at the time of entry where the warrant cited the section and charged that with "force and violence" the defendant trespassed upon the property of the occupant. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Essential Ingredients of Offense. — To constitute trespass on the land of another after notice or warning under former G.S. 14-134, three essential ingredients had to coexist: (1) The land had to be the land of the prosecutor in the sense that it was in either his actual or constructive possession; (2) the accused had to enter upon the land intentionally; and (3) the accused had to do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

To constitute the offense forbidden by former G.S. 14-134 and with which defendants were charged there had to be an entry on land after being forbidden; and such entry had to be wilful, and not from ignorance, accident, or under a bona fide claim of right or license. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

Entering the property "without a license therefor" was not a necessary element of the crime under former G.S. 14-134. State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

Possession was an essential element of the crime. If the State failed to establish that prosecutor had possession (actual or constructive) no crime had been established. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

The principal distinctions between forcible trespass and forcible entry and detainer were that forcible trespass required that the complaining party be an occupant of the premises while forcible entry and detainer required occupancy plus some type of estate in the land. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Entry Under Claim of Right Was a Defense to Criminal Prosecution. — One who entered upon the land of another under a bona fide claim of right was guilty of no criminal offense. State v. Crosset, 81 N.C. 579 (1879).

In a prosecution under former G.S. 14-134, even though the State established that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus established as an ultimate fact that defendant entered the locus in quo without legal right, defendant could still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right, i.e., that he believed he had a right to enter, and that he had reasonable grounds for such belief. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Good faith in making the entry was a defense. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

But Not to a Civil Action. — Entry under a claim of right was a defense only in a criminal action, as ignorance of a trespasser did not exonerate him from civil liability. State v. Whitener, 93 N.C. 590 (1885); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

Burden on Defendant to Show Reasonable Grounds for Claim of Right. — As a defense to a charge under former G.S. 14-134, it was sufficient for defendants to establish that they entered under a bona fide belief of a right to so enter, which belief had a reasonable foundation in fact, but the burden was on the defendant to establish facts sufficient to excuse his wrongful conduct. State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958), appeal dismissed, 359 U.S. 951, 79 S. Ct. 737, 3 L. Ed. 2d 759 (1959); 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960).

A mere belief on the part of a trespasser that he had a claim of right or license did not protect him; he had to satisfy the jury that he had reasonable grounds for such belief. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964). See also, State v. Fisher, 109 N.C. 817, 13 S.E. 878 (1891); State v. Durham, 121 N.C. 546, 28 S.E.

22 (1897); State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906); State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

Land Sought to Be Condemned. — An indictment for willful trespass under former G.S. 14-134 would lie against an employee of a railroad company for an entry after being forbidden on land which the company was seeking to condemn, the entry being for the purpose of constructing the road and before an appraisement has been made, although a restraining order against such a trespass would be refused. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Entry by Husband on Wife's Property. — A husband was not subject to the rule of this section, in regard to property of his wife, and although she might forbid him to enter he could enter nevertheless. State v. Jones, 132 N.C. 1043, 43 S.E. 939 (1903).

Entry As Servant. — One who entered upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, was not guilty of any criminal offense. State v. Winslow, 95 N.C. 649 (1886).

Upon the trial under an indictment for trespass on lands after being forbidden, it was no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law was incompetent. State v. Mallard, 143 N.C. 666, 57 S.E. 351 (1907).

Entry by Former Tenant to Gather Crops. — For a conviction under the provisions of former G.S. 14-134 for unlawful trespass on lands after being forbidden, it was not alone sufficient to show that the trespass had been forbidden, when there was evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence was held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

Entry as Guest of Tenant. — One forbidden by the landlord to enter his land was not guilty under former G.S. 14-134 if he entered a part of the land in the possession of a tenant and as a guest of the tenant. State v. Lawson, 101 N.C. 717, 7 S.E. 905 (1888).

Entry When Sober After Entry While Intoxicated Forbidden. — Where defendant's evidence in a prosecution for trespass was to the effect that the prosecutrix had forbidden him the premises only when he was intoxicated and that on the occasion in question he was sober, his testimony, if the jury found it to be true, would entitle him to an acquittal, and he was entitled to an instruction on the legal effect of his evidence. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Abatement of Pending Convictions by Civil Rights Act. — Since the Civil Rights Act of 1964 forbid discrimination in places of public accommodation and removed peaceful attempts to be served on an equal basis from the category of punishable activities, pending convictions for violation of former G.S. 14-134 were abated by passage of the act, even though the conduct involved occurred prior to its enactment. Blow v. North Carolina, 379 U.S. 684, 85 S. Ct. 635, 13 L. Ed. 2d 603 (1965).

Evidence Not Establishing Prosecutor's Possession. — Where, in a prosecution under former G.S. 14-134, the only evidence offered by the State as to title of prosecutor was oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, defendant's motion to nonsuit should have been granted, since the evidence was insufficient to establish prosecutor's possession of the land within the meaning of the section. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Indictment Had to Negative License to Enter. — In an indictment for entering on the land of another and taking therefrom turpentine, etc., it was necessary that a "license so to enter" should be distinctly negatived as an essential part of the description of the offense. State v. Bullard, 72 N.C. 445 (1875).

An indictment was fatally defective if it does not charge that the entry was "without a license therefor." State v. Smith, 263 N.C. 788, 140 S.E.2d 404 (1965).

An indictment in which it was charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., was sufficient. State v. Whitehurst, 70 N.C. 85 (1874).

Ownership or Possession Had to Be Alleged and the Proof Had to Correspond. — It was necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof had to correspond with the charge. If the rightful possession was in one other than the person named in the warrant or bill, there was a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Amendment as to Possession Constituted Fatal Variance. — On appeal to the superior court from conviction on a warrant charging trespass on the property of one person after being forbidden, the allowance of an amendment to charge that the property was in the possession of a different person resulted in the charge of an entirely different crime and constitutes a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Warrant Could Be Amended. — The superior court had power to amend, after verdict, a warrant brought by appeal of defendant charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." State v. Smith, 103 N.C. 410, 9 S.E. 200 (1889).

Warrant with Affidavit Attached. — A warrant for trespass would not be quashed because it did not contain the necessary descriptive words of the illegal offense, when it referred to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit made it a part of the warrant. State v. Winslow, 95 N.C. 649 (1886).

Jury Instruction in Felony Breaking or Entering Prosecution. — A jury instruction on the lesser included offenses of misdemeanor breaking or entering and first degree trespass was not required in a prosecution for felonious breaking or entering, where there was no evidence that defendant scaled the wall, attained the roof, forced a hole in it, and entered the store for some reason other than larceny, particularly as items were stolen from the premises. State v. Hamilton, 132 N.C. App. 316, 512 S.E.2d 80 (1999).

Cited in In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001).

§ 14-159.13. Second degree trespass.

(a) Offense. — A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:

(1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or

(2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.

(b) Classification. — Second degree trespass is a Class 3 misdemeanor. (1987, c. 700, s. 1; 1993, c. 539, s. 102; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Probable Cause. — The trial court erred by failing to grant defendant father a directed verdict on plaintiff son's claim for malicious prosecution where defendant had probable cause to institute trespass proceedings, where the undisputed evidence showed that defendant owned the premises upon which store in question was located; that plaintiff did not enter into a written or unwritten lease with defendant to occupy the premises; that, on the day prior to his arrest for trespass, plaintiff received written notification that "effective immediately" he was no longer employed by defendant; and that the written notification requested that he "vacate" the premises and notified him that his continued presence at the store would be "considered trespassing." Hill v. Hill, 142 N.C. App. 524, 545 S.E.2d 442, 2001 N.C. App. LEXIS 185 (2001).

Necessity Defense Unavailable. — The defense of "necessity" is unavailable to individuals who commit the crime of trespass in an effort to "save the lives" of fetuses from abortion. State v. Thomas, 103 N.C. App. 264, 405 S.E.2d 214, cert. denied, 329 N.C. 792, 408 S.E.2d 528 (1991).

The North Carolina General Assembly has made a "clear and deliberate choice" regarding the competing values at issue by choosing to make those abortions performed in accordance with the provisions of G.S. 14-45.1 lawful. Since there was no evidence at the defendants' trial that the clinic was performing or about to perform illegal abortions, it is implicit that the "evil" which the defendants sought to avoid by blocking the clinic's entrances was nonexistent. The nonexistence of an "evil" to avoid foreclosed the possibility of a defense based upon necessity. State v. Thomas, 103 N.C. App. 264, 405 S.E.2d 214, cert. denied, 329 N.C. 792, 408 S.E.2d 528 (1991).

Implied Consent Defense Unavailable. — Even if nuclear protestors had implied consent to enter the lobby of a building occupied by an electric company, by refusing to leave after being told that they could not meet with the chief executive officer, under G.S. 14-159.13 they committed second-degree trespass. State v. Marcopolos, 154 N.C. App. 581, 572 S.E.2d 820, 2002 N.C. App. LEXIS 1518 (2002).

Denial of Motion to Dismiss Proper. — Denial of a juvenile defendants' motion to dismiss second-degree trespass charge under G.S. 14-159.13 was proper, because the sign marked "Girl's Locker Room" was reasonably likely to give defendant notice that defendant was not authorized to go into the girls' locker room, and defendant's admission that defendant violated school rules by entering the girls' locker room supported a reasonable inference that defendant knew defendant was not permitted in the locker room. In re S.M.S., — N.C. App. —, 675 S.E.2d 44, 2009 N.C. App. LEXIS 363 (2009).

Cited in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992); State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993); State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998); State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

§ 14-159.14. Lesser included offenses.

The offenses created by this act shall constitute lesser included offenses of breaking or entering as provided in G.S. 14-54 and G.S. 14-56. (1987, c. 700, s. 1.)

CASE NOTES

Conviction of Lesser Offense Vacated. — First degree trespass was a lesser included offense of misdemeanor breaking and entering; hence, where defendant was erroneously convicted of both offenses, his conviction for first degree trespass had to be vacated. State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616, 2002 N.C. App. LEXIS 577 (2002).

§§ 14-159.15 through 14-159.19: Reserved for future codification purposes.

Article 22C.

Cave Protection Act.

§ 14-159.20. Definitions.

The terms listed below have the following definitions as used in this Article, unless the context clearly requires a different meaning:

(1) "Cave" means any naturally occurring subterranean cavity. The word "cave" includes or is synonymous with cavern, pit, well, sinkhole, and grotto;

(2) "Commercial cave" means any cave with improved trails and lighting utilized by the owner for the purpose of exhibition to the general public as a profit or nonprofit enterprise, wherein a fee is collected for entry;

(3) "Gate" means any structure or device located to limit or prohibit access or entry to any cave;

(4) "Person" means any individual, partnership, firm, association, trust or corporation;

(5) "Speleothem" means a natural mineral formation or deposit occurring in a cave. This includes or is synonymous with stalagmites, stalactites, helectites, anthodites, gypsum flowers, needles, angel's hair, soda straws, draperies, bacon, cave pearls, popcorn (coral), rimstone dams, columns, palettes, and flowstone. Speleothems are commonly composed of calcite, epsomite, gypsum, aragonite, celestite and other similar minerals; and

(6) "Owner" means a person who has title to land where a cave is located, including a person who owns title to a leasehold estate in such land. (1987, c. 449, s. 1.)

§ 14-159.21. Vandalism; penalties.

It is unlawful for any person, without express, prior, written permission of the owner, to willfully or knowingly:

(1) Break, break off, crack, carve upon, write, burn or otherwise mark upon, remove, or in any manner destroy, disturb, deface, mar or harm the surfaces of any cave or any natural material therein, including speleothems;

(2) Disturb or alter in any manner the natural condition of any cave;

(3) Break, force, tamper with or otherwise disturb a lock, gate, door or other obstruction designed to control or prevent access to any cave, even though entrance thereto may not be gained.

Any person violating a provision of this section shall be guilty of a Class 3 misdemeanor. (1987, c. 449, s. 1; 1993, c. 539, s. 103; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.22. Sale of speleothems unlawful; penalties.

It is unlawful to sell or offer for sale any speleothems in this State, or to export them for sale outside the State. A person who violates any of the provisions of this section shall be guilty of a Class 3 misdemeanor. (1987, c. 449, s. 1; 1993, c. 539, s. 104; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.23. Limitation of liability of owners and agents.

The owner of a cave, and his agents and employees, shall not be liable for any injury to, or for the death of any person, or for any loss or damage to property, by reason of any act or omission unless it is established that the injury, death, loss, or damage occurred as a result of gross negligence, wanton conduct, or intentional wrongdoing. The limitation of liability provided by this section applies only with respect to injury, death, loss, or damage occurring within a cave, or in connection with entry into or exit from a cave, and applies only with respect to persons to whom no charge has been made for admission to the cave. (1987, c. 449, s. 1.)

Article 23.

Trespasses to Personal Property.

§ 14-160. Willful and wanton injury to personal property; punishments.

(a) If any person shall wantonly and willfully injure the personal property of another he shall be guilty of a Class 2 misdemeanor.

(b) Notwithstanding the provisions of subsection (a), if any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars ($200.00), he shall be guilty of a Class 1 misdemeanor.

(c) This section applies to injuries to personal property without regard to whether the property is destroyed or not. (1876-7, c. 18; Code, s. 1082; 1885, c. 53; Rev., s. 3676; C.S., s. 4331; 1969, c. 1224, s. 14; 1993, c. 539, s. 105.)

Cross References. — As to definition of personal property, see G.S. 12-3, subdivision (6). As to malicious or willful injury to hired personal property, see G.S. 14-165. As to prosecution for perjury based upon acquittal in former prosecution under this section, see note to G.S. 14-209.

CASE NOTES

Elements Generally. — Proof of four elements appears essential to sustain an adjudication of delinquency based upon violation of this section: (1) that personal property was injured; (2) that the personal property was that "of another," i.e., someone other than the person or persons accused; (3) that the injury was inflicted "wantonly and willfully"; and (4) that the injury was inflicted by the person or persons accused. In re Meaut, 51 N.C. App. 153, 275 S.E.2d 200 (1981).

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Thus, Malice Need Not Be Charged Under This Section. — This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906).

It is not necessary to allege or prove any malice to the owner of personal property on the part of one who wantonly and willfully injures it nor is it material whether the property was destroyed or not. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Injury Must Be Wanton and Willful. — Destruction of personal property is not a crime. It becomes so only when the injury is wanton and willful under this section. State v. Sims, 247 N.C. 751, 102 S.E.2d 143 (1958).

Children Throwing Rocks at a Car. — Sufficient evidence existed to support the juvenile court's findings that the juveniles acted "wantonly and willfully" in damaging a vehicle, when they threw rocks at it denting it and cracking the windshield, and thus support the findings of delinquency. In re McKoy, 138 N.C. App. 143, 530 S.E.2d 334, 2000 N.C. App. LEXIS 550 (2000).

Elements Differ from Discharging Firearm into Occupied Vehicle. — The elements of willful damage to property by shooting out the automobile window are not the same as discharging a firearm into an occupied vehicle. The element of damages which must be shown in a charge of willful damage to property is not an element in a charge of discharging a firearm into an occupied vehicle. Therefore, the two charges are not the same in fact or in law. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Offense May Be Committed Jointly. — The offense under this section may be committed jointly by several persons, one doing the act, the others aiding and abetting or participating. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906); State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959).

What Constitutes Personal Property — Promissory Note. — A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and G.S. 12-3, subdivision (6). State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Same — Electric Streetcar. — An electric streetcar is personalty and not a fixture. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Same — Fence. — Proof of the destruction of a fence erected upon land was held to be insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there was a fatal variance between allegation of ownership of the realty and proof. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Destruction of Whiskey by Revenue Officer. — The mere possession of whiskey gives no title, and a revenue officer who seizes a barrel concealed on private premises, and in good faith destroys it, is not guilty of a misdemeanor under this section. North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

Indictment Need Not Allege That Act Was Done "Unlawfully". — An indictment for injury to personal property under this section, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and willfully. State v. Martin, 107 N.C. 904, 12 S.E. 194 (1890).

But Indictment Must Allege That Injury Was Done "Willfully and Wantonly". — An indictment cannot be sustained under this section if there is neither an allegation nor finding that the injury was "willfully and wantonly" done. The words "unlawfully and on purpose" will not supply in their place. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

Indictment That Failed to Allege Ownership of the Property Was Defective. — Indictments alleging that the city transit and parking services owned the parking meters allegedly broken into by defendant, were insufficient to allege injury to personal property in violation of G.S. 14-160 and larceny because the city transit and parking services was not a natural person, and the indictments did not allege that the city transit and parking services was capable of owning property. State v. Price, 170 N.C. App. 672, 613 S.E.2d 60, 2005 N.C. App. LEXIS 1085 (2005).

Effect of Erroneous Conviction Under This Section Instead of § 14-165. — Where there is an erroneous conviction under this section, when the indictment should have been drawn under G.S. 14-165, et seq., the prisoner should be discharged with permission to the solicitor (now district attorney) to send another bill, if so advised. State v. Reed, 196 N.C. 357, 145 S.E. 691 (1928).

In the absence of any proof that damage was greater than $200, defendant should be sentenced pursuant to subsection (a). State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Applied in State v. Fisher, 270 N.C. 315, 154 S.E.2d 333 (1967); State v. Locklear, 7 N.C. App. 375, 172 S.E.2d 267 (1970); In re Ingram, 8 N.C. App. 266, 174 S.E.2d 89 (1970); State v. Jordan, 59 N.C. App. 527, 296 S.E.2d 823 (1982).

Cited in State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965); In re Mash, 63 N.C. App. 130, 303 S.E.2d 660 (1983); State v. Casey, 60 N.C. App. 414, 299 S.E.2d 235 (1983); State v. Watson, 66 N.C. App. 306, 311 S.E.2d 381 (1984); State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988); State v. Poe, 119 N.C. App. 266, 458 S.E.2d 242 (1995); State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998); In re R.D.L., 191 N.C. App. 526, 664 S.E.2d 71, 2008 N.C. App. LEXIS 1506 (2008); State v. Lilly, — N.C. App. —, 673 S.E.2d 718, 2009 N.C. App. LEXIS 260 (2009).

§ 14-160.1. Alteration, destruction or removal of permanent identification marks from personal property.

(a) It shall be unlawful for any person to alter, deface, destroy or remove the permanent serial number, manufacturer's identification plate or other permanent, distinguishing number or identification mark from any item of personal property with the intent thereby to conceal or misrepresent the identity of said item.

(b) It shall be unlawful for any person knowingly to sell, buy or be in possession of any item of personal property, not his own, on which the permanent serial number, manufacturer's identification plate or other permanent, distinguishing number or identification mark has been altered, defaced, destroyed or removed for the purpose of concealing or misrepresenting the identity of said item.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, a violation of any of the provisions of this section shall be a Class 1 misdemeanor.

(d) This section shall not in any way affect the provisions of G.S. 20-108, 20-109(a) or 20-109(b). (1977, c. 767, s. 1; 1993, c. 539, s. 106; 1994, Ex. Sess., c. 24, s. 14(c); 2009-204, s. 1.)

Effect of Amendments. — Session Laws 2009-204, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, added "Unless the conduct is covered under some other provision of law providing greater punishment," at the beginning of subsection (c).

§ 14-160.2. Alteration, destruction, or removal of serial number from firearm; possession of firearm with serial number removed.

(a) It shall be unlawful for any person to alter, deface, destroy, or remove the permanent serial number, manufacturer's identification plate, or other permanent distinguishing number or identification mark from any firearm with the intent thereby to conceal or misrepresent the identity of the firearm.

(b) It shall be unlawful for any person knowingly to sell, buy, or be in possession of any firearm on which the permanent serial number, manufacturer's identification plate, or other permanent distinguishing number or identification mark has been altered, defaced, destroyed, or removed for the purpose of concealing or misrepresenting the identity of the firearm.

(c) A violation of any of the provisions of this section shall be a Class H felony. (2009-204, s. 2.)

Editor's Note. — Session Laws 2009-204, s. 3, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-161: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(7).

§ 14-162. Removing boats.

If any person shall loose, unmoor, or turn adrift from any landing or other place wherever the same shall be, any boat, canoe, or other marine vessel, or if any person shall direct the same to be done without the consent of the owner, or the person having the lawful custody or possession of such vessel, he shall be guilty of a Class 2 misdemeanor. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (R.C., c. 14, ss. 1, 3; Code, s. 2288; 1889, c. 378; Rev., s. 3544; C.S., s. 4333; 1977, c. 729; 1993, c. 539, s. 107; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-163. Poisoning livestock.

If any person shall willfully and unlawfully poison any horse, mule, hog, sheep or other livestock, the property of another, such person shall be punished as a Class I felon. (1898-9, c. 253; Code, s. 1003; Rev., s. 3313; C.S., s. 4334; 1969, c. 1224, s. 3; 1973, c. 1388; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — As to double damages for injury to agricultural commodities or production systems, see G.S. 1-539-2B. As to molesting or injuring livestock generally, see G.S. 14-366. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-163.1. Assaulting a law enforcement agency animal, an assistance animal, or a search and rescue animal.

(a) The following definitions apply in this section:

(1) Assistance animal. — An animal that is trained and may be used to assist a "person with a disability" as defined in G.S. 168A-3. The term "assistance animal" is not limited to a dog and includes any animal trained to assist a person with a disability as provided in Article 1 of Chapter 168 of the General Statutes.

(2) Law enforcement agency animal. — An animal that is trained and may be used to assist a law enforcement officer in the performance of the officer's official duties.

(3) Harm. — Any injury, illness, or other physiological impairment; or any behavioral impairment that impedes or interferes with duties performed by a law enforcement agency animal or an assistance animal.

(3a) Search and rescue animal. — An animal that is trained and may be used to assist in a search and rescue operation.

(4) Serious harm. — Harm that does any of the following:

a. Creates a substantial risk of death.

b. Causes maiming or causes substantial loss or impairment of bodily function.

c. Causes acute pain of a duration that results in substantial suffering.

d. Requires retraining of the law enforcement agency animal or assistance animal.

e. Requires retirement of the law enforcement agency animal or assistance animal from performing duties.

(a1) Any person who knows or has reason to know that an animal is a law enforcement agency animal, an assistance animal, or a search and rescue animal and who willfully kills the animal is guilty of a Class H felony.

(b) Any person who knows or has reason to know that an animal is a law enforcement agency animal, an assistance animal, or a search and rescue animal and who willfully causes or attempts to cause serious harm to the animal is guilty of a Class I felony.

(c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal, an assistance animal, or a search and rescue animal and who willfully causes or attempts to cause harm to the animal is guilty of a Class 1 misdemeanor.

(d) Unless the conduct is covered under some other provision of law providing greater punishment, any person who knows or has reason to know that an animal is a law enforcement agency animal, an assistance animal, or a search and rescue animal and who willfully taunts, teases, harasses, delays, obstructs, or attempts to delay or obstruct the animal in the performance of its duty as a law enforcement agency animal, an assistance animal, or a search and rescue animal is guilty of a Class 2 misdemeanor.

(d1) A defendant convicted of a violation of this section shall be ordered to make restitution to the person with a disability, or to a person, group, or law enforcement agency who owns or is responsible for the care of the law enforcement agency animal or search and rescue animal for any of the following as appropriate:

(1) Veterinary, medical care, and boarding expenses for the law enforcement agency animal, the assistance animal, or the search and rescue animal.

(2) Medical expenses for the person with the disability relating to the harm inflicted upon the assistance animal.

(3) Replacement and training or retraining expenses for the law enforcement agency animal, the assistance animal, or the search and rescue animal.

(4) Expenses incurred to provide temporary mobility services to the person with a disability.

(5) Wages or income lost while the person with a disability is with the assistance animal receiving training or retraining.

(6) The salary of the law enforcement agency animal handler as a result of the lost services to the agency during the time the handler is with the law enforcement agency animal receiving training or retraining.

(6a) The salary of the search and rescue animal handler as a result of the search and rescue services lost during the time the handler is with the search and rescue animal receiving training or retraining.

(7) Any other expense reasonably incurred as a result of the offense.

(e) This section shall not apply to a licensed veterinarian whose conduct is in accordance with Article 11 of Chapter 90 of the General Statutes.

(f) Self-defense is an affirmative defense to a violation of this section.

(g) Nothing in this section shall affect any civil remedies available for violation of this section. (1983, c. 646, s. 1; 1993, c. 539, s. 108; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 258, s. 1; 2001-411, s. 1; 2005-184, s. 1; 2007-80, s. 1; 2009-460, s. 1.)

Editor's Note. — Subsection (a1), as added by Session Laws 2007-80, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2009-460, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, substituted "animal, an assistance animal, or a search and rescue animal" for "animal or an assistance animal" throughout the section; added subdivision (a)(3a); in subdivisions (d1)(1) and (d1)(3), substituted "law enforcement agency animal, the assistance animal, or the search and rescue animal" for "assistance animal or law enforcement animal"; and added subdivision (d1)(6a).

§ 14-164: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(8).

ARTICLE 24.

Vehicles and Draft Animals — Protection of Bailor against Acts of Bailee.

§ 14-165. Malicious or willful injury to hired personal property.

Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall maliciously or willfully injure or damage the same by in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a Class 2 misdemeanor. (1927, c. 61, s. 1; 1965, c. 1073, s. 1; 1993, c. 539, s. 109; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to willful and wanton injury to personal property, see G.S. 14-160.

§ 14-166. Subletting of hired property.

Any person who shall rent or hire, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sublet or rent the same to any other person, firm or corporation, shall be guilty of a Class 2 misdemeanor. (1927, c. 61, s. 2; 1965, c. 1073, s. 2; 1969, c. 1224, s. 15; 1993, c. 539, s. 110; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-167. Failure to return hired property.

Any person who shall rent or hire, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, and who shall willfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for which such property has been rented or hired, shall be guilty of a Class 2 misdemeanor.

If the value at the time of the rental or hiring of the truck, automobile, or other motor vehicle that is not returned is in excess of four thousand dollars ($4,000), the person who rented or hired it and failed to return it shall be guilty of a Class H felony. (1927, c. 61, s. 3; 1965, c. 1073, s. 3; 1969, c. 1224, s. 15; 1993, c. 539, s. 111; 1994, Ex. Sess., c. 24, s. 14(c); 2005-182, s. 1.)

CASE NOTES

Cited in Nationwide Mut. Ins. Co. v. Land, 78 N.C. App. 342, 337 S.E.2d 180 (1985).

§ 14-168. Hiring with intent to defraud.

Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a Class 2 misdemeanor. (1927, c. 61, s. 4; 1965, c. 1073, s. 4; 1969, c. 1224, s. 15; 1993, c. 539, s. 112; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-168.1. Conversion by bailee, lessee, tenant or attorney-in-fact.

Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a Class 1 misdemeanor.

If, however, the value of the property converted or secreted, or the proceeds thereof, is in excess of four hundred dollars ($400.00), every person so converting or secreting it is guilty of a Class H felony. In all cases of doubt the jury shall, in the verdict, fix the value of the property converted or secreted. (1965, c. 1073, s. 5; 1979, c. 468; 1979, 2nd Sess., c. 1316, s. 13; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 113; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-90 Compared. — This section is more limited in its scope with regard to bailees than G.S. 14-90; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while G.S. 14-90 covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between § 14-90 and this section as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

This section does not remove bailees from § 14-90 or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Previous Ownership by Named Victim an Essential Element of Crime. — An essential element of the crime of conversion by a bailee is the intent to convert or the act of conversion, which by definition requires proof that someone other than the defendant owned the relevant property, so that the State is required to prove ownership, and a proper indictment must identify as the victim a legal entity capable of owning property. State v. Woody, 132 N.C. App. 788, 513 S.E.2d 801 (1999).

Cited in State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975); Nationwide Mut. Ins. Co. v. Land, 78 N.C. App. 342, 337 S.E.2d 180 (1985); State v. Maynard, 79 N.C. App. 451, 339 S.E.2d 666 (1986); Estridge v. Guilford County Housecalls Healthcare Group, Inc., 131 N.C. App. 744, 509 S.E.2d 219 (1998); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003).

§ 14-168.2. Definitions.

For the purposes of this Article, the terms "rent," "hire" and "lease" are used to designate the letting for hire of any horse, mule or other like animal, or any buggy, wagon, truck, automobile, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value by lease, bailment, or rental agreement. (1965, c. 1073, s. 5.)

§ 14-168.3. Prima facie evidence of intent to convert property.

It shall be prima facie evidence of intent to commit a crime as set forth in G.S. 14-167, 14-168, and 14-168.1 with respect to any property other than a truck, automobile, or other motor vehicle when one who has, by written instrument, leased or rented the personal property of another:

(1) Failed or refused to return such property to its owner after the lease, bailment, or rental agreement has expired,
  a. Within 10 days, and
  b. Within 48 hours after written demand for return thereof is personally served or given by registered mail delivered to the last known address provided in such lease or rental agreement, or
(2) When the leasing or rental of such personal property is obtained by presentation of identification to the lessor or rentor thereof which is false, fictitious, or knowingly not current as to name, address, place of employment, or other identification. (1965, c. 1118; 2005-182, s. 2.)

§ 14-168.4. Failing to return rented property on which there is purchase option.

(a) It shall be a Class 2 misdemeanor for any person to fail to return rented property with intent to defeat the rights of the owner, which is rented pursuant to a written rental agreement in which there is an option to purchase the property, after the date of termination provided in the agreement has occurred or, if the termination date is the occurrence of a specified event, then that such event has in fact occurred.

(b) Intent to commit the crime set forth in subsection (a) may be presumed from the following evidence:

(1) Evidence that the defendant has disposed of the property, or has encumbered the property by allowing a security interest to be placed on the property or by delivering the property to a pawnbroker; or
(2) Evidence that the defendant has refused to deliver the property to the sheriff or other officer charged with the execution of process directed to him for its seizure, after a judgment for possession of the property or a claim and delivery order for the property has been issued; or
(3) Evidence that the defendant has moved the rented property out of state and has failed to notify the owner of the new location of the property.

However, this presumption may be rebutted by evidence from the defendant that he has no intent to defeat the rights of the owner of the property.

(c) Violations of this Article for failure to return rented property which is rented pursuant to a written rental agreement in which there is an option to purchase shall be prosecuted only under this section. (1987 (Reg. Sess., 1988), c. 1065, s. 3; 1993, c. 539, s. 114; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-168.5. Prima facie evidence of intent to convert a truck, automobile, or other motor vehicle; demand for return or payment.

(a) Prima Facie Evidence. — It shall be prima facie evidence of intent to commit a crime as set forth in G.S. 14-167, 14-168, and 14-168.1 when one who has, by written instrument, leased or rented a truck, automobile, or other motor vehicle owned by another:

(1) Failed or refused to return the vehicle to the lessor or rentor at the place specified after the lease, bailment, or rental agreement has expired, within 72 hours after written demand for the vehicle is made in accordance with subsection (b) of this section; or

(2) When the leasing or rental of the vehicle is obtained by presentation of identification to the lessor or rentor of the vehicle which is false, fictitious, or knowingly not current as to name, address, place of employment, or other identification.

(b) Method of Demand; When Effective. —

(1) Demand for return of a leased or rented truck, automobile, or other motor vehicle may be made in one of three ways:
  a. By personal service in accordance with Rule 4(j) of the North Carolina Rules of Civil Procedure.
  b. By certified mail, return receipt requested, addressed to the last known address provided in the lease, bailment, or rental agreement.
  c. By depositing the demand with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) addressed to the last known address provided in the lease, bailment, or rental agreement.

(2) Demand is effective upon hand delivery to the last known address, three days after deposit by mail (even if the demand is returned as undeliverable), or upon delivery by a designated delivery service to the last known address. (2005-182, s. 3.)

§ 14-169. Violation made misdemeanor.

Except as otherwise provided, any person violating the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1927, c. 61, s. 5; 1929, c. 38, s. 1; 1969, c. 1224, s. 15; 1993, c. 539, s. 115; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 25.

Regulating the Leasing of Storage Batteries.

§§ 14-170 through 14-176: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(4)-(10).

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses Against Public Morality and Decency.

§ 14-177. Crime against nature.

If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon. (25 Hen. VIII, c. 6; 5 Eliz., c. 17; R.C.,

c. 34, s. 6; 1868-9, c. 167, s. 6; Code, s. 1010; Rev., s. 3349; C.S., s. 4336; 1965, c. 621, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1191; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article on the law of crime against nature with particular regard to this section, see 32 N.C.L. Rev. 312 (1954).

For survey of 1974 case law on this section, see 53 N.C.L. Rev. 1037 (1975).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For note, "The Squeal Rule: Statutory Resolution and Constitutional Implications — Burdening the Minor's Right of Privacy," see 6 Duke L.J. 1325 (1984).

For note, "The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship," see 10 Campbell L. Rev. 131 (1996).

For note, "The Irrational Use of Rational Basis Review in Lawrence v. Texas: Implications for Our Society," see 26 Campbell L. Rev. 21 (2004).

For comment, "The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts," see 82 N.C.L. Rev. 723 (2004).

CASE NOTES

This section is constitutional. State v. Enslin, 25 N.C. App. 662, 214 S.E.2d 318, appeal dismissed, 288 N.C. 245, 217 S.E.2d 669 (1975), cert. denied, 425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 753 (1976). See State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980); State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

This section is constitutional, and a defendant is not entitled to quash the bill of indictment against him on grounds that it is unconstitutional because of its vagueness and overbreadth. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973); State v. Crouse, 22 N.C. App. 47, 205 S.E.2d 361 (1974).

This section is not unconstitutionally vague. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

Persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by this section. This keeps it from being unconstitutionally vague. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

The right of privacy does not prohibit the prosecution of unmarried persons for consensual fellatio done in private. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

The State, consistent with the U.S. Const., Amend. XIV, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

No authority prohibits a state on constitutional grounds from punishing under a statute such as this section individuals who commit the proscribed act in a public restroom. State v. Jarrell, 24 N.C. App. 610, 211 S.E.2d 837, cert. denied, 286 N.C. 725, 213 S.E.2d 724 (1975).

Since the decision of the United States Supreme Court in Lawrence v. Texas expressly excluded prostitution and public conduct from its holding, North Carolina was allowed to criminalize the solicitation of a sexual act it deemed a crime against nature; thus, the crime of solicitation of a crime against nature, G.S. 14-177, was not unconstitutional. State v. Pope, 168 N.C. App. 592, 608 S.E.2d 114, 2005 N.C. App. LEXIS 344 (2005), cert. denied, 359 N.C. 413, 612 S.E.2d 636 (2005).

Although G.S. 14-177 is not unconstitutional on its face, it was unconstitutional as applied to defendant's conviction since a minor was not involved, the conduct did not involve non-consensual or coercive sexual acts, the conduct did not occur in a public place, and the conduct did not involve prostitution or solicitation. State v. Whiteley, 172 N.C. App. 772, 616 S.E.2d 576, 2005 N.C. App. LEXIS 1795 (2005).

Because the crime against nature statute, G.S. 14-177, did not run afoul of the due process clause of the Fourteenth Amendment to the U.S. Constitution and the fact that appellant, a juvenile, was 14 and the girl was 12, did not exempt appellant from the statute, he was properly adjudicated delinquent based upon two acts of fellatio. In re R.L.C., 361 N.C. 287, 643 S.E.2d 920, 2007 N.C. LEXIS 417 (2007).

Purpose. — The legislative intent and purpose of this section is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality. State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Definition. — The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans per anum and per os. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

Conduct declared criminal by this section is sexual intercourse contrary to the order of nature. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Scope of Section. — This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

This section includes unnatural intercourse between male and male. State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914).

This section includes acts with animals and acts between humans per anum and per os. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

This section is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

The crime against nature includes a consensual fellatio between a man and a woman. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied and appeal dismissed, 298 N.C. 303, 259 S.E.2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

In this jurisdiction crime against nature embraces sodomy, buggery and bestiality as those offenses were known and defined at common law. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964), cert. denied, 380 U.S. 985, 85 S. Ct. 1355, 14 L. Ed. 2d 277 (1965); State v. Stokes, 1 N.C. App. 245, 161 S.E.2d 53, rev'd on other grounds, 274 N.C. 409, 163 S.E.2d 770 (1968).

Though penetration by or of a sexual organ is an essential element of the crime, the crime against nature is not limited to penetration by the male sexual organ. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

This section condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

This section and § 14-202.1 are complementary rather than repugnant or inconsistent. Section 14-202.1 condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Section 14-202.1 is not repugnant to this section so as to work a repeal in part of this section, intentionally or otherwise. The two sections are complementary rather than repugnant or inconsistent. State v. Lance, 244 N.C. 455, 94 S.E.2d 335 (1956).

Section 14-202.1 supplements this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

This section and G.S. 14-202.1 can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

And § 14-202.1 Is Not a Lesser Included Offense of the Crime Against Nature. — Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of G.S. 14-202.1 is not a lesser included offense of the crime against nature described in this section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

There was no merit to defendant's contention that the trial court lacked jurisdiction to try him under the indecent liberties with children statute, G.S. 14-202.1, because the criminal act he committed was a crime against nature prohibited by this section, since the crime against nature statute and the indecent liberties with children statute are complementary but not mutually exclusive. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Sexual Preference. — Neither by its terms nor by judicial gloss proscribes sexual preference or the status of being homosexual; in order to violate the statute, a person must commit one of the specific acts coming within the purview of the statute. Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

A simple statement descriptive of an individual's alleged sexual orientation does not as a matter of law impute to that individual commission of a crime. Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

Referring to a person as "gay" or "bisexual" is not tantamount to charging that individual with the commission of a crime. Donovan v.

Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

Crime against nature and taking indecent liberties with a child are separate and distinct offenses. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Sentencing of defendant for both crime against nature and sexual activity by a substitute parent involving the same victim did not violate the merger doctrine or subject him to double jeopardy. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Proof of penetration of or by the sexual organ is essential to conviction under this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Where evidence showed that the defendant penetrated the victim's female sexual organ with his tongue, there was sufficient evidence to overrule defendant's motion for nonsuit. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Crime against nature is not a lesser included offense of first- or second-degree sexual offense. State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983). See also, State v. Barrett, 307 N.C. 126, 302 S.E.2d 632 (1982).

Defendant's conviction of both the crime against nature and second-degree sexual offense was not error, because the crime against nature proscribed by this section requires penetration of or by the sexual organ, while second-degree sexual offense does not. State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434 (1986).

Assault with intent to commit rape and committing a crime against nature are not essentially the same offense since the elements of each offense are distinct and different. State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975).

An assault upon a woman is not a lesser degree of the crime of sodomy. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Conviction for Attempt. — Upon the trial of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. State v. Savage, 161 N.C. 245, 76 S.E. 238 (1912); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

A valid warrant or indictment is an essential of jurisdiction in a prosecution under this section. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Sufficiency of Indictment. — An indictment under this section which charges that defendant did unlawfully, willfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast is sufficient. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964), cert. denied, 380 U.S. 985, 85 S. Ct. 1355, 14 L. Ed. 2d 277 (1965); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966).

It is essential to a valid indictment in this jurisdiction that the indictment must allege that the defendant did unlawfully, willfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

It is necessary to the legal sufficiency of an indictment charging the commission of a crime against nature to state with exactitude, inter alia, the name of the person with or against whom the offense was committed, in order that there can be certitude in the statement of the accusation as will identify the offense with which the accused is sought to be charged and to protect the accused from being twice put in jeopardy for the same offense. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

Indictment charging defendant with crime against nature held sufficient under G.S. 15A-924(a)(5). State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987).

The sole testimony of an accomplice will support a conviction in a prosecution for crime against nature. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973).

Use of Anatomical Dolls to Illustrate Testimony. — The courts of this State have allowed the use of anatomical dolls in sexual abuse cases to illustrate the testimony of child witnesses; the practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony, and it conveys the information sought to be elicited while permitting the child to use a familiar item, thereby making him more comfortable. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Even though dolls were used to illustrate the testimony of a social worker rather than the abused children, the evidence was still admissible; the demonstration illustrated the social worker's testimony as to the manner in which the children communicated the accounts of sexual abuse and the social worker's demonstration of what she observed each child do with the dolls also corroborated the testimony of each child. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Instruction Defining Unnatural Sexual Intercourse. — In a prosecution of defendant for crime against nature, cunnilingus, the trial court's definition of "unnatural sexual intercourse" in the jury charge was proper and could not have caused the jury to confuse cunnilingus with sexual intercourse. State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980).

Factual basis for nolo contendere pleas to charges of sexual activity by a substitute parent and crime against nature held adequate. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Evidence Held Sufficient. — Evidence of crime against nature against child held sufficient. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Applied in State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937); State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1955); State v. Williams, 247 N.C. 272, 100 S.E.2d 500 (1957); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); State v. Walston, 259 N.C. 385, 130 S.E.2d 636 (1963); State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Wright, 263 N.C. 129, 139 S.E.2d 10 (1964); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967); State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971); State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Gray, 21 N.C. App. 63, 203 S.E.2d 88 (1974); State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975); State v. Speight, 28 N.C. App. 201, 220 S.E.2d 628 (1975); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975); State v. Sharratt, 29 N.C. App. 199, 223 S.E.2d 906 (1976); Creech v. Sparkman, 523 F. Supp. 1157 (E.D.N.C. 1981); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. Warren, 309 N.C. 224, 306 S.E.2d 446 (1983); State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 527 (1987); In re Heil, 145 N.C. App. 24, 550 S.E.2d 815, 2001 N.C. App. LEXIS 577 (2001).

Cited in State v. Reid, 230 N.C. 561, 53 S.E.2d 849 (1949); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980); State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981); State v. Shane, 304 N.C. 643, 285 S.E.2d 813 (1981); State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985); Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859 (1985); State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988); State v. Wilson, 362 N.C. 162, 655 S.E.2d 359, 2008 N.C. LEXIS 32 (2008); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008); State v. Shaffer, — N.C. App. —, 666 S.E.2d 856, 2008 N.C. App. LEXIS 1744 (2008).

§ 14-178. Incest.

(a) Offense. — A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.

(b) Punishment and Sentencing. —

(1) A person is guilty of a Class B1 felony if either of the following occurs:
  a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.
  b. The person commits incest against a child who is 13, 14, or 15 years old and the person is at least six years older than the child when the incest occurred.

(2) A person is guilty of a Class C felony if the person commits incest against a child who is 13, 14, or 15 and the person is more than four but less than six years older than the child when the incest occurred.

(3) In all other cases of incest, the parties are guilty of a Class F felony.

(c) No Liability for Children Under 16. — No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred. (1879, c. 16, s. 1; Code, s. 1060; Rev., s. 3351; 1911, c. 16; C.S., s. 4337; 1965, c. 132; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1192; 1994, Ex. Sess., c. 24, s. 14(c); 2002-119, s. 1.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Editor's Note. — The preamble to Session Laws 2002-119, provides: "Whereas, despite the progress made in modernizing laws to protect children in North Carolina, a little-known loophole exists in the General Statutes of North Carolina that has very troubling consequences for some abused children; and

"Whereas, this loophole allows far lesser penalties for perpetrators convicted of sexually assaulting their own children than for those who rape or molest other children; and

"Whereas, this unintended disparity is the result of archaic incest laws that date to 1879; statutes that were originally intended to limit intermarriage among family members but now hamper modern efforts to fight sexual abuse of children; and

"Whereas, this double standard, that essentially rewards perpetrators for the most unthinkable betrayal of a child's trust, does not reflect the values and goals of the citizens of North Carolina; and

"Whereas, criminals who sexually assault children should be prosecuted without regard to familial relationship; Now, therefore, the General Assembly of North Carolina enacts:"

Legal Periodicals. — For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

The crime of incest is purely statutory. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Incest was not indictable at common law. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925); State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Incest, although punished by the ecclesiastical courts of England as an offense against good morals, is not at common law an indictable offense. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Incest requires carnal intercourse. State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985), appeal dismissed and cert. denied, 316 N.C. 382, 342 S.E.2d 901 (1986).

Intercourse with Daughter. — A father violates this section and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963); State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850, appeal dismissed, 300 N.C. 200, 269 S.E.2d 626 (1980).

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. State v. Lawrence, 95 N.C. 659 (1886); Strider v. Lewey, 176 N.C. 448, 97 S.E. 398 (1918).

Intercourse with Daughter of Half-Sister. — It was held under former G.S. 14-179 that carnal intercourse of a man with the daughter of his half-sister was incest. State v. Harris, 149 N.C. 513, 62 S.E. 1090 (1908).

Both parties are not necessarily guilty. Strider v. Lewey, 176 N.C. 448, 97 S.E. 398 (1918).

Evidence. — The crime of felonious incest has as an element that the defendant and the other participant be related in one of three enumerated familial ways, including parent-child. Thus, to prove one element of the offense in the case at hand, it was necessary to establish the parent-child relationship and it was error to then use the evidence of this relationship to find that defendant took advantage of a position of trust or confidence. State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76, cert. denied, 337 N.C. 697, 448 S.E.2d 536 (1994).

Failure to Charge "Carnal" Knowledge. — The mere fact that indictment failed to charge "carnal" knowledge is not a fatal defect that would sustain the defendant's motion to quash the indictment. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

Corroboration of Prosecutrix' Testimony Not Required. — There is no statute providing that the testimony of the prosecutrix must be corroborated by the evidence of others in a prosecution for incest. In consequence, a conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all of the elements of the offense beyond a reasonable doubt. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

Parental Immunity Doctrine Inapplicable. — Minor plaintiffs' action against their father for willfully assaulting, abusing, molesting and raping them was improperly dismissed under the provisions of G.S. 1A-1, Rule 12(b)(6) on the ground that the action was barred by the parental immunity doctrine. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

Where a father's acts against his minor daughters constituted incest in violation of this section, second degree rape in violation of G.S. 14-27.3, and second degree sexual offense in violation of G.S. 14-27.5, and caused plaintiffs to suffer permanent physical, emotional and mental injuries, the doctrine of parental immunity will not bar a civil suit against him. Doe ex rel. Connolly v. Holt, 103 N.C. App. 516, 405 S.E.2d 807 (1991), aff'd, 332 N.C. 90, 418 S.E.2d 511 (1992).

Evidence of Acts Other Than Those Charged in Indictment. — In a prosecution for incest, evidence of acts of incestuous intercourse between the prosecuting witness and defendant other than those charged in the indictment, whether prior or subsequent thereto, is admissible to corroborate the proof of the act relied upon for conviction. State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974).

Proof of other similar acts is competent in corroboration. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

In prosecution for incest, evidence tending to show that defendant had had prior sexual contact with the prosecuting witness was reasonably probative of defendant's knowledge, opportunity, intent and plan, and was not so prejudicial as to outweigh its probative value and render it inadmissible; moreover, even if there was error in the admission of such evidence, absent a showing of a reasonable possibility that a different result would have been reached had the evidence been excluded, any possible error would be considered harmless. State v. Cameron, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Confessions of the wife to the husband are not admissible in a trial for incest. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895). But see § 8-57.

Testimony of Other Daughter as to Similar Acts. — In a prosecution under this section for an offense allegedly committed upon defendant's daughter, testimony of an older daughter that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N.C. 527, 31 S.E.2d 516 (1944).

Statements Made by Prosecutrix to Witnesses. — The trial court in an incest prosecution did not err in permitting repeated testimony by other witnesses of statements allegedly made to them by the prosecuting witness regarding defendant's acts toward her since the trial judge has wide discretion in allowing corroborative testimony. State v. Pollock, 50 N.C. App. 169, 273 S.E.2d 501 (1980).

Prosecutrix May Not Be Bastardized by Mother. — In a prosecution under this section, the married mother of the prosecutrix may not testify that defendant, a person not her husband, is the natural father of the prosecutrix, since a mother will not be permitted to bastardize her own issue and testify to illicit relations, except in an action which directly involves the parentage of the child, and, the prosecutrix having been born in wedlock, the law will conclusively presume legitimacy in the absence of evidence that the father was impotent or could not have had access. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Defendant's multiple convictions for incest were affirmed because defendant's multiple acts of incest committed against his two daughters over a course of years were not continuing offenses. State v. Shelton, 167 N.C. App. 225, 605 S.E.2d 228, 2004 N.C. App. LEXIS 2178 (2004).

Sufficiency of Evidence. — Where defendant was charged with incest in violation of this section, and the State's evidence established that defendant had sexual intercourse with his stepchild, and that defendant knew the person was related to him, the three elements of the crime of incest were sufficiently established as a matter of law and this was sufficient evidence of a violation of this section to take to a jury. State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979), cert. denied, 299 N.C. 322, 265 S.E.2d 399 (1980).

The State introduced sufficient evidence of penetration to permit a rational trier of fact to find beyond a reasonable doubt that the defendant committed the offenses of incest and rape, where the child victim testified at trial that her father had penetrated her, even though there were discrepancies in her extrajudicial statements to others and in her trial testimony with regard to the manner, extent and frequency of the penetration. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985).

Testimony of the victim's mother that defendant was the victim's father and testimony of the victim that defendant started molesting her when she was four years old provided support for defendant's incest conviction. State v. Locklear, 172 N.C. App. 249, 616 S.E.2d 334, 2005 N.C. App. LEXIS 1583 (2005).

There was sufficient evidence of defendant's overt actions beyond mere preparation in defendant's attempt to have vaginal intercourse with his daughter for purposes of an attempted statutory rape of a person who is 13, 14, or 15 years old under G.S. 14-27.7A(a) and an attempted incest charge under G.S. 14-178(a)(ii) to go to the jury; defendant's repeated asking of his daughter to have intercourse with him, when combined with his comments that he wanted to be "inside her" and be "her first," and the repeated sexual acts, constituted sufficient evidence of overt sexual behavior from which it could be inferred that defendant intended to engage in vaginal intercourse with his victim. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

There was substantial evidence to support convictions for incest under G.S. 14-178(a), and two counts of statutory sex offense of a person who was 15 years old in violation of G.S. 14-27.7A(a), because: (1) the victim testified that defendant was her biological father and identified him in open court, and her birth certificate identified defendant as her father, providing direct evidence of defendant's paternity; and (2) there was substantial direct and circumstantial evidence that defendant had vaginal intercourse or engaged in a sexual act with his daughter on multiple occasions while she was 15. State v. Ware, 188 N.C. App. 790, 656 S.E.2d 662, 2008 N.C. App. LEXIS 263 (2008).

Aggravating Factors in Sentencing. — Evidence that defendant pled guilty to one count of incest with his 15-year-old daughter, but that defendant's incestuous relationship with his daughter began when she was 12 years old supported the trial court's findings of the factor in aggravation provided for in G.S. 15A-1340.4(a)(1)j. State v. Jackson, 70 N.C. App. 782, 321 S.E.2d 169 (1984).

Applied in State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976); State v. Britt, 93 N.C. App. 126, 377 S.E.2d 79 (1989).

Cited in State v. Mizelle, 15 N.C. App. 583, 190 S.E.2d 277 (1972); State v. Hosey, 79 N.C. App. 196, 339 S.E.2d 414 (1986); State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988); State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

§ 14-179: Repealed by Session Laws 2002-119, s. 2, effective December 1, 2002.

Cross References. — For present provisions pertaining to incest between uncle and niece and nephew and aunt, see G.S. 14-178.

§ 14-180: Repealed by Session Laws 1975, c. 402.

§§ 14-181, 14-182: Repealed by Session Laws 1973, c. 108, s. 4.

§ 14-183. Bigamy.

If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be punished as a Class I felon. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (See 9 Geo. IV, c. 31, s. 22; 1790, c. 323, P.R.; 1809, c. 783, P.R.; 1829, c. 9; R.C., c. 34, s. 15; Code, s. 988; Rev., s. 3361; 1913, c. 26; C.S., s. 4342; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1193; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For note as to consequences of a voidable divorce decree, see 35 N.C.L. Rev. 409 (1957).

CASE NOTES

Constitutionality. — This section, making bigamous cohabitation in this State a felony, is valid and offends neither the federal nor State Constitutions. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

The 1913 amendment to this section, which added the words "shall thereafter cohabit with such person in this State," which words qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina, is constitutional and does not confer extraterritorial jurisdiction upon the courts. See State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917); State v. Moon, 178 N.C. 715, 100 S.E. 614 (1919).

Offense Against Society. — At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Validity of First Marriage. — That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not so invalidate the marriage that bigamy cannot be predicated thereon. State v. Robbins, 28 N.C. 23 (1845).

In a trial for bigamy, an instruction that defendant could not be convicted unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

The evidence showing that there were a number of eyewitnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed that the ceremony was valid. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

A ceremony solemnized by a Roman Catholic layman, who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc., was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in this State. State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

Burden on Defendant to Show Absence of Wife. — The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Absence for Less Than Seven Years. — A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Indictment — Averment of First Marriage. — An indictment for bigamy which charges that defendant "willfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife," sufficiently averred the first marriage. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same — Name of First Wife. — It is not necessary in an indictment for bigamy to set out the name of the first wife. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same — Averment That Defendant Was Not Divorced. — It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. State v. Norman, 13 N.C. 222 (1829); State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891); State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Same — Time and Place of Marriage. — This section does not by its language make it necessary for the indictment to state the dates of the marriages, and G.S. 15-155 expressly enacts that such a statement shall not be necessary. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907), overruled on other grounds, State v. Ray, 151 N.C. 710, 66 S.E. 204 (1909).

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found to confer jurisdiction. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907), overruled on other grounds, State v. Ray, 151 N.C. 710, 66 S.E. 204 (1909).

Venue. — Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution could be instituted in the county of their apprehension. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Admissions as to Prior Marriage. — In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Testimony of First Wife. — In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

By the express provisions of G.S. 8-57, defendant's legal wife was a competent witness before the grand jury, which was considering an indictment against defendant charging him with a violation of the provisions of this section. State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

The record book of marriage for the county or the original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Proof of Second Marriage Out of State. — If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the State, he cannot move to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Mitchell, 83 N.C. 674 (1880); State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905); State v. Barrington, 141 N.C. 820, 53 S.E. 663 (1906); State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove beyond a reasonable doubt each of the essential elements of the offense. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946).

Proof of Foreign Divorces. — Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury, but not beyond a reasonable doubt, of the bona fides of his residence in the other state. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive, and when challenged in a prosecution under this section for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the state granting their divorces and that such divorces are valid. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Proof of a divorce granted in another state upon a trial for bigamy in North Carolina courts is only evidence which should be submitted to the jury under proper instructions. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

Applied in State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

Cited in State v. Woodruff, 99 N.C. App. 107, 392 S.E.2d 434 (1990).

§ 14-184. Fornication and adultery.

If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. (1805, c. 684, P.R.; R.C., c. 34, s. 45; Code, s. 1041; Rev., s. 3350; C.S., s. 4343; 1969, c. 1224, s. 9; 1993, c. 539, s. 119; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For note on dependency tax deductions for paramours and how I.R.C. § 152(b)(5) applies to this statute, see 3 Campbell L. Rev. 133 (1981).

For note, "The Squeal Rule: Statutory Resolution and Constitutional Implications—Burdening the Minor's Right of Privacy," see 6 Duke L.J. 1325 (1984).

For note, "The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship," see 10 Campbell L. Rev. 131 (1996).

For comment, "The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts," see 82 N.C.L. Rev. 723 (2004).

CASE NOTES

History of Section. — See State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Statute of Limitations. — Adultery is subject to a two-year statute of limitations. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Offense Is Statutory. — The offense of fornication and adultery is statutory. State v.

Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949).

Protected Sexual Relationship. — Because this section makes fornication and adultery a misdemeanor in this State, the only sexual relationship the law protects is that between married partners. Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

Adultery is an aggravated species of fornication. State v. Crowell, 26 N.C. 231 (1844).

"Lewdly and lasciviously cohabit" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945); State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949); State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

A single act of illicit sexual intercourse is not fornication and adultery as defined by this section. "Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

Thus a single act of illicit sexual intercourse does not constitute fornication and adultery as defined by this section, the offense being habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other. However, the duration of the association is immaterial if the requisite habitual intercourse is established and it has been held that a period of two weeks is sufficient to constitute the offense. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

State Need Not Prove That Male Defendant and His Wife Were Separated. — In a prosecution under this section, it is not required that the State prove that the male defendant and his wife were separated. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Acquittal as to One Party. — Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. State v. Mainor, 28 N.C. 340 (1846). This holding was followed in the case of State v. Lyerly, 52 N.C. 158 (1859), and was held as law in this State until doubted in State v. Rhinehart, 106 N.C. 787, 11 S.E. 512 (1890). The question came before the court again in State v. Armistead, 54 N.C. App. 358, 283 S.E.2d 162 (1981), when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in State v. Childress, 321 N.C. 231, 362 S.E.2d 263 (1987).

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

New Trial as to One Defendant. — If both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other. State v. Parham, 50 N.C. 416 (1858).

Indictment — Use of Word "Adulterously". — The use of the word "adulterously" dispenses with the necessity of alleging that the parties were not married and were of different sexes. State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890).

Same — Use of Words "Lewdly and Lasciviously". — The words "lewdly and lasciviously" need not be used. State v. Britt, 150 N.C. 811, 63 S.E. 1056 (1909).

Same — Allegation of Criminal Intent. — The State is not called upon to allege or prove the criminal intent. State v. Cutshall, 109 N.C. 764, 14 S.E. 107 (1891).

Same — Allegation That Female Defendant Is a "Spinster". — The fact that the female is erroneously alleged to be a "spinster" is not ground of arrest of judgment. State v. Guest, 100 N.C. 410, 6 S.E. 253 (1888).

When Declarations of Codefendant Are Admissible. — While the admissions or confessions of one party are not to be received against the codefendant, it has been held that under certain circumstances such declarations are admissible when made by the female defendant in the presence of the male. See State v. Roberts, 188 N.C. 460, 124 S.E. 833 (1924).

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party was competent as an admission of acts which with other similar acts tended to prove the offense of fornication and adultery. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

The proviso in this section relates to extrajudicial declarations, and does not prevent a woman jointly charged with the offense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of nolo contendere has been accepted by the State, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948), discussed in 27 N.C.L. Rev. 365 (1949).

Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Circumstantial Evidence. — It is never essential to conviction of fornication and adultery that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

The acts of illicit intercourse may be proved by circumstantial evidence, and it is not required that even one such act be directly proven. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

It is competent to prove that either defendant had a living spouse. State v. Manly, 95 N.C. 661 (1886).

Statements and conduct prior to the offense charged are admissible. State v. Austin, 108 N.C. 780, 13 S.E. 219 (1891).

Testimony as to conduct of the parties after indictment is admissible. State v. Stubbs, 108 N.C. 774, 13 S.E. 90 (1891).

Improper Advances Made by Defendant to Another Woman. — Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her was competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Applied in State v. Miller, 214 N.C. 317, 199 S.E. 89 (1938).

Cited in Wilson v. Swing, 463 F. Supp. 555 (M.D.N.C. 1978); State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (1979); Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993).

§ 14-185: Repealed by Session Laws 1975, c. 402.

§ 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.

Any man and woman found occupying the same bedroom in any hotel, public inn or boardinghouse for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boardinghouse, shall be deemed guilty of a Class 2 misdemeanor. (1917, c. 158, s. 2; C.S., s. 4345; 1969, c. 1224, s. 3; 1993, c. 539, s. 120; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutionality. — The portion of this section making it a misdemeanor to occupy a bedroom with a member of the opposite sex for immoral purposes is too vague and indefinite to comply with constitutional due process standards. Such opinion does not apply to statutes which refer to "immoral purposes" but which also contain phrases which, by the doctrine of ejusdem generis, may be used to define "immoral purposes." The phrase "any immoral purposes" within this section is not preceded by any phrases from which could be determined the meaning of "immoral purposes." State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

This section fails to define with sufficient precision exactly what the term "any immoral purpose" may encompass. The word immoral is not equivalent to the word illegal; hence, enforcement of this section may involve legal acts which, nevertheless, are immoral in the view of many citizens. One must necessarily speculate, therefore, as to what acts are immoral. If the legislative intent of this section is to proscribe illicit sexual intercourse the statute could have specifically so provided. State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

§ 14-187: Repealed by Session Laws 1975, c. 402.

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

(a) On a prosecution in any court for keeping a disorderly house or bawdy house, or permitting a house to be used as a bawdy house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy house is also "keeper" thereof.

(b) On a prosecution in any court for keeping a disorderly house or a bawdy house, or permitting a house to be used as a bawdy house or used in such a way to make it disorderly or a common nuisance, the offense shall constitute a Class 2 misdemeanor. (1907, c. 779; C.S., s. 4347; 1969, c. 1224, s. 22; 1993, c. 539, s. 121; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutionality. — This section is constitutional. State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

Disorderly House Defined. — A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passersby. State v. Wilson, 93 N.C. 608 (1885).

Person Leasing Premises. — A person who leases a house knowing that it is to be used for disorderly and unlawful purposes is treated as a direct offender. State v. Boyd, 175 N.C. 791, 95 S.E. 161 (1918).

Powers of City Authorities. — The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill fame is discussed in State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Illustrative Cases. — The following have been held to constitute disorderly houses: A shop in which disorderly crowds assemble. See State v. Robertson, 86 N.C. 628 (1882); A store in which persons collect and disturb the neighborhood. See State v. Thornton, 44 N.C. 252 (1853).

The following have been held not to constitute disorderly houses: A private dwelling wherein an uproar was frequently raised but which disturbed few people. See State v. Wright, 51 N.C. 25 (1858). The residence of an unchaste woman. See State v. Evans, 27 N.C. 603 (1845).

Cited in State v. Hilderbran, 201 N.C. 780, 161 S.E. 488 (1931).

§§ 14-189, 14-189.1: Repealed by Session Laws 1971, c. 405, s. 4.

§§ 14-189.2, 14-190: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-190.1. Obscene literature and exhibitions.

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or
(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:
(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
(3) The material lacks serious literary, artistic, political, or scientific value; and
(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:
(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or
(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or
(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class I felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband.

(i) Nothing in this section shall be deemed to preempt local government regulation of the location or operation of sexually oriented businesses to the extent consistent with the constitutional protection afforded free speech. (1971, c. 405, s. 1; 1973, c. 1434, s. 1; 1985, c. 703, s. 1; 1993, c. 539, s. 1194; 1994, Ex. Sess., c. 24, s. 14(c); 1998-46, s. 2.)

Cross References. — As to civil remedy for sale of harmful materials to minors, see G.S. 19-9 through 19-20.

Editor's Note. — Session Laws 1971, c. 405, which enacted this section, in s. 2, effective July 1, 1971, provided: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Legal Periodicals. — For article, "Regulating Obscenity Through the Power To Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

For note on control of obscenity through enforcement of a nuisance statute, see 4 Campbell L. Rev. 139 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For article, "Obscenity: The Justices' (Not So) New Robes," see 8 Campbell L. Rev. 387 (1986).

For article, "Pornography and the First

Amendment," see 1986 Duke L.J. 589.

For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

For observation, "Why The 1985 North Carolina Obscenity Law Is Fundamentally Wrong," see 65 N.C.L. Rev. 793 (1987).

For note, "Seizing Obscenity: New York v. P.J. Video, Inc. and the Waning of Presumptive Protection," see 65 N.C.L. Rev. 799 (1987).

For comment, "Prostitution and Obscenity: A Comment Upon the Attorney General's Report on Pornography," see 1987 Duke L.J. 123.

For note, "Constitutional Law — Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under Barnes v. Glen Theatre, Inc.," see 27 Wake Forest L. Rev. 1061 (1992).

CASE NOTES

History of Section. — See State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Section Is Constitutional. — This section specifically defines the elements of obscenity and hence is not unconstitutional on grounds of vagueness or overbreadth. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

The dissemination of obscenity is not protected by the State and federal constitutions; thus, this section by its terms does not infringe upon the rights to disseminate protected material. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Motion to quash warrant grounded on the alleged unconstitutionality of this section would be denied. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

This section is constitutional. State v. Johnson, 20 N.C. App. 699, 202 S.E.2d 479 (1974); State v. Smith, 89 N.C. App. 19, 365 S.E.2d 631, rev'd on other grounds, 323 N.C. 439, 373 S.E.2d 435 (1988); State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

This section is not substantially overbroad and gives sufficiently definite warning of the proscriptions therein. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

This section is aimed at the dissemination of obscenity which is not protected by any constitutional guarantees; the statute is not aimed at mere possession of obscenity in the privacy of one's own home. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

It is not innocent but calculated dissemination of obscene material which is prohibited by this section, and accordingly the scienter requirement therein is constitutionally sufficient. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

It is not constitutionally mandated for a state to statutorily create a right to a prompt adversary proceeding on the obscenity of material seized and retained as evidence pending a trial wherein said evidence will be introduced; the statutory scheme of this section does not constitute a prior restraint merely because there is no provision for an adversary hearing which a defendant bears the burden of requesting. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Subsection (b) of this section is not unconstitutional on its face. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Subsections (a) and (d) of this section are to be read in pari materia with subsection (c), and thus subsection (c) is not unconstitutionally vague. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

This section and G.S. 14-190.13, 14-190.16 and 14-190.17 are constitutional as drawn; while potentially beyond constitutional bounds if improperly applied, these statutes are not so substantially overbroad as to require constitutional invalidation on their face. Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987).

Neither this section nor judge's instructions contravened the Constitution by failing to specify what is meant by "community." State v. Mayes, 86 N.C. App. 569, 359 S.E.2d 30, petition allowed as to additional issues, 321 N.C. 122, 361 S.E.2d 599 (1987), aff'd, 323 N.C. 159, 371 S.E.2d 476, cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1988).

The constitutionality of this section is no longer in doubt. State v. Smith, 87 N.C. App. 217, 360 S.E.2d 495 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 667 (1988).

Subsection (b) of this section is not rendered unconstitutional by failing to require the use of a "statewide" community standard in determining what materials are obscene. State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 469, 368 S.E.2d 385 (1988).

Contention that the exclusion of the term "educational" from subdivision (b)(3) of this section rendered the provision invalid as a violation of the right to education guaranteed by N.C. Const., Art. I, § 15 was without merit. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

This section is neither vague nor overbroad because of the specificity with which it defines which types of "sexual conduct" are considered obscene. State v. Cinema Blue of Charlotte, Inc., 98 N.C. App. 628, 392 S.E.2d 136, appeal dismissed, 327 N.C. 142, 394 S.E.2d 181 (1990), cert. denied, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1042 (1991).

Constitutionality of 1985 Amendment. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

N.C. Const., Art. I, §§ 14 and 19 do not require that a statewide standard be judicially incorporated into this section in order to render the statute facially valid. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

Sections 14-190.1 to 14-190.8 made material and substantial changes in North Carolina law prohibiting the dissemination of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

And Section 14-189.1 Was Not Continued in Effect. — Session Laws 1971, c. 405, which repealed G.S. 14-189.1, did not substantially reenact it, therefore it was not continued in effect. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

There is nothing in Session Laws 1971, c. 405, which repealed G.S. 14-189.1 outright and enacted this section, to indicate an intent to leave the old law unrepealed, or to reaffirm it. On the contrary, the clear implication is that the legislature intended to get rid of a law of dubious constitutionality. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The changes made in the 1971 Act evidence the legislature's apprehension that G.S. 14-189.1 did not meet the requirements of the federal Constitution. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The enactment of this section was an obvious attempt to provide a new law which would meet the latest tests enunciated by the United States Supreme Court in order that State law-enforcement officers might proceed with assurance against public dissemination and pandering of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

Application of 1973 amendment to defendants arrested prior to the amendment violated neither due process nor the ex post facto doctrine as the materials had to be found obscene under the doctrines of both Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, rehearing denied, 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128 (1973), which precipitated the 1973 amendment and "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), the pre-1973 obscenity test in order to convict. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

County or Municipal Ordinance Relating to Obscenity. — Nothing in G.S. 14-190.1 to 14-190.9, statewide laws relating to obscene literature and exhibitions and to indecent exposure, expresses or indicates an intent by the General Assembly to preclude cities and towns or counties from enacting and enforcing ordinances requiring a higher standard of conduct or condition within their respective jurisdictions. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972), wherein the Supreme Court declined to express any opinion as to whether a county or municipal ordinance, otherwise valid, may constitutionally prohibit and make punishable an exhibition or the dissemination of materials found to be "obscene" under the standards of the community in which such ordinance applies, though not "obscene" as judged by the "contemporary national community standards."

This section specifically defines the elements of obscenity. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Effect of U.S. Supreme Court Decisions. — The United States Supreme Court, in the interest of strengthening powers to regulate pornography, did not elect to eliminate constitutionally valid law that would otherwise be available in prosecuting pending obscenity cases. State v. Bryant, 20 N.C. App. 223, 201

S.E.2d 211, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Definitions in U.S. Supreme Court Cases to Be Considered. — In appellate review, the court shall consider both definitions of obscenity in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, rehearing denied, 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128 (1973), and "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966). If the film is not obscene under both of these standards the charges must be dismissed. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211, aff'd, State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971), cert. denied, State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

Construction of Section to Conform to Guidelines Set by U.S. Supreme Court. — The broad terms in which obscene material was defined in subsection (b) of this section before the 1973 amendment fall far short of the United States Supreme Court's requirement that the sexual conduct which may be deemed obscene and patently offensive must be specifically defined. However, in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419 (1973), the United States Supreme Court held that where state obscenity statutes as written do not define what sexual conduct may be deemed obscene and patently offensive with sufficient specificity to comply with the guidelines set forth in that case, the state courts should be afforded the opportunity by construction to confine the obscene matter prohibited by their statutes to "hard-core" pornography. Thus this section as it stood before the 1973 amendment would be construed to prohibit as obscene only material consisting of the following: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

A conviction under this section is rendered constitutionally invalid if the statute is not applied substantially in accordance with the test in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed. 2d 419, rehearing denied, 414 U.S. 881, 94 S. Ct. 26, 38 L. Ed. 2d 128 (1973), both as initially formulated and as subsequently construed and explained by the United States Supreme Court. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Subsection (b) of this section requires three factual findings before material can be defined as obscene. First, the jury must find that the material depicts "sexual conduct" in a patently offensive way. This requires a two-part inquiry: (1) Does the material in question contain descriptions or depictions of sexual conduct defined in subsection (c), and if so, then (2) is the sexual conduct depicted or described in a "patently offensive way?" Second, the jury must find that the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex. Third, the jury must find that the material lacks serious literary, artistic, political or scientific value. State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264 (1987), rev'd on other grounds, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

This section specifically defines the acts of "sexual conduct" the portrayal of which may be found obscene if otherwise in violation of the statute. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

Test as to Value. — The test is not whether a material has any value, but whether it has "serious" scientific, artistic, literary or political value. State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 467, 368 S.E.2d 385 (1988).

Application of Statewide Standard Not Required. — Under this section, trial court does not err by failing to charge the jury to apply a "statewide" community standard. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Films which are stark portrayals of sex acts without a suggested theme or purpose other than to portray the acts in the most blatant manner, and which exhibit a morbid interest in nudity and portray sex acts far beyond customary limits of candor in description or representation of such matters, are patently offensive "hard-core" portrayals of sexual conduct proscribed by this section which regulates dissemination of obscene materials in a public place. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Photographs can be so obscene that the fact is incontrovertible. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

There was sufficient evidence to deny defendant's motion to dismiss the charge of using a minor in obscenity because a photograph the State introduced into evidence depicted defendant and a naked child in a sexually suggestive pose. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

Application of More Stringent Criteria

Than Constitutionally Required. — Where there was ample evidence to support the jury finding that films were "utterly without redeeming social value," more stringent criteria than the present test of "lacking serious literary, artistic, political or scientific value," the fact that the prosecution in these cases was required to meet the more difficult test gives these defendants no ground for complaint. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Although whether material alleged to be obscene is patently offensive may now be determined by "contemporary community standards" rather than by "contemporary national community standards," the fact that the prosecution was required to establish and did establish that films were patently offensive when tested by "contemporary national community standards" affords defendant no ground of complaint, since the prosecution was required to meet a more difficult test. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Positive and Negative Findings Required. — This section, in addition to requiring positive findings on the questions of offensive display of sexual conduct patently offensive to the average person, requires an additional negative finding that the material lacks serious literary, artistic, political, educational or scientific value. State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

What Level of Scienter Must Be Proved. — This section is neither a specific intent statute requiring proof that defendant knew the legal status of the materials he disseminated, nor, on the other hand, does it impose strict liability for disseminating obscenity. Instead, the statute requires just the intermediate level scienter proof: proof that defendant knew the nature and content of the materials purveyed. State v. Smith, 87 N.C. App. 217, 360 S.E.2d 495 (1987), cert. denied, 321 N.C. 478, 364 S.E.2d 667 (1988).

Finding of Intent and Guilty Knowledge Required for Conviction. — This section requires a finding of intent and guilty knowledge before a defendant may be convicted for dissemination of obscenity in a public place. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

Under subsection (a) of this section, the prosecutor must prove beyond a reasonable doubt that the person charged "intentionally" disseminated obscenity. This standard requires findings of both "intent" and "guilty knowledge." State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 469, 368 S.E.2d 385 (1988).

Guilty knowledge requires not only knowledge of the character or nature of the materials, but also knowledge of their content. State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 469, 368 S.E.2d 385 (1988).

Evidence held sufficient to permit a reasonable inference that defendant had knowledge of the contents of the materials in question. State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 469, 368 S.E.2d 385 (1988).

Evidence, when viewed in the light most favorable to the state, held to constitute sufficient circumstantial evidence to allow a reasonable inference that defendant store manager knew the character and content of the materials she disseminated. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

The State is not required to offer affirmative testimony concerning each of the statutory criteria; the materials themselves are sufficient evidence for a determination of the question of obscenity. State v. Von Wilds, 88 N.C. App. 69, 362 S.E.2d 605 (1987), cert. denied, 322 N.C. 329, 368 S.E.2d 873 (1988). But see State v. Smith, 323 N.C. 439, 373 S.E.2d 435 (1988).

The trial court did not err in failing specifically to define the term "community," or to instruct the jury to reach a consensus as to the geographic bounds of the community standards they were to apply. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

Availability of Similar Material Not Sufficient to Show Community Acceptance. — Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance; therefore, the trial court did not err in refusing to admit into evidence two magazines purchased by a private investigator in a local convenience store for comparison by the jury with the two allegedly obscene magazines which were the subject of the trial. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

Notice of Nature of Material and Protection Against Exposure to Juveniles. — In dissemination of obscenity case, court properly denied request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the U.S. Const., Amends. I and XIV, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Possession of Obscenity in Own Home Not Prohibited. — This section does not authorize the issuance of criminal process for mere possession of obscenity in the privacy of one's own home. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Single Sale of Multiple Items Spawns One Indictment. — A single sale of multiple obscene materials in contravention of this section does not spawn multiple indictments. State v. Smith, 323 N.C. 439, 373 S.E.2d 435 (1988).

Despite the number of obscene materials sold at one time, a defendant may not be convicted of more than one offense for each transaction. State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (1996).

The fact that defendant sold two obscene magazines did not transform his crime into a multi-offense situation. State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (1996).

Trial court's exclusion of "comparable materials" offered to show that the materials for which defendant was prosecuted were not patently offensive and did not appeal to a prurient interest in sex was not error where three of the magazines in question were involved in prosecutions in Durham County and thus were of little relevance in establishing the community standard in Catawba County, and where although the fourth magazine was involved in a Catawba County case, in which the person charged was acquitted, there was no evidence that the acquittal was based on a jury finding that the material was not obscene. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Exclusion of Survey Results Upheld. — In a prosecution under this section, the trial court properly excluded the results of a survey amounting to little more than a referendum on the desirability of the U.S. Const., Amend. I and this section, as the issue which the jury was to decide was whether the average adult, applying contemporary community standards, would find that the magazines in question appealed to a prurient interest in sex in a patently offensive manner. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (1988), cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

In prosecution for dissemination of obscene material, the trial court did not err in excluding certain evidence and expert testimony proffered by the defendant concerning a survey of 400 adults in 41 counties about pornography, where the excluded survey questions had no relevance to what the community considered obscene. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

The State is not required to offer affirmative testimony concerning each of the statutory criteria; the materials themselves are sufficient evidence for a determination of the question of obscenity. State v. Von Wilds, 88 N.C. App. 69, 362 S.E.2d 605 (1987).

Witness Held Qualified to Testify as an Expert. — Where the expert witness had years of experience in teaching speech communication, including the use of sexually explicit materials, at a state university, he had used magazines of the type at issue here throughout his teaching career to assist students in the understanding and application of the U.S. Const., Amend. I and state law relating to obscenity, and he had made a specific study of the subject, he was qualified to give his expert opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

Discretion of Court in Admission of Expert Testimony. — While expert testimony is admissible in obscenity trials, the trial court retains wide discretion in its determination to admit and exclude evidence. State v. Anderson, 85 N.C. App. 104, 354 S.E.2d 264, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548, rev'd on other grounds, 322 N.C. 22, 366 S.E.2d 459 (1988).

While the trial court erred in refusing to permit the expert witness to testify that he had made a systematic study under accepted methodology of sexually explicit materials with relation to U.S. Const., Amend. I and this section, and that based on this study, he held the opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex, the error was harmless because another expert witness testified that the magazines were not patently offensive and that they did not appeal to the prurient interest in sex and that they had artistic and scientific value. State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), cert. denied, 488 U.S. 1009, 109 S. Ct. 792, 102 L. Ed. 2d 784 (1989).

Exclusion of Expert Testimony Upheld. — Fact that expert "found adult material" at several locations in the county did not provide a sufficient basis to support the admission of his expert testimony concerning whether the average adult in the community would find the materials which defendant was accused of selling to be patently offensive. His study was simply too unfocused and unspecific to provide him with a sufficient basis to give an expert opinion as to whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive. Thus, the trial court properly exercised its discretion by excluding his expert opinion testimony concerning whether the magazines in question were patently offensive to the average adult, applying contemporary community standards, on the ground that he was no better qualified than the jury to address the question and could not assist the jury. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, cert. denied, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988).

A proper jury charge under this section must direct the jury to (1) determine patent offensiveness, like appeal to prurient interest, by applying community standards, and (2) determine value from each work "taken as a whole," and decide whether a reasonable person would find serious literary, artistic, political, or scientific value in the material, taken as a whole. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Jury instruction on the definition of obscenity derived solely from this section is necessarily incomplete and inadequate. State v. Watson, 88 N.C. App. 624, 364 S.E.2d 683, cert. denied, 322 N.C. 485, 370 S.E.2d 235 (1988).

Erroneous Instruction Held Harmless. — In a prosecution under this section, the trial court erred in instructing the jury to assess the materials' value based on their "own views," rather than on a reasonable man test. However, this error would be deemed harmless where the appellate court, having examined the materials, concluded that no rational juror, properly instructed, could find value in them. State v. Roland, 88 N.C. App. 19, 362 S.E.2d 800 (1987), aff'd, 322 N.C. 469, 368 S.E.2d 385 (1988).

Case Properly Submitted to Jury. — Films shown in defendants' place of business which had no plot, no real motive and no objectives other than to appeal to the prurient interest in sex were uncontrovertibly obscene and exhibition of such films was not protected by the U.S. Const., Amends. I and XIV; therefore, the trial court did not err in submitting the case to the jury in an action under this section. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Disseminating obscene material to a child victim under G.S. 14-190.1(a)(4) charge properly went to a jury as: (1) the victim was able to describe in detail the pictures defendant showed to the victim on defendant's computer; (2) when presented with the state's evidence, the victim testified that the photographs were substantially similar to those shown to the victim by defendant; (3) the specific photographs were found on several disks seized from defendant's storage unit; and (4) the photographs that the victim testified about showed nude men and women, in which the women appeared young in age and had blonde hair, and in which the men and women were engaged in a sexual act. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Conditions of Probation. — Where defendant had been convicted of disseminating obscene materials, trial court did not abuse its discretion when it imposed as a condition of defendant's probation that he refrain from "working in any retail establishment that sells sexually explicit materials." State v. Johnston, 123 N.C. App. 292, 473 S.E.2d 25 (1996).

Applied in State v. Horn, 285 N.C. 82, 203 S.E.2d 36 (1974); State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Cited in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977); U.T., Inc. v. Brown, 457 F. Supp. 163 (W.D.N.C. 1978); Suggs v. Brannon, 804 F.2d 274 (4th Cir. 1986); Cinema Blue of Charlotte, Inc. v. Gilchrist, 887 F.2d 49 (4th Cir. 1989); State v. Treadwell, 99 N.C. App. 769, 394 S.E.2d 245 (1990); St. John v. North Carolina Parole Comm'n, 764 F. Supp. 403 (W.D.N.C. 1991); State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993); Durham Video & News, Inc. v. Durham Bd. of Adjustment, 144 N.C. App. 236, 550 S.E.2d 212, 2001 N.C. App. LEXIS 426 (2001); State v. Howell, 169 N.C. App. 58, 609 S.E.2d 417, 2005 N.C. App. LEXIS 524 (2005); State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006); State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

§ 14-190.2: Repealed by Session Laws 1985, c. 703, s. 2.

§ 14-190.3: Repealed by Session Laws 1985, c. 703, s. 3.

§ 14-190.4. Coercing acceptance of obscene articles or publications.

No person, firm or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book, or publication which is obscene within the meaning of G.S. 14-190.1; nor shall any person, firm or corporation deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such articles, books, or publications, or by reason of the return thereof. Violation of this section is a Class 1 misdemeanor. (1971, c. 405, s. 1; 1985, c. 703, s. 4; 1993, c. 539, s. 122; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

§ 14-190.5. Preparation of obscene photographs, slides and motion pictures.

Every person who knowingly:

(1) Photographs himself or any other person, for purposes of preparing an obscene film, photograph, negative, slide or motion picture for the purpose of dissemination; or

(2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for the purpose of dissemination,

shall be guilty of a Class 1 misdemeanor. (1971, c. 405, s. 1; 1985, c. 703, s. 5; 1993, c. 539, s. 123; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

§ 14-190.6. Employing or permitting minor to assist in offense under Article.

Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a Class I felony. (1971, c. 405, s. 1; 1983, c. 916, s. 2; 1985, c. 703, s. 6.)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

For comment, "Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Evidence Sufficient. — There was sufficient evidence to deny defendant's motion to dismiss the charge of using a minor in obscenity because a photograph the State introduced into evidence depicted defendant and a naked child in a sexually suggestive pose. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

Double Jeopardy Not Shown. — Defendant's right to be free from double jeopardy was not violated because none of the elements for indecent liberties with a child and using a minor in obscenity were the same; therefore, defendant did not receive ineffective assistance of counsel for failure to raise the double jeopardy argument. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

§ 14-190.7. Dissemination to minors under the age of 16 years.

Every person 18 years of age or older who knowingly disseminates to any minor under the age of 16 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a Class I felony. (1971, c. 405, s. 1; 1977, c. 440, s. 2; 1985, c. 703, s. 7.)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Evidence Sufficient to Withstand Motion to Dismiss. — There was enough evidence that defendant provided obscene and harmful materials to minors to carry those charges to the jury; thus, the trial court's denial of defendant's motion to dismiss the charges of dissemination to minors under the age of 16 was proper. State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

Cited in State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

§ 14-190.8. Dissemination to minors under the age of 13 years.

Every person 18 years of age or older who knowingly disseminates to any minor under the age of 13 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be punished as a Class I felon. (1971, c. 405, s. 1; 1977, c. 440, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 175, ss. 7, 10; c. 720, ss. 4, 10; 1985, c. 703, s. 8; 1993, c. 539, s. 1195; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which substantially amended this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Cited in State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987).

§ 14-190.9. Indecent exposure.

(a) Unless the conduct is punishable under subsection (a1) of this section, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, except for those places designated for a public purpose where the same sex exposure is incidental to a permitted activity, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a Class 2 misdemeanor.

(a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony. An offense committed under this subsection shall not be considered to be a lesser included offense under G.S. 14-202.1.

(b) Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding.

(c) Notwithstanding any other provision of law, a local government may regulate the location and operation of sexually oriented businesses. Such local regulation may restrict or prohibit nude, seminude, or topless dancing to the extent consistent with the constitutional protection afforded free speech. (1971, c. 591, s. 1; 1993, c. 301, s. 1; c. 539, s. 124; 1994, Ex. Sess., c. 24, s. 14(c); 1998-46, s. 3; 2005-226, s. 1.)

Editor's Note. — Session Laws 1971, c. 591, which enacted this section, in s. 2, provided: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Legal Periodicals. — For article discussing whether buttocks are properly classified as private parts within the meaning of this section, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

This section is not unconstitutional on its face. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

Nudity Is Conduct Subject to Regulation. — When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

This section is separate and apart from the general obscenity statutes. — This section was enacted by passage of Chapter 591 of the 1971 Session Laws, and is separate and apart from those statutes dealing with the dissemination of obscenity (G.S. 14-190.1 through 14-190.8), all of which were enacted by passage of Chapter 405 of the 1971 Session Laws. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

This section did not preempt a county ordinance regulating the location of adult and sexually oriented businesses. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

Conduct Is Not Required to Be "Obscene" or "Indecent". — This section, like its predecessors, simply declares the act of exposing one's private parts in a public place in the presence of persons of the opposite sex, or permitting or aiding or abetting another in doing so, to be a misdemeanor. The statute does not use the term "obscene" and for that matter does not even require the act of exposing one's private parts in public to be "indecent." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

And Court Is Not Concerned with Definitions of "Obscene" and "Obscenity". — Since this section does not involve the concept of "obscenity" — the definition of which has given both the federal and State courts so much difficulty — the North Carolina court is not concerned with the many and often conflicting decisions attempting to define "obscene" or "obscenity." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Taking Part in Immoral Show, etc., Is Covered by Obscenity Statutes. — In 1971, the General Assembly amended the obscenity statutes and the indecent exposure statute. In amending the indecent exposure statute the prohibition against procuring or "taking part in any immoral show, exhibition or performance where indecent, immoral, or lewd dances are conducted in any booth, tent, room or other public or private place to which the public is invited ..." was deleted. This proscription was placed in the obscenity statutes and is covered by G.S. 14-190.1, particularly subdivision (2) of subsection (a) thereof. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

Viewers of Exposure Need Not Be Unwilling. — There is nothing whatsoever in the present or former indecent exposure statutes that in any way requires the viewers of the exposure of one's private parts to be unwilling observers. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

An open parking lot of a business is a public place. State v. Streath, 73 N.C. App. 546, 327 S.E.2d 240, cert. denied, 313 N.C. 513, 329 S.E.2d 402 (1985).

Creek embankment was a "public place"; although located adjacent to the victims' back yard, it was a place where children played, where anyone could go by walking through the back yard, and where no signs of a "No Trespassing" nature were posted. State v. Fusco, 136 N.C. App. 268, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

Intentional exposure while sitting in an automobile in a public place constitutes exposure in a public place. State v. Streath, 73 N.C. App. 546, 327 S.E.2d 240, cert. denied, 313 N.C. 513, 329 S.E.2d 402 (1985).

Private Parts. — "Private parts" include the external organs of sex and excretion. State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998).

Buttocks Not Private Parts. — Buttocks are not private parts within the meaning of this section. State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998).

"Mooning." — Evidence was sufficient to support a conviction under this section, where, as the defendant "mooned" the victim, he was bent over at the waist with his short pants at his ankles and with no other clothing on except a baseball cap, so that, even if the defendant did not see any of the defendant's private parts, the jury could nonetheless find that they were exposed. State v. Fly, 348 N.C. 556, 501 S.E.2d 656 (1998).

Victim testimony is not necessary to substantiate the charge of indecent exposure where other testimony established that defendant was exposing himself and that a female was present and could have seen had she looked. State v. Fusco, 136 N.C. App. 268, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

Defendant's placing of the witness' hand on his bare private parts, whether seen or not, necessarily involves exposure. State v. Streath, 73 N.C. App. 546, 327 S.E.2d 240, cert. denied, 313 N.C. 513, 329 S.E.2d 402 (1985).

Warrant Must Allege Exposure in Presence of Person of Opposite Sex. — When one of the essential elements of the offense created by this section is that the exposure of the private parts be "in the presence of any other person or persons, of the opposite sex," and the warrants fail to so charge, such omission is fatal, and the warrants must be quashed. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Aiding and Abetting. — Both former G.S. 14-190 and this section clearly and expressly proscribe the conduct for which defendant was arrested, namely, aiding or abetting other persons in willfully exposing their private parts in the presence of other persons of the opposite sex and in a public place. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Where four females willfully exhibited their private parts to an audience of some seventy-five males in a public place, and defendant aided and abetted in such exposure, such conduct constituted a misdemeanor under this section. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Inclusion of a sentence focusing on viewability as part of the court's overall instruction on the meaning of "public place" was not error. State v. Fusco, 136 N.C. App. 268, 523 S.E.2d 741, 1999 N.C. App. LEXIS 1377 (1999).

Cited in State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972); Freewood Assocs. v. Davie County Zoning Bd. of Adjustment, 28 N.C. App. 717, 222 S.E.2d 910 (1976); State v. Freeman, 303 N.C. 299, 278 S.E.2d 207 (1981); State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

§§ 14-190.10 through 14-190.12: Repealed by Session Laws 1985, c. 703, s. 9.

Cross References. — See now G.S. 14-190.13 to 14-190.20.

§ 14-190.13. Definitions for certain offenses concerning minors.

The following definitions apply to G.S. 14-190.14, displaying material harmful to minors; G.S. 14-190.15, disseminating or exhibiting to minors harmful material or performances; G.S. 14-190.16, first degree sexual exploitation of a minor; G.S. 14-190.17, second degree sexual exploitation of a minor; G.S. 14-190.17A, third degree sexual exploitation of a minor; G.S. 14-190.18, promoting prostitution of a minor; G.S. 14-190.19, participating in prostitution of a minor.

(1) Harmful to Minors. — That quality of any material or performance that depicts sexually explicit nudity or sexual activity and that, taken as a whole, has the following characteristics:

a. The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest of minors in sex; and

b. The average adult person applying contemporary community standards would find that the depiction of sexually explicit nudity or sexual activity in the material or performance is patently offensive to prevailing standards in the adult community concerning what is suitable for minors; and

c. The material or performance lacks serious literary, artistic, political, or scientific value for minors.

(2) Material. — Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words.

(3) Minor. — An individual who is less than 18 years old and is not married or judicially emancipated.

(4) Prostitution. — Engaging or offering to engage in sexual activity with or for another in exchange for anything of value.

(5) Sexual Activity. — Any of the following acts:

a. Masturbation, whether done alone or with another human or an animal.

b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.

c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.

d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.

e. Excretory functions; provided, however, that this sub-subdivision shall not apply to G.S. 14-190.17A.

f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

g. The lascivious exhibition of the genitals or pubic area of any person.

(6) Sexually Explicit Nudity. — The showing of:

a. Uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast, except as provided in G.S. 14-190.9(b); or

b. Covered human male genitals in a discernibly turgid state. (1985, c. 703, s. 9; 1989 (Reg. Sess., 1990), c. 1022, s. 2; 1993, c. 301, s. 2; 2008-218, s. 1.)

Cross References. — As to duty of film and photographic print processor or computer technician to report film or computer images containing pictures of minors engaging in sexual activity, see G.S. 66-67.4.

Editor's Note. — Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-218, s. 1, effective December 1, 2008, and applicable to offenses committed on or after that date, made a minor grammatical change in the introductory paragraph; and added subdivision (5)g.

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Section 14-190.17 and this section are not unconstitutionally vague and provide fair notice of their prohibitions. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Subdivision (5)c of this section is not substantially overbroad and comports with the requirement stated in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L. Ed. 2d 1113 (1982), that there must be limits placed on the category of sexual conduct. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

This section and G.S. 14-190.1, 14-190.16, and 14-190.17 are constitutional as drawn; while potentially beyond constitutional bounds if improperly applied, these statutes are not so substantially overbroad as to require constitutional invalidation on their face. Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987).

G.S. 14-1910.13 was held to be constitutional; the appellate court disagreed with defendant that the statutes were overbroad because they did not extend the images to minors which did not require a live minor for their production and because they prohibited material that was accepted by the community. State v. Howell, 169 N.C. App. 58, 609 S.E.2d 417, 2005 N.C. App. LEXIS 524 (2005).

Cited in State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

OPINIONS OF ATTORNEY GENERAL

Effective Date. — The portion of 1989 (Reg. Sess., 1990), c. 1022 which provided that c. 1022 is effective October 1, 1989, is unconstitutional and cannot be enforced. That defect, however, does not render the act unconstitutional. The effect is to make the act effective the day it was passed (July 27, 1990). See opinion of the Attorney General to Senator Connie Wilson, North Carolina General Assembly, 60 N.C.A.G. 34 (1990).

§ 14-190.14. Displaying material harmful to minors.

(a) Offense. — A person commits the offense of displaying material that is harmful to minors if, having custody, control, or supervision of a commercial establishment and knowing the character or content of the material, he displays material that is harmful to minors at that establishment so that it is open to view by minors as part of the invited general public. Material is not considered displayed under this section if the material is placed behind "blinder racks" that cover the lower two thirds of the material, is wrapped, is placed behind the counter, or is otherwise covered or located so that the portion that is harmful to minors is not open to the view of minors.

(b) Punishment. — Violation of this section is a Class 2 misdemeanor. Each day's violation of this section is a separate offense. (1985, c. 703, s. 9; 1993, c. 539, s. 125; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

§ 14-190.15. Disseminating harmful material to minors; exhibiting harmful performances to minors.

(a) Disseminating Harmful Material. — A person commits the offense of disseminating harmful material to minors if, with or without consideration and knowing the character or content of the material, he:

(1) Sells, furnishes, presents, or distributes to a minor material that is harmful to minors; or

(2) Allows a minor to review or peruse material that is harmful to minors.

(b) Exhibiting Harmful Performance. — A person commits the offense of exhibiting a harmful performance to a minor if, with or without consideration and knowing the character or content of the performance, he allows a minor to view a live performance that is harmful to minors.

(c) Defenses. — Except as provided in subdivision (3), a mistake of age is not a defense to a prosecution under this section. It is an affirmative defense to a prosecution under this section that:

(1) The defendant was a parent or legal guardian of the minor.

(2) The defendant was a school, church, museum, public library, governmental agency, medical clinic, or hospital carrying out its legitimate function; or an employee or agent of such an organization acting in that capacity and carrying out a legitimate duty of his employment.

(3) Before disseminating or exhibiting the harmful material or performance, the defendant requested and received a driver's license, student identification card, or other official governmental or educational identification card or paper indicating that the minor to whom the material or performance was disseminated or exhibited was at least 18 years old, and the defendant reasonably believed the minor was at least 18 years old.

(4) The dissemination was made with the prior consent of a parent or guardian of the recipient.

(d) Punishment. — Violation of this section is a Class 1 misdemeanor. (1985, c. 703, s. 9; 1993, c. 539, s. 126; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Evidence Sufficient to Withstand Motion to Dismiss. — There was enough evidence that defendant provided obscene and harmful materials to minors to carry those charges to the jury; thus, the trial court's denial of defendant's motion to dismiss the charges of disseminating harmful material to minors was proper. State v. Hill, 179 N.C. App. 1, 632 S.E.2d 777, 2006 N.C. App. LEXIS 1636 (2006).

§ 14-190.16. First degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he:

(1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or

(4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class C felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1196; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(o); 2008-117, s. 3; 2008-218, s. 2.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (d).

Session Laws 2008-218, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (d).

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

This section and G.S. 14-190.1, 14-190.13 and 14-190.17 are constitutional as drawn; while potentially beyond constitutional bounds if improperly applied, these statutes are not so substantially overbroad as to require constitutional invalidation on their face. Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987).

The State has an interest of surpassing importance in the health, safety and welfare of minors; this section and G.S. 14-190.17 are sufficiently narrowly tailored toward said interests and require the exploitation of a live minor to sustain convictions thereunder. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Prior Restraints. — The proscriptions contained in this section and G.S. 14-190.17 do not constitute prior restraints. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

There is a scienter requirement in this section and G.S. 14-190.17. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Visual Representation. — When this section and G.S. 14-190.17 refer to a visual representation of a minor, they are referring to a representation of a live person under 18 years of age. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

§ 14-190.17. Second degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of second degree sexual exploitation of a minor if, knowing the character or content of the material, he:

(1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or

(2) Distributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class E felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1197; 1994, Ex. Sess., c. 24, s. 14(c); 2008-117, s. 4; 2008-218, s. 3.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class E felony" for "Class F felony" in subsection (d).

Session Laws 2008-218, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class E felony" for "Class F felony" in subsection (d).

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

This section and G.S. 14-190.13 are not unconstitutionally vague and provide fair notice of their prohibitions. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

This section and G.S. 14-190.1, 14-190.13 and 14-190.16 are constitutional as drawn; while potentially beyond constitutional bounds if improperly applied, these statutes are not so substantially overbroad as to require constitutional invalidation on their face. Cinema I Video, Inc. v. Thornburg, 320 N.C. 485, 358 S.E.2d 383 (1987).

Double Jeopardy. — Possessing child pornography images and receiving the images did not amount to the same offense, and punishing defendant for exploitation of a minor under G.S. 14-190.17 for both possessing and receiving the same illicit images did not violate defendant's double jeopardy rights. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

The State has an interest of surpassing importance in the health, safety and welfare of minors; G.S. 14-190.16 and this section are sufficiently narrowly tailored toward said interests and require the exploitation of a live minor to sustain convictions thereunder. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Prior Restraints. — The proscriptions contained in G.S. 14-190.16 and this section do not constitute prior restraints. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

There is a scienter requirement in G.S. 14-190.16 and this section. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 458, 358 S.E.2d 383 (1987).

Visual Representation. — When G.S. 14-190.16 and this section refer to a visual representation of a minor, they are referring to a representation of a live person under 18 years of age. Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), aff'd, 320 N.C. 485, 358 S.E.2d 383 (1987).

Evidence Held Sufficient. — Sufficient evidence supported defendant's convictions for exploitation of a minor under G.S. 14-190.17 and secret peeping under G.S. 14-202 as defendant used defendant's computer to download and view movies of minors engaged in sexual activity, and placed a hidden camera in the room of defendant's stepdaughter to observe her. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

Charges Properly Consolidated for Trial. — Defendant exhibited a similar modus operandi for G.S. 15A-926(a) purposes in the exploitation of a minor for the possession of computer files containing child pornography and exploitation of a minor for receiving those files under G.S. 14-190.17, and secret peeping under G.S. 14-202 crimes charged as defendant used the same personal computer to view pictures of young women; the two types of offenses shared a transactional connection, and the offenses were properly consolidated for trial as the secret peeping charge involved placing a camera in the room of defendant's stepdaughter and using the computer to view those images. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

§ 14-190.17A. Third degree sexual exploitation of a minor.

(a) Offense. — A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity.

(b) Inference. — In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations or otherwise represents or depicts as a minor is a minor.

(c) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(d) Punishment and Sentencing. — Violation of this section is a Class H felony. (1989 (Reg. Sess., 1990), c. 1022, s. 1; 1993, c. 539, s. 1198; 1994, Ex. Sess., c. 24, s. 14(c); 2008-117, s. 5; 2008-218, s. 4.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-218, s. 10 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H felony" for "Class I felony" in subsection (d).

Session Laws 2008-218, s. 4, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class H felony" for "Class I felony" in subsection (d).

CASE NOTES

Plain language of G.S. 14-190.17A(a) supported multiple convictions for sexual exploitation where, inter alia, each of the 200 photographs on defendant's computer had been opened and saved on the hard drive; it was of no consequence that they had been downloaded as five zip files. State v. Howell, 169 N.C. App. 58, 609 S.E.2d 417, 2005 N.C. App. LEXIS 524 (2005).

Evidence Sufficient to Withstand Motion to Dismiss. — Denial of defendant's motion to dismiss was not erroneous because the State presented sufficient evidence to submit the charge of third degree sexual exploitation of a minor to the jury even if G.S. 14-190.17A required knowledge of both the character and content of the material as the jury was allowed to review all twelve computer files to determine if the names reflected the materials' content, and there was sufficient evidence to support a finding that defendant possessed the material in question, including the fact that the computer and a receipt for its purchase by defendant were found at defendant's place of business. State v. Riffe, 191 N.C. App. 86, 661 S.E.2d 899, 2008 N.C. App. LEXIS 1166 (2008).

Conditions on Appeal of Probationary Sentence. — Trial court acted properly in imposing conditions of release upon a sentence of probation on defendant's convictions of third-degree sexual exploitation of a minor, G.S. 14-190.17A, which had been stayed pending appeal pursuant to G.S. 15A-1451(a)(4); the plain language of G.S. 15A-536 indicated that "release" meant "to set or make free" from the supervision and control of the court, as well as from imprisonment, and to apply the statute only where the defendant was in or facing custody would lead to the absurd result that the court would have no oversight over defendants with probationary sentences on appeal. State v. Howell, 166 N.C. App. 751, 603 S.E.2d 901, 2004 N.C. App. LEXIS 2021 (2004).

Cited in State v. Dexter, 186 N.C. App. 587, 651 S.E.2d 900, 2007 N.C. App. LEXIS 2313 (2007).

OPINIONS OF ATTORNEY GENERAL

Effective Date. — The portion of 1989 (Reg. Sess., 1990), c. 1022 which provides that c. 1022 is effective October 1, 1989, is unconstitutional and cannot be enforced. That defect, however, does not render the act unconstitutional. The effect is to make the act effective the day it was passed (July 27, 1990). See opinion of the Attorney General to Senator Connie Wilson, North Carolina General Assembly, 60 N.C.A.G. 34 (1990).

§ 14-190.18. Promoting prostitution of a minor.

(a) Offense. — A person commits the offense of promoting prostitution of a minor if he knowingly:

(1) Entices, forces, encourages, or otherwise facilitates a minor to participate in prostitution; or

(2) Supervises, supports, advises, or protects the prostitution of or by a minor.

(b) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(c) Punishment and Sentencing. — Violation of this section is a Class C felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1199; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(p); 2008-117, s. 6.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 6, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "Class C felony" for "Class D felony" in subsection (c).

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

The purpose of this section is the protection of minors, and violation of the statute occurs when a party knowingly entices, forces, encourages, or otherwise facilitates a minor to engage in acts of prostitution. State v. Morris, 87 N.C. App. 499, 361 S.E.2d 414 (1987).

It is the attempt to corrupt a minor with which this statute is concerned, and it never states or implies that actual acts of prostitution must be committed by the minor. State v. Morris, 87 N.C. App. 499, 361 S.E.2d 414 (1987).

Cited in State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987).

§ 14-190.19. Participating in prostitution of a minor.

(a) Offense. — A person commits the offense of participating in the prostitution of a minor if he is not a minor and he patronizes a minor prostitute. As used in this section, "patronizing a minor prostitute" means:

(1) Soliciting or requesting a minor to participate in prostitution;

(2) Paying or agreeing to pay a minor, either directly or through the minor's agent, to participate in prostitution; or

(3) Paying a minor, or the minor's agent, for having participated in prostitution, pursuant to a prior agreement.

(b) Mistake of Age. — Mistake of age is not a defense to a prosecution under this section.

(c) Punishment and Sentencing. — Violation of this section is a Class F felony. (1985, c. 703, s. 9; 1993, c. 539, s. 1200; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

§ 14-190.20. Warrants for obscenity offenses.

A search warrant or criminal process for a violation of G.S. 14-190.1 through 14-190.5 may be issued only upon the request of a prosecutor. (1985, c. 703, s. 9.1.)

Legal Periodicals. — For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For note, "Assessing the Constitutionality of North Carolina's New Obscenity Law," see 65 N.C.L. Rev. 400 (1987).

CASE NOTES

Constitutionality. — The federal district court would abstain from determining the constitutionality of North Carolina House Bill No. 1171 (Session Laws 1985, c. 703), enacted in 1985, which added this section, until the parties could obtain a resolution of this issue in the North Carolina General Courts of Justice. Floyd v. Thornburg, 619 F. Supp. 756 (W.D.N.C. 1985).

Cited in Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986).

§ 14-191: Repealed by Session Laws 1971, c. 591, s. 4.

§§ 14-192, 14-193: Repealed by Session Laws 1971, c. 405, s. 4.

§ 14-194: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-195: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(11).

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

(a) It shall be unlawful for any person:
- (1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;
- (2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

(4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another;

(5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass;

(6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section.

(b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received. For purposes of this section, the term "telephonic communications" shall include communications made or received by way of a telephone answering machine or recorder, telefacsimile machine, or computer modem.

(c) Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1913, c. 35; 1915, c. 41; C.S., s. 4351; 1967, c. 833, s. 1; 1989, c. 305; 1993, c. 539, s. 128; 1994, Ex. Sess., c. 24, s. 14(c); 1999-262, s. 1; 2000-125, s. 2.)

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

CASE NOTES

Constitutionality. — Subdivision (a)(1) of this section is unconstitutionally overbroad. Radford v. Webb, 446 F. Supp. 608 (W.D.N.C. 1978), aff'd, 596 F.2d 1205 (4th Cir. 1979). But see In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974).

Use of one's telephone clearly involves substantial privacy interests which the State may recognize and protect. Subdivision (a)(1) seeks to protect that interest from an invasion made in an essentially intolerable manner, and the means chosen by the legislature were both appropriate and sufficiently narrowed to achieving the legitimate ends sought to be attained. In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974). But see Radford v. Webb, 446 F. Supp. 608 (W.D.N.C. 1978), aff'd, 596 F.2d 1205 (4th Cir. 1979).

Because subdivision (a)(3) of this section prohibits conduct rather than speech, it survives constitutional challenge. Statutes prohibiting annoying telephoning were directed at the conduct of using telephones to annoy, offend, terrify or harass others and not directed at prohibiting the communication of thoughts or ideas. State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, 307 N.C. 271, 299 S.E.2d 216 (1982).

Subdivision (a)(3) of this section is not unconstitutionally vague, because the statute adequately warns of the activity it prohibits. State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, 307 N.C. 271, 299 S.E.2d 216 (1982).

Essential elements of a violation of subdivision (a)(3) of this section are (1) repeatedly telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number. State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, 307 N.C. 271, 299 S.E.2d 216 (1982); State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986).

Subdivision (a)(3) of this section does not require more than one call per day. State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986).

The term "repeatedly" does not ordinarily connote a recurrence within a 24-hour period. State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986).

There was no fatal variance between warrant charging repeated calls to victim on or about March 29, 1984, and on or about April 5, 1984, and evidence indicating that defendant made more than one call to victim's apartment on these dates, even though victim did not answer more than one call each date. State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986).

"Another" does not refer only to "another person." A sheriff's department is a person under subdivision (a)(3) of this section. The fact that defendant called more than one employee does not make the statute inapplicable, because G.S. 12-3(1) provides that "Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing." State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, 307 N.C. 271, 299 S.E.2d 216 (1982).

Consent by the victim is not an essential element bearing on the offense. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967), decided under former § 14-196.1.

Threat to take one's life or to beat one falls within this section's proscription against using language in telephone communications threatening to inflict bodily harm. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975).

Failure of Court to Define "Annoy" and "Harass". — See State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness made by a recorder attached to the witness's telephone are not incompetent in prosecuting for annoying a female by repeated telephoning because they violate the North Carolina Wiretapping Statute (G.S. 14-155) and also G.S. 14-372 and former G.S. 15-27. These statutes were not enacted to prevent introduction of evidence obtained in such a case and are not relevant in such prosecution. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

The State laid the requisite foundation for the admissibility of tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness where the witness identified them as being the voice of the defendant, and stated that they were a fair and accurate representation of the conversations she had with the defendant. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Evidence of Intent. — It is competent for the purpose of showing the intent of the defendant and her attitude toward the prosecuting witness for the court to permit the witness to testify that the defendant had attempted to block her car in the parking lot of the supermarket, that she had frequently followed her to such places as the hospital, school, etc., and would cut her car in front of the witness's at least once a week, and sometimes more than that. Her conduct in blocking the witness's car and cutting in front of it showed the defendant's intent to harass, annoy, and molest her and is competent as interpreting the reasons for her frequent telephone calls which were alleged to be for the same purpose. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Evidence of Contents of Calls Admissible. — In a prosecution charging defendant with making harassing, embarrassing and annoying telephone calls in violation of subdivision (a)(3) of this section, the actual contents of the statements attributed to defendant were relevant to show whether the intent of the telephone calls was to abuse, annoy, threaten, terrify, harass or embarrass the victims of the calls, and the trial court did not err in allowing witnesses to testify about the actual contents of the calls. State v. Boone, 79 N.C. App. 746, 340 S.E.2d 527 (1986).

Entrapment Not Shown. — Where police placed a want ad in the newspapers similar to ads which had been placed by women who subsequently received obscene telephone calls, and used an electronic device to identify the telephone number of the caller, they merely set a trap to catch defendant in the execution of a crime which had its genesis in his own mind, and the defense of entrapment was not available to him in a prosecution for violating former G.S. 14-196.1. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967).

Where, despite warnings, defendant continued telephoning the sheriff's department, threatening to shoot the blue lights off of patrol cars, calling the deputies and sheriff names, and using curse words, etc., these calls were not protected speech. The content and number of telephone calls defendant placed supported the conclusion that defendant intended to annoy, harass, and threaten employees of the sheriff's department. This conduct was not constitutionally protected. State v. Camp, 59 N.C. App. 38, 295 S.E.2d 766, cert. denied, 307 N.C. 271, 299 S.E.2d 216 (1982).

Right to Counsel. — A warrant charging a violation of this section charges a serious offense, entitling defendant to the assistance of legal counsel. State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969).

§§ 14-196.1, 14-196.2: Repealed by Session Laws 1967, c. 833, s. 3.

§ 14-196.3. Cyberstalking.

(a) The following definitions apply in this section:

(1) Electronic communication. — Any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature, transmitted in

whole or in part by a wire, radio, computer, electromagnetic, photoelectric, or photo-optical system.

(2) Electronic mail. — The transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.

(b) It is unlawful for a person to:

(1) Use in electronic mail or electronic communication any words or language threatening to inflict bodily harm to any person or to that person's child, sibling, spouse, or dependent, or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person.

(2) Electronically mail or electronically communicate to another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing, or embarrassing any person.

(3) Electronically mail or electronically communicate to another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct, or criminal conduct of the person electronically mailed or of any member of the person's family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass.

(4) Knowingly permit an electronic communication device under the person's control to be used for any purpose prohibited by this section.

(c) Any offense under this section committed by the use of electronic mail or electronic communication may be deemed to have been committed where the electronic mail or electronic communication was originally sent, originally received in this State, or first viewed by any person in this State.

(d) Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(e) This section does not apply to any peaceable, nonviolent, or nonthreatening activity intended to express political views or to provide lawful information to others. This section shall not be construed to impair any constitutionally protected activity, including speech, protest, or assembly. (2000-125, s. 1; 2000-140, s. 91.)

Editor's Note. — As enacted by Session Laws 2000-125, the section was assigned to Article 35 of Chapter 14; Session Laws 2000-140 assigned the section to Article 26.

§ 14-197. Using profane or indecent language on public highways; counties exempt.

If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a Class 3 misdemeanor. The following counties shall be exempt from the provisions of this section: Pitt and Swain. (1913, c. 40; C.S., s. 4352; Pub. Loc. Ex. Sess., 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; 1957, c. 348; 1959, c. 733; 1963, cc. 39, 123; 1969, c. 300; 1971, c. 718; 1973, cc. 120, 233; 1993, c. 539, s. 129; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Sufficiency of Warrant or Indictment. — A bill of indictment charging that defendant "unlawfully and willfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" was insufficient to charge a violation of this section in failing to charge that the indecent or profane language was spoken on a public road or highway and in a loud and boisterous manner. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language" was insufficient to charge the statutory crime proscribed by this section, since it failed to charge that defendant used the profane language (1) on a public road or highway, (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953).

§ 14-198: Repealed by Session Laws 1975, c. 402.

§ 14-199. Obstructing way to places of public worship.

If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a Class 2 misdemeanor. (1785, c. 241, P.R.; R.C., c. 97, s. 5; Code, s. 3669; Rev., s. 3776; C.S., s. 4354; 1945, c. 635; 1969, c. 1224, s. 1; 1993, c. 539, s. 130; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to procedure for laying out church roads, see G.S. 136-71.

§§ 14-200, 14-201: Repealed by Session Laws 1994, Extra Session, c. 14, ss. 72(9), 72(10).

§ 14-202. Secretly peeping into room occupied by another person.

(a) Any person who shall peep secretly into any room occupied by another person shall be guilty of a Class 1 misdemeanor.

(a1) Unless covered by another provision of law providing greater punishment, any person who secretly or surreptitiously peeps underneath or through the clothing being worn by another person, through the use of a mirror or other device, for the purpose of viewing the body of, or the undergarments worn by, that other person without their consent shall be guilty of a Class 1 misdemeanor.

(b) For purposes of this section:

(1) The term "photographic image" means any photograph or photographic reproduction, still or moving, or any videotape, motion picture, or live television transmission, or any digital image of any individual.

(2) The term "room" shall include, but is not limited to, a bedroom, a rest room, a bathroom, a shower, and a dressing room.

(c) Unless covered by another provision of law providing greater punishment, any person who, while in possession of any device which may be used to create a photographic image, shall secretly peep into any room shall be guilty of a Class A1 misdemeanor.

(d) Unless covered by another provision of law providing greater punishment, any person who, while secretly peeping into any room, uses any device to create a photographic image of another person in that room for the purpose of arousing or gratifying the sexual desire of any person shall be guilty of a Class I felony.

(e) Any person who secretly or surreptitiously uses any device to create a photographic image of another person underneath or through the clothing being worn by that other person for the purpose of viewing the body of, or the undergarments worn by, that other person without their consent shall be guilty of a Class I felony.

(f) Any person who, for the purpose of arousing or gratifying the sexual desire of any person, secretly or surreptitiously uses or installs in a room any device that can be used to create a photographic image with the intent to capture the image of another without their consent shall be guilty of a Class I felony.

(g) Any person who knowingly possesses a photographic image that the person knows, or has reason to believe, was obtained in violation of this section shall be guilty of a Class I felony.

(h) Any person who disseminates or allows to be disseminated images that the person knows, or should have known, were obtained as a result of the violation of this section shall be guilty of a Class H felony if the dissemination is without the consent of the person in the photographic image.

(i) A second or subsequent felony conviction under this section shall be punished as though convicted of an offense one class higher. A second or subsequent conviction for a Class 1 misdemeanor shall be punished as a Class A1 misdemeanor. A second or subsequent conviction for a Class A1 misdemeanor shall be punished as a Class I felony.

(j) If the defendant is placed on probation as a result of violation of this section:

(1) For a first conviction under this section, the judge may impose a requirement that the defendant obtain a psychological evaluation and comply with any treatment recommended as a result of that evaluation.

(2) For a second or subsequent conviction under this section, the judge shall impose a requirement that the defendant obtain a psychological evaluation and comply with any treatment recommended as a result of that evaluation.

(k) Any person whose image is captured or disseminated in violation of this section has a civil cause of action against any person who captured or disseminated the image or procured any other person to capture or disseminate the image and is entitled to recover from those persons actual damages, punitive damages, reasonable attorneys' fees and other litigation costs reasonably incurred.

(*l*) When a person violates subsection (d), (e), (f), (g), or (h) of this section, or is convicted of a second or subsequent violation of subsection (a), (a1), or (c) of this section, the sentencing court shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5. If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

(m) The provisions of subsections (a), (a1), (c), (e), (g), (h), and (k) of this section do not apply to:

(1) Law enforcement officers while discharging or attempting to discharge their official duties; or

(2) Personnel of the Department of Correction or of a local confinement facility for security purposes or during investigation of alleged misconduct by a person in the custody of the Department or the local confinement facility.

(n) This section does not affect the legal activities of those who are licensed pursuant to Chapter 74C, Private Protective Services, or Chapter 74D, Alarm Systems, of the General Statutes, who are legally engaged in the discharge of their official duties within their respective professions, and who are not engaging in activities for an improper purpose as described in this section.

(1923, c. 78; C.S., s. 4356(a); 1957, c. 338; 1993, c. 539, s. 131; 1994, Ex. Sess., c. 24, s. 14(c); 2003-303, s. 1; 2004-109, s. 7.)

Legal Periodicals. — For discussion of application of this section to police officers, see 1 N.C.L. Rev. 286 (1923).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Constitutionality. — This section is sufficiently narrowed by judicial interpretation to require that the act condemned must be a spying for the wrongful purpose of invading the privacy of the female occupant of the room, thereby omitting from its scope those persons who have a legitimate purpose upon another's property and those who only inadvertently glance in the window of another. Thus, the statute is not so overbroad as to proscribe legitimate conduct. Therefore, this section is not unconstitutional for overbreadth. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section is sufficiently definite to give an individual fair notice of the conduct prohibited, and to guide a judge in its application and a lawyer in defending one charged with its violation, and therefore, this statute violates neither N.C. Const., Art. I, § 19, nor the Due Process Clause of the Federal Constitution by reason of vagueness and uncertainty. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy. This is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section apparently was derived from the common-law crimes of common nuisance and eavesdropping. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

"Peep". — The word "peep" means to look cautiously or slyly — as if through a crevice — out from chinks and knotholes. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

The word "secretly" as used in this section conveys the definite idea of spying upon another with the intention of invading her privacy. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

Length of Blind Irrelevant. — The fact that a venetian blind lacks some six to ten inches of reaching the windowsill is entirely irrelevant in a prosecution of defendant for peeping into a room occupied by a female. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

Defendant is entitled to know identity of female person whose privacy he is charged with having invaded. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Warrant was defective where it failed to name the victim of the peeping misdemeanant, and could not be cured by a bill of particulars supplying the name. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Charges Properly Consolidated for Trial. — Defendant exhibited a similar modus operandi for G.S. 15A-926(a) purposes in the exploitation of a minor for the possession of computer files containing child pornography and exploitation of a minor for receiving those files under G.S. 14-190.17, and secret peeping under G.S. 14-202 crimes charged as defendant used the same personal computer to view pictures of young women; the two types of offenses shared a transactional connection, and the offenses were properly consolidated for trial as the secret peeping charge involved placing a camera in the room of defendant's stepdaughter and using the computer to view those images. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

Evidence Held Sufficient. — Evidence in prosecution of defendant for peeping secretly into a room occupied by a woman was held sufficient to be submitted to the jury where a witness for the State testified that the room was usually occupied by a woman and he saw someone in the room immediately after defendant left the window. State v. Peterson, 232 N.C. 332, 59 S.E.2d 635 (1950).

Sufficient evidence supported defendant's convictions for exploitation of a minor under G.S. 14-190.17 and secret peeping under G.S. 14-202 as defendant used defendant's computer to download and view movies of minors engaged in sexual activity, and placed a hidden camera in the room of defendant's stepdaughter to observe her. State v. Anderson, — N.C. App. —, 669 S.E.2d 793, 2008 N.C. App. LEXIS 2237 (2008).

Evidence Held Insufficient. — Evidence tending to show that shoe prints were found six or eight feet from the window of a house in which a woman lived alone, that shoe prints were also found in the edge of a field nearby, and that bloodhounds were put on the trail at the edge of the field and followed the scent to defendant's house, without evidence as to when or by whom the tracks were made, was insufficient evidence of the corpus delicti, aliunde the confession of the defendant, to be submitted to the jury in a prosecution under this section. State v. Bass, 253 N.C. 318, 116 S.E.2d 772 (1960).

Cited in State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004); State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

§ 14-202.1. Taking indecent liberties with children.

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is punishable as a Class F felony. (1955, c. 764; 1975, c. 779; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; 179, s. 14; 1993, c. 539, s. 1201; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to privileged nature of communications with agents of rape crisis centers and domestic violence programs, see G.S. 8-53.12. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

CASE NOTES

I. General Consideration.
II. Elements and Proof of Offense.
III. Evidence.
IV. Instructions.

I. GENERAL CONSIDERATION.

Constitutionality. — The use of language such as "immoral, improper, indecent liberties" and "lewd or lascivious act" in this section is not unconstitutionally vague. State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

This section is not unconstitutionally vague. State v. Maxwell, 47 N.C. App. 658, 267 S.E.2d 582, appeal dismissed and cert. denied, 301 N.C. 102, 273 S.E.2d 307 (1980).

This section is not unconstitutionally void for vagueness since it clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); State v. Strickland, 77 N.C. App. 454, 335 S.E.2d 74 (1985).

This section does not violate equal protection in requiring a five-year difference between the age of the defendant, who cannot himself be under 16, and the age of the victim, who must be under age 16, since the age classifications within the statute are reasonably related to the purpose of the statute, i.e., the protection of children from the sexual advances of adults. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

This statute sufficiently appraises defendants of prohibited conduct and is not void for vagueness. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

The term "with" contained in this section was not unconstitutionally vague as applied to defendant who exposed himself from behind a sliding glass door to children some 35 feet away. State v. Nesbitt, 133 N.C. App. 420, 515 S.E.2d 503 (1999).

This statute was not unconstitutionally vague as applied to defendant/father. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

Standing to Challenge Section. — Defendant held to lack standing to challenge constitutionality of section on equal protection grounds. See State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

Defendant had no standing to attack this section on the ground that it was unconstitutionally overbroad in that it proscribes innocent displays of affection in violation of the U.S. Const., Amend. I since the statute had never been so interpreted and was not so applied against defendant, and defendant had no U.S. Const., Amend. I right to express himself through unlawful actions. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

This section and § 14-177 are complementary rather than repugnant or inconsistent. State v. Lance, 244 N.C. 455, 94 S.E.2d 335 (1956); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Section 14-177 and this section can be reconciled and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

There was no merit to defendant's contention that the trial court lacked jurisdiction to try him under the indecent liberties with children statute, this section, because the criminal act he committed was a crime against nature prohibited by G.S. 14-177, since the crime against nature statute and the indecent liberties with children statute are complementary but not mutually exclusive. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

And this section supplements § 14-177. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

There was no legislative intent in enacting this section to repeal § 14-177 in any aspect; the intent was to supplement it and to give even broader protection to children. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This Section and § 14-177 Distinguished. — This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Section 14-177 condemns crimes against nature whether committed against adults or children. This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. This section, of course, condemns other acts against children than unnatural sexual acts. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Section 14-177 condemns crimes against nature whether committed against adults or children while this section condemns other acts against children than unnatural sexual acts and condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of G.S. 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

This Statute Held Not to Punish Only Unnatural Acts. — The indecent liberties statute is not intended to punish only acts which, if committed by and against adults, would be inherently "unnatural", such as crimes against nature and incest. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Indictments with Dates Different from Those of Arrest Warrants Held Not Prejudicial to Defendant. — Trial court committed no error, plain or otherwise, with respect to defendant not having been served with bills of indictment or with respect to the State offering evidence that the offenses occurred on dates different from those alleged in the arrest warrants, where defendant was represented by counsel of record on the date of the return of the true bills of indictment, where he and his counsel waived formal arraignment, at which they would have been informed of the allegations contained in the bills of indictment, where defendant presented evidence that he was never alone with victim during any of the times during which the State's evidence showed the offenses occurred, and where he did not rely solely upon alibi but also presented evidence through his own testimony and the testimony of others directly contradicting victim's account of the incidents. State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258, 2000 N.C. App. LEXIS 811 (2000).

Neither the indictments nor the jury verdicts returned thereon were required to specify the acts which constituted the indecent liberties for which the defendant was convicted. State v. Miller, 137 N.C. App. 450, 528 S.E.2d 626, 2000 N.C. App. LEXIS 418 (2000).

The indictments against the defendant for first-degree sexual offense and for indecent liberties with a child were upheld in spite of his allegations that they were defective as a matter of law in not setting out each element of the offenses. State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794, 2000 N.C. App. LEXIS 1301 (2000).

Crime against nature and taking indecent liberties with a child are separate and distinct offenses. State v. Hoover, 89 N.C. App. 199, 365 S.E.2d 920, cert. denied, 323 N.C. 177, 373 S.E.2d 118 (1988).

Elements of This Section and § 14-27.4

Are Different. — Imposition of sentences for first-degree sexual offenses as well as offenses of taking of indecent liberties with a child, based on the same acts, did not constitute double jeopardy, as the elements of the two crimes are different. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

The definitional elements of first-degree sex offense and indecent liberties are different; therefore, defendant's conviction of first-degree sex offense and indecent liberties did not contravene his constitutional protection against double jeopardy. State v. Manley, 95 N.C. App. 213, 381 S.E.2d 900, cert. denied, 325 N.C. 712, 388 S.E.2d 467 (1989).

Assault Is Not Lesser Included Offense. — Since assault is not an essential element of taking indecent liberties with a child, the crime of assault on a child under the age of 12 years cannot be a lesser included offense of taking indecent liberties with a child. State v. Holman, 94 N.C. App. 361, 380 S.E.2d 128 (1989).

Assault on a Female Not a Lesser Included Offense. — Assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the greater offense. State v. Love, 127 N.C. App. 437, 490 S.E.2d 249 (1997).

for a defendant to be punished for convictions of rape, incest, and taking indecent liberties with a minor when all the convictions were based on one incident. State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988).

Defendant's conviction of three counts of indecent liberties under G.S. 14-202.1(a)(1) for a single episode for touching and sucking a victim's breasts, performing oral sex on the victim, and committing sexual intercourse with the victim did not violate the double jeopardy clause of the U.S. Constitution and N.C. Const., Art. I, § 19, as there were two distinct sexual acts and touch in the single encounter; the indictments each spelled out a separate and distinct fact needed to be proven by the state in order to gain a conviction, and the three acts were distinct acts each constituting the crime of indecent liberties. State v. James, — N.C. App. —, 643 S.E.2d 34, 2007 N.C. App. LEXIS 797 (2007).

Defendant's right to be free from double jeopardy was not violated because none of the elements for indecent liberties with a child and using a minor in obscenity were the same; therefore, defendant did not receive ineffective assistance of counsel for failure to raise the double jeopardy argument. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

Consolidation of Separately Occurring Offenses Held Not Error. — Consolidation of two counts of first-degree sexual offense and two counts of taking indecent liberties with a child, which allegedly occurred one week apart did not constitute error. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Violation of This Section Is Not a Lesser Included Offense Under § 14-177. — Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of this section is not a lesser included offense of the crime against nature described in G.S. 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Nor a Lesser Included Offense of Statutory Rape. — The offense of taking indecent liberties with a child under this section is not a lesser included offense of statutory rape under G.S. 14-27.2(a)(1), because the age elements are different, and, while sexual purpose may be inherent in an act of forcible vaginal intercourse, it is not required to be proved in order to convict a defendant of rape. State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982), overruling State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977); State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

Convictions of Both Rape and Indecent Liberties Permissible. — Vaginal intercourse is not an element of taking indecent liberties with a minor, and committing the act for the purpose of arousing or gratifying sexual desire is not an element of rape. Thus defendant was not placed in double jeopardy by being convicted of both crimes. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

Violation of This Section Is Not a Lesser Included Offense of First Degree Sexual Offense. — In a prosecution of defendant under G.S. 14-27.4(a) for engaging in a sexual act with children under 12 years, the trial court did not err in failing to instruct on taking indecent liberties with children in violation of this section, since taking indecent liberties with children is not a lesser included offense of the crime proscribed by G.S. 14-27.4(a). State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981).

Because indecent liberties with a minor does not merge with and is not a lesser included offense of first-degree sexual offense, evidence presented on the charges of first-degree sexual offense may also support a conviction for indecent liberties; thus, it was impossible to tell which particular acts corresponded with which charges and convictions for indecent liberties where defendant was convicted of seven of ten counts of taking indecent liberties with a minor and the trial court failed to indicate which offenses were to be considered for which verdict sheets. State v. Bates, 172 N.C. App. 27, 616 S.E.2d 280, 2005 N.C. App. LEXIS 1585 (2005).

The purpose of this section is to give broader protection to children than the prior laws provided. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

Sufficiency of Indictment. — Indictments for taking indecent liberties held to clearly inform defendant of the conduct which was the subject of the accusations as required by G.S. 15A-924(a)(5), and therefore sufficiently charged the offense, and did not need to specify the exact act which constituted the "immoral, improper and indecent liberty." State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259, cert. denied, 320 N.C. 516, 358 S.E.2d 530 (1987); State v. Fultz, 92 N.C. App. 80, 373 S.E.2d 445 (1988).

Indictment for indecent liberties that matched the form required by G.S. 14-202.1 was sufficient to inform defendant of the charges against him. State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633, 2005 N.C. App. LEXIS 2400 (2005), rev'd in part on other grounds, 361 N.C. 406, 646 S.E.2d 362 (2007).

Indictment which was couched in the language of the statute was sufficient. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Defendant's claim that by failing to differentiate the various charges by providing different dates for the offenses and listing the underlying acts, the indictments opened the door to defendant being subjected to double jeopardy for the same acts on the same dates, was rejected because: (1) defendant's indictments for statutory sexual offense, statutory sexual offense against a person who was 13, 14, or 15 years of age, and sexual offense were in compliance with the requirements of G.S. 15-144.2, and the indictments matched the wording of G.S. 14-27.4(a)(1), G.S. 14-27.7A(a), and G.S. 14-27.5(a)(1); (2) defendant's indictments for the charges of taking indecent liberties with a child matched the wording of G.S.14-202.1(a)(2); and (3) defendant's assault on a female indictments matched the wording of G.S. 14-33(c)(2); each of the indictments was sufficient to inform defendant of the charges against defendant, and defendant failed to show any deprivation of defendant's ability to prepare a defense due to a lack of specificity in the indictments. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Abuse of Trust as Aggravating Factor. — Where defendant was convicted of taking indecent liberties with his stepson and stepson's overnight guest, court properly found as an aggravating factor that he abused a position of trust and confidence to commit the offense. State v. Caldwell, 85 N.C. App. 713, 355 S.E.2d 813 (1987).

Youth of Victim as Aggravating Factor. — Aggravation of defendant's sentence for taking indecent liberties with a minor on grounds that the 13-year-old victim was very young was error, as she was not for purposes of this offense "very young." State v. Sumpter, 318 N.C. 102, 347 S.E.2d 396 (1986).

Finding that the eight-year-old victim was "very young" was not clearly erroneous; proof that the victim was "very young" was not necessary to prove the offense, and consequently the aggravating factor and the offense did not merge. United States v. Price, 812 F.2d 174 (4th Cir. 1987).

The trial court improperly used the victim's age as an aggravating factor because the State did not present evidence that "the victim was more vulnerable than other victims because of his age"; merely checking the AOC form is not sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by consideration of the nature of the crime. State v. Rudisill, 137 N.C. App. 379, 527 S.E.2d 727, 2000 N.C. App. LEXIS 321 (2000).

Prior Convictions as Aggravating Factors. — Appellate court found no error in the trial court's determination, by a preponderance of the evidence, that defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each because that determination was a fact of a prior conviction and not precluded by Blakely or Allen. The trial court also properly determined, by a preponderance of the evidence, that four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law; thus, defendant's sentence of 25 to 30 months for each violation of G.S. 14-202.1, to be served consecutively, was affirmed. State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417, 2006 N.C. App. LEXIS 190 (2006), cert. denied, — N.C. —, 631 S.E.2d 141 (2006).

Where two or more offenses are joined for judgment, one offense may properly be aggravated by evidence needed to prove a separate joined offense; in a case where sexual offense by a person in a parental role was not the most serious crime in the consolidated judgment and thus was not the offense from which defendant's sentence was derived, the aggravator of abusing a position of trust did not apply to the crime of sexual offense by a person in a parental role, but rather properly applied to the most serious offense in each of the two consolidated judgments, the statutory sexual offense of a person aged 13, 14, or 15. State v. Tucker, 357 N.C. 633, 588 S.E.2d 853, 2003 N.C. LEXIS 1411 (2003).

Multiple Short-Form Indictments Did Not Create a Danger of Ununanimous Verdicts. — Appellate court erred in reversing defendant's convictions of first-degree statutory rape, G.S. 14-27.2, and taking indecent liberties with a minor, G.S. 14-202.1(a)(1), as defendant was properly charged by short-form indictments on all the charges as authorized by G.S. 15-144.2(a), because there was no danger of a nonunanimous verdict resulting from the multiple indictments in violation of N.C. Const. art. 1, § 24, and G.S. 15A-1237(b), as even if some jurors disagreed on the kinds of sexual misconduct committed, the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of any immoral, improper, or indecent liberties as required by G.S. 14-202.1(a)(1), and because defendant was indicted on five counts of statutory rape, the victim testified to five specific incidents of statutory rape, and five verdicts of guilty were returned. State v. Lawrence, 360 N.C. 368, 627 S.E.2d 609, 2006 N.C. LEXIS 30 (2006).

Unanimous Verdict Requirement. — Defendant's claim, that his right to a unanimous jury verdict as to each of the charges against him was violated because none of the verdict sheets set out the specific actus reus that the jury had to find in order to convict, was rejected as the indecent liberties statute did not list distinct criminal offenses in the disjunctive. State v. Brigman, 178 N.C. App. 78, 632 S.E.2d 498, 2006 N.C. App. LEXIS 1298 (2006), appeal dismissed, cert. denied, 636 S.E.2d 813 (N.C. 2006).

Defendant was not deprived of defendant's right to a unanimous jury verdict as to charges of first-degree statutory sexual offense under G.S. 14-27.2, statutory sexual offense against a person who was 13, 14, or 15 years old under G.S. 14-27.4(a)(1), taking indecent liberties with a child under G.S. 14-202.1, second-degree forcible sexual offense under G.S 14-27.5, and assault on a female by a male at least 18 years of age under G.S. 14-33(c)(2) as: (1) the indictments were valid absent the inclusion of the specific acts that constituted the alleged sexual offenses; (2) the jury instructions and verdict sheets for each offense specifically identified each case by its number, listed the date on which each offense was alleged to have occurred, and listed the specific acts which were to serve as the underlying basis for each offense; (3) the jury was instructed specifically in each case in which defendant was charged with multiple counts of the same offense involving the same victim; (4) there was nothing in the record to indicate that the jury was confused by either the trial court's instructions or the verdict sheets; and (5) the jury was polled following the announcement of the verdicts. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Offenses Committed Prior to October 1, 1994. — Judgments sentencing defendant for indecent liberties with a child incorrectly showed the offenses to be Class F felonies because defendant committed the offenses prior to October 1, 1994; therefore, under G.S. 14-202.1, the felony of indecent liberties with a child was a Class H felony. State v. Lawrence, — N.C. App. —, 667 S.E.2d 262, 2008 N.C. App. LEXIS 1742 (2008); State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Applied in State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967); State v. Wells, 31 N.C. App. 736, 230 S.E.2d 437 (1976); State v. Craven, 312 N.C. 580, 324 S.E.2d 599 (1985); State v. Owens, 73 N.C. App. 631, 327 S.E.2d 42 (1985); State v. Holloway, 82 N.C. App. 586, 347 S.E.2d 72 (1986); State v. Speller, 102 N.C. App. 697, 404 S.E.2d 15 (1991); State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262, 2002 N.C. App. LEXIS 1170 (2002); Allstate Ins. Co. v. Lahoud, 167 N.C. App. 205, 605 S.E.2d 180, 2004 N.C. App. LEXIS 2149 (2004).

Cited in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Turgeon, 44 N.C. App. 547, 261 S.E.2d 501 (1980); State v. Ludlum, 303 N.C. 666, 281 S.E.2d 159 (1981); State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984); Burgess v. Griffin, 585 F. Supp. 1564 (W.D.N.C. 1984); State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985); State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986); State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986); Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986); State v. Singleton, 85 N.C. App. 123, 354 S.E.2d 259 (1987); State v. Brice, 320 N.C. 119, 357 S.E.2d 353 (1987); State v. Summers, 92 N.C. App. 453, 374 S.E.2d 631 (1988); State v. Dalton, 96 N.C. App. 65, 384 S.E.2d 573 (1989); State v. Coffey, 326 N.C. 268, 389 S.E.2d 48, 1990 N.C. LEXIS 119 (1990); Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990); State v. Jones, 99 N.C. App. 412, 393 S.E.2d 585 (1990); State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991), cert. denied, 335 N.C. 239, 439 S.E.2d 153 (1993); Messick v. Catawba County, 110 N.C. App. 707, 431 S.E.2d 489 (1993); Nationwide Mut. Ins. Co. v. Abernethy, 115 N.C. App. 534, 445 S.E.2d 618 (1994); State v. Bass, 121 N.C. App. 306, 465 S.E.2d 334 (1996); State v. Connell, 127 N.C. App. 685, 493 S.E.2d 292 (1997); State v. Wagoner, 131 N.C. App. 285, 506 S.E.2d 738 (1998); State v. Tennant, 141 N.C. App. 524, 540 S.E.2d 807, 2000 N.C. App. LEXIS 1395 (2000); State v. Yearwood, 147 N.C. App. 662, 556 S.E.2d 672, 2001 N.C. App. LEXIS 1256 (2001); United States v. Pierce, 278 F.3d 282, 2002 U.S. App. LEXIS 447 (4th Cir. 2002); State v. Bartlett, 153 N.C. App. 680, 571 S.E.2d 28, 2002 N.C. App. LEXIS 1247 (2002); State v. Tucker, 156 N.C. App. 53, 575 S.E.2d 770, 2003 N.C. App. LEXIS 33 (2003); State v. Radford, 156 N.C. App. 161, 576 S.E.2d 134, 2003 N.C. App. LEXIS 69 (2003); State v. Sinnott, 163 N.C. App. 268, 593 S.E.2d 439, 2004 N.C. App. LEXIS 370 (2004); State v. Ewell, 168 N.C. App.

98, 606 S.E.2d 914, 2005 N.C. App. LEXIS 169 (2005); State v. Browning, 177 N.C. App. 487, 629 S.E.2d 299, 2006 N.C. App. LEXIS 1079 (2006); State v. Hammett, 361 N.C. 92, 637 S.E.2d 518, 2006 N.C. LEXIS 1296 (2006); State v. Reber, 182 N.C. App. 250, 641 S.E.2d 742, 2007 N.C. App. LEXIS 589 (2007); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008); State v. Worley, — N.C. App. —, 677 S.E.2d 540, 2009 N.C. App. LEXIS 757 (2009); State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

II. ELEMENTS AND PROOF OF OFFENSE.

Single Offense Provable by Commission of Various Acts. — The crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts; the evil the legislature sought to prevent in this context is a defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

In order to obtain a conviction of taking indecent liberties with a minor, the State must prove that (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

Elements of the offense of taking indecent liberties with a minor are: (1) the defendant was at least 16 years of age; (2) he was five years older than his victim; (3) he willfully took or attempted to take an indecent liberty with the victim; (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred; and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Attempt. — Evidence proffered was sufficient to show that defendant committed the inchoate crime of attempted indecent liberties with children and attempted solicitation of a minor, even though the minor was an adult police officer posing as a child, because the warrant application recounted numerous sexually explicit instant message conversations between defendant and individuals who defendant believed were children, in which he asked to meet the "children" to engage in sexual conduct, and the warrant application also stated that defendant transmitted a video of himself masturbating. State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

What Intent State Must Prove. — Language requiring intent to commit an unnatural sexual act no longer appears in this section. The State need now only prove a "purpose of arousing or gratifying sexual desire." State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Indictments Held Sufficient. — Indictments were sufficiently specific under this section, where the indictments quoted the language of the statute, even though they did not describe the nature of the sex acts. State v. Blackmon, 130 N.C. App. 692, 507 S.E.2d 42 (1998), cert. denied, 349 N.C. 531, 526 S.E.2d 470 (1998).

Indictment charging defendant with statutory sexual offense under G.S. 14-27.2, statutory sexual offense of a person who was 13, 14, or 15 years of age under G.S. 14-27.7A, taking indecent liberties with a child under G.S. 14-202.1, and forcible sexual offense under G.S. 14-27.5 that did not list the specific underlying sexual acts was valid, as the jury was instructed on the specific sexual acts that were to serve as the underlying act for each charged offense; when a short form indictment properly alleged the essential elements of the offense, it did not have to allege every matter required to be proved on the trial under G.S. 15-144.2(a), and indictments charging indecent liberties with a child or a sexual offense were valid even when they did not contain a specific allegation regarding which specific sexual act was committed. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

Variance Between Indictment and Proof is Cause for Dismissal. — Even in child sexual abuse cases, a variance as to time becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense; while time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved, when the defendant relies on the date set forth in the indictment, but the State's evidence substantially varies to the prejudice of defendant's alibi defense, the interests of justice and fair play require that the defendant's motion for dismissal be granted. In a case charging the defendant with taking indecent liberties with a child, where the State's proof failed to show that alleged abuse occurred on the dates in the indictment, where the defendant had relied on those dates in building his alibi defense, and where all the evidence presented at trial went to sexual encounters over a period of years that ended a significant period of time prior to the dates listed in the indictment, defendant's motion to dismiss should have been granted, and defendant's conviction was reversed on appeal. State v. Custis, 162 N.C. App. 715, 591 S.E.2d 895, 2004 N.C. App. LEXIS 245 (2004).

Conviction on Bill of Particulars Not Required. — Trial court did not err during defendant's trial on the charge of taking indecent liberties with a child by denying the defendant's motion to require the jury to convict him on specific acts set out in a bill of particulars; even if some jurors found that one type of sexual conduct occurred and other jurors found that another type of sexual conduct occurred, the jury as a whole could unanimously find that there occurred sexual conduct within the ambit of immoral, improper, or indecent liberties. State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002).

Defendant's purpose for committing an act prohibited by this section is the gravamen of this offense; the particular act performed is immaterial. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

That the action was for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions. State v. Rhodes, 321 N.C. 102, 361 S.E.2d 578 (1987).

Inference of Arousal or Gratification of Sexual Desire. — Where the evidence established that, while alone in a drug store bathroom with the five year old victim, defendant touched her chest and her vaginal area, that touching was sufficient to permit the jury to infer that defendant's purpose in doing so was to arouse himself or to gratify his sexual desire. State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220, cert. denied, 334 N.C. 625, 435 S.E.2d 348 (1993), 511 U.S. 1008, 114 S. Ct. 1378, 128 L. Ed. 2d 54, rehearing denied, 511 U.S. 1102, 114 S. Ct. 1875 (1994).

Purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Touching Not Required. — It is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of this section. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981); State v. Kistle, 59 N.C. App. 724, 297 S.E.2d 626 (1982), cert. denied, 307 N.C. 471, 298 S.E.2d 694 (1983).

The word "with" is not limited to mean only a physical touching. State v. Turman, 52 N.C. App. 376, 278 S.E.2d 574 (1981).

No actual touching of a child is necessary to complete the offense described in this section. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Evidence of vaginal penetration was not necessary to prove the offense defendant pled guilty to and was sentenced for (taking indecent liberties with a child); therefore, the finding that his conduct indicated he was guilty of the greater offense charged was not forbidden by G.S. 15A-1340.4(a)(1). State v. Parker, 92 N.C. App. 102, 373 S.E.2d 558 (1988), cert. denied, 324 N.C. 250, 377 S.E.2d 760 (1989).

A defendant need not be within a certain distance of or in close proximity to the child under subdivision (a)(1) of this section. State v. Strickland, 77 N.C. App. 454, 335 S.E.2d 74 (1985).

Taking photographs of nude female child in clearly sexually suggestive position violates section. State v. Kistle, 59 N.C. App. 724, 297 S.E.2d 626 (1982), cert. denied, 307 N.C. 471, 298 S.E.2d 694 (1983).

Constructive Presence. — Where defendant, the headmaster of a school, took advantage of an authoritative position of trust by asking the victim, a fifteen year old student, to try out uniforms so that he could secretly film, and later observe her in a state of undress, defendant was "constructively present" and thereby took immoral, improper or indecent liberties "with" the minor victim. State v. McClees, 108 N.C. App. 648, 424 S.E.2d 687, cert. denied, 333 N.C. 465, 427 S.E.2d 626 (1993).

By using the telephone to have sexually explicit conversations with the 15-year-old victim, defendant had virtually the same capability to hear and be heard by the victim as defendant would have had if defendant were in the same room with the victim, and because defendant's conduct would have constituted the taking of indecent liberties if defendant were in the victim's actual presence, the use of the phone rendered defendant constructively present under the circumstances and in violation of this section. State v. Every, 157 N.C. App. 200, 578 S.E.2d 642, 2003 N.C. App. LEXIS 538 (2003).

Age of the victim is an element of the offense which proscribes taking indecent liberties with a child under the age of 16 years. United States v. Price, 812 F.2d 174 (4th Cir. 1987).

Age as an Aggravating Factor. — Where age is an element of the offense, as with taking indecent liberties with children, if the evidence, by its greater weight, shows that the age of the victim caused the victim to be more vulnerable to the crime committed against him than he otherwise would have been, the trial court can properly find the statutory aggravating factor based on age. If, however, the evidence shows that the victim was not more vulnerable than any other victim of the same crime would have been, the statutory aggravating factor that the victim was "very young" cannot properly be found. State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994).

Alcohol as Aggravating Factor. — Trial court did not err in finding the fact that defendant furnished alcohol to sisters and then victimized them was a nonstatutory aggravating factor where a preponderance of evidence supported that finding, and the State was not required to prove, pursuant to G.S. 15A-1340.16(d) regarding aggravating factors, that the sisters were under the age of 16, even though the State did have to prove the sisters were under age 16 in order to convict under G.S. 14-202.1, regarding taking indecent liberties. State v. Bowers, 146 N.C. App. 270, 552 S.E.2d 238, 2001 N.C. App. LEXIS 866 (2001), cert. denied, 354 N.C. 576, 559 S.E.2d 185 (2001).

A parental or familial relationship is not a necessary element of the crime of taking indecent liberties with children. State v. Caldwell, 85 N.C. App. 713, 355 S.E.2d 813 (1987).

Allowing Testimony as to Age of Defendant Not Error. — In a prosecution for first degree sexual offenses and taking indecent liberties with minors, the trial court did not err in allowing a deputy to testify as to his opinion that defendant appeared to be between 29 and 30 years of age since it was not necessary for the State to prove defendant's exact age in order to convict him of any of the crimes charged, and the deputy had ample opportunity to observe defendant during the booking process and in the courtroom. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Testimony of Rape Supported Finding. — Where children's testimony showed that defendant raped each of them, evidence supported finding that he had taken indecent liberties with them. State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

Medical opinion evidence that the vagina of the victim had been penetrated was relevant to the charge of taking indecent liberties with a child, even though the child's testimony did not mention penetration. State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993).

Photographs of male models and men in underwear were properly admitted into evidence in defendant's trial for taking indecent liberties with a child and crime against nature. State v. Creech, 128 N.C. App. 592, 495 S.E.2d 752 (1998), cert. denied, 348 N.C. 285, 501 S.E.2d 921 (1998).

Evidence Held Sufficient. — Evidence that 32-year-old defendant led his 12-year-old victim, in the course of playing hide-and-go-seek, into a dark dog shed, that while hiding there defendant put his arm around the victim, placed his hand between her legs and underneath her softball shorts and rubbed her vagina with his finger, and that when the victim tried to move away, defendant pulled her back to him and fondled her again, was sufficient to warrant the inference that the defendant willfully took indecent liberties with the child for the purpose of arousing or gratifying his sexual desire. State v. Slone, 76 N.C. App. 628, 334 S.E.2d 78 (1985).

Evidence that defendant not only approached and menaced nine-year-old victim, but did so with a repeatedly announced desire to engage in sexual activity, and that he exposed his penis and placed his hand on it while within several feet of victim sufficed to show that defendant took or attempted to take an immoral liberty with victim for the purpose of arousing or gratifying sexual desire. State v. Hicks, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Evidence held sufficient to warrant the inference that the defendant willfully took or attempted to take an indecent liberty with a child for the purpose of arousing or gratifying his sexual desire. State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987).

Evidence was sufficient to convict defendant of five counts of indecent liberties under subdivision (1) of subsection (a) of this section, each count coinciding with an episode of intercourse described by one of his two children, where the State presented evidence that in each instance the defendant ordered his victim to undress and lie down, then exposed his penis before proceeding with the act of intercourse. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

Corroborated testimony of child who was nine at the time of the offense that 20-year-old defendant rubbed against her until he ejaculated was sufficient evidence to permit the jury to find beyond a reasonable doubt that defendant took indecent liberties with her for the purpose of gratifying his sexual desire. State v. Griffin, 319 N.C. 429, 355 S.E.2d 474 (1987).

Evidence was held sufficient to permit the jury to infer that defendant took indecent liberties with four-year-old victim for the purpose of arousing or gratifying his sexual desire. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Where the victim testified that she and defendant were alone in the family's mobile home when she and defendant "started picking at each other . . . just playing," and defendant went up and under her blouse and he started rubbing her, and the victim also testified that before she and defendant went into the bedroom, defendant went into the kitchen and locked the back screen door, and defendant stopped rubbing her when her brother attempted to enter the locked back door, the jury could properly infer that defendant's action in rubbing the victim's breasts was for the purpose of arousing or gratifying his sexual desire. State v. Bruce, 90 N.C. App. 547, 369 S.E.2d 95, cert. denied, 323 N.C. 367, 373 S.E.2d 549 (1988).

Where the defendant, a 30-year-old man, waited until all the other adults were in another part of the house, entered the room where the victims lay, got into bed between the children and kissed each of them, putting his tongue into their mouths, ears and noses, and he then threatened to strike the children and kill their mother if they told anyone what he had done, the acts of kissing were "immoral, improper, or indecent" acts within the meaning of subsection (1) of the statute and were "lewd or lascivious" acts within the meaning of subsection (2) of the statute. State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988).

Where evidence of the age of both victim and defendant was presented at trial, the victim testified as to the date of the offense and that defendant "put his private parts in my private parts," there was plenary evidence in the record as to each of the essential elements of the offense of taking indecent liberties with a child. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

Testimony of 13-year-old victim that intruder was feeling on his "private area" permitted the jury to reasonably conclude that the activity concerned the victim's genital area, and taken with the remainder of State's evidence, was sufficient to establish the underlying felony of taking indecent liberties with a child and, a fortiori, the offense of first-degree burglary. State v. Oakman, 97 N.C. App. 433, 388 S.E.2d 579 (1990).

Where a child's mother knowingly engaged in anal intercourse with her husband in the presence of their child; engaged in sexual activity with another woman in the presence of her child; watched her child engage in vaginal intercourse with an adult woman, and where her husband told the child to engage in sexual activity with the other woman, the jury could reasonably infer from these acts that the child's mother and her husband willfully engaged in an immoral, improper or indecent liberty with the child to arouse or gratify her own sexual desire. State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993).

Evidence of defendant's age held sufficient to sustain conviction for the offense of taking indecent liberties with a child. State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778, cert. denied, 335 N.C. 239, 439 S.E.2d 153 (1993).

There was substantial evidence that defendant committed an indecent liberty with a child for the purpose of arousing or gratifying sexual desire because an exhibit the State introduced depicted defendant and a naked child in a sexually suggestive pose; the State also presented numerous nude photographs of defendant and the victim at trial in addition to that exhibit. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

Evidence Held Insufficient. — Defendant's conviction for indecent liberties with a minor was upheld on appeal where the evidence showed that the victim was 12 years old and defendant was over the age of 16 and at least five years older than the victim; additional evidence, considered in the light most favorable to the State, showed that the victim awoke after passing out to find defendant on top of her, with her pants and underwear pulled down and subsequent vaginal and anal area pain occurred. State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774, 2005 N.C. App. LEXIS 250 (2005).

Defendant's conviction for indecent liberties with a minor was reversed, and the trial court erred by denying defendant's request to dismiss that charge, because there was no substantial evidence that defendant brushed against his niece's breasts for the purpose of arousing sexual desire, and defendant's purpose for committing the offense is a gravamen of the offense. State v. Stanford, 169 N.C. App. 214, 609 S.E.2d 468, 2005 N.C. App. LEXIS 529 (2005).

Where defendant's conversations with a minor were neither sexually graphic nor accompanied by other actions tending to show defendant's purpose was sexually motivated, the evidence was insufficient to support a charge of taking indecent liberties in violation of G.S. 14-202.1(a)(1), so the trial court erred in denying defendant's motion to dismiss the charge. State v. Brown, 162 N.C. App. 333, 590 S.E.2d 433, 2004 N.C. App. LEXIS 121 (2004).

Sufficient evidence supported convictions for taking indecent liberties with a child under G.S. 14-202.1, statutory sex offense under G.S. 14-27.7A(a), and sexual activity by a custodian, G.S. 14-27.7(a), where the 15-year-old victim, a patient in a behavioral hospital, testified that she had engaged in sexual activity with defendant, a mental health technician at the hospital, and where the victim's mother and sister also testified that the victim told them about her interactions with defendant, and that they heard firsthand telephone conversations between the victim and defendant regarding specific sexual activity. State v. Evans, 162 N.C. App. 540, 591 S.E.2d 564, 2004 N.C. App. LEXIS 180 (2004).

Evidence was insufficient to support defendant's conviction on one of the two counts charged against him of indecent liberties with children; the State, at most, only proved that a single sex act occurred, which could only support one of the two convictions, and not both convictions. State v. Jones, 172 N.C. App. 308, 616 S.E.2d 15, 2005 N.C. App. LEXIS 1580 (2005).

Testimony of child victim held sufficient for the jury to find the dates of the offenses. State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988).

Evidence that defendant disrobed in children's presence, and that he engaged in intercourse with each child in presence of other supported finding of indecent liberties offense.

State v. Hewett, 93 N.C. App. 1, 376 S.E.2d 467 (1989).

The uncorroborated testimony of the victim is sufficient to convict under this section if the testimony establishes all of the elements of the offense. State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (1993).

III. EVIDENCE.

Expert Testimony Improperly Admitted as Substantive Evidence. — In defendant's trial for first-degree rape and taking indecent liberties with a child, the trial court admitted expert's testimony as substantive evidence. To do so was error because expert testimony regarding the symptoms and characteristics of sexually abused children is admissible only to assist the jury in understanding the behavior patterns of sexually abused children, and must be so limited by the trial court. State v. Hutchens, 110 N.C. App. 455, 429 S.E.2d 755, cert. denied, 334 N.C. 436, 433 S.E.2d 181 (1993).

Expert Testimony About Behaviors Observed in Children Who Have Experienced Sexual Abuse. — Trial court did not abuse its discretion by allowing an expert witness who was called by the State during defendant's trial on charges of attempted first-degree rape and taking indecent liberties with a minor to testify about common characteristics and behaviors observed in children who experienced sexual abuse, even though the witness did not interview the victim or talk to her parents. State v. McCall, 162 N.C. App. 64, 589 S.E.2d 896, 2004 N.C. App. LEXIS 12 (2004).

Competency of Six-Year-Old Victim. — In sexual offense case, fact that six-year-old victim testified without objection that she was six years old and had one brother who was eight years old, named the school she attended, gave her teacher's name and where she lived, and said that she was going to tell the truth clearly supported the trial judge's conclusion that the six-year-old victim was competent to testify; thus, the trial judge's failure to conduct a voir dire examination to establish the child's competency was not prejudicial error. State v. Gilbert, 96 N.C. App. 363, 385 S.E.2d 815 (1989).

Closed Circuit Television in Voir Dire Hearing. — Where, during voir dire hearing as to four-year-old victim's competency as a witness in prosecution for taking indecent liberties, defendant, although absent from the courtroom, was able to hear all testimony, interact freely with his attorney, and through his attorney confront the victim, thereby accomplishing effective cross-examination, the exclusion of defendant from the courtroom did not violate N.C. Const., Art. I, § 18, 19 or 23, as the trial court's use of a closed circuit television and its act of providing defendant and his attorney adequate opportunity to communicate during the victim's testimony were sufficient to permit defendant to hear the evidence and to refute it. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

The uncorroborated testimony of a victim under this section is sufficient to convict a defendant if such testimony suffices to establish all the elements of the offense. State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

Child victim's uncorroborated testimony was sufficient to convict a juvenile defendant for committing indecent liberties between children under G.S. 14-202.1, since the State's evidence established that, at the time of the incident, the victim was seven and defendant was 15, and that defendant masturbated in front of the victim. Because the State established each element of the offense, the victim's testimony was sufficient to support the conviction. In re B.E., 186 N.C. App. 656, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

There was substantial evidence that defendant committed an indecent liberty with a child based upon an incident when he asked the victim to touch his penis in the shower because the victim's testimony established all of the elements of the offense. State v. Martin, — N.C. App. —, 671 S.E.2d 53, 2009 N.C. App. LEXIS 55 (2009).

Record contained sufficient evidence that defendant was "with" children, within the meaning of this section, when he used his dogs to encourage children to come to his yard and then exposed himself from within a nearby glass door. State v. Nesbitt, 133 N.C. App. 420, 515 S.E.2d 503 (1999).

Evidence of Similar Conduct. — In prosecution for taking indecent liberties with a minor, evidence that defendant had, on occasions other than that at issue, engaged in similar sexual conduct with victim and her sister was competent to show defendant's intent, motive and on-going plan to gratify his sexual desires while ostensibly baby-sitting the children. State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985).

In a prosecution for taking immoral, improper, and indecent liberties with a female under the age of 16, evidence of prior misconduct by the defendant toward the prosecuting witness was admissible as an exception to the rule that evidence of independent offenses is not admissible. State v. Jenkins, 35 N.C. App. 758, 242 S.E.2d 505, cert. denied, 295 N.C. 470, 246 S.E.2d 11 (1978).

Defendant's prior sexual acts in the presence of children were admitted to show his purpose of arousing or gratifying sexual desire. State v. Beckham, 145 N.C. App. 119, 550 S.E.2d 231, 2001 N.C. App. LEXIS 559 (2001).

Where defendant had sexually explicit conversations with a 15-year-old former karate student in violation of this section, the trial court's admission of evidence of defendant's subsequent conduct with another student where there were certain similarities was not prejudicial under the circumstances. State v. Every, 157 N.C. App. 200, 578 S.E.2d 642, 2003 N.C. App. LEXIS 538 (2003).

Defendant was convicted of taking indecent liberties with a 15-year-old girl by giving her a letter in which he proposed, in graphic language, to have intercourse and oral sex with her. He was not entitled to relief due to counsel's alleged ineffectiveness in not objecting to the admission of testimony that he gave a similar letter to another child, as he failed to show that absent the admission of the disputed testimony the jury probably would have returned a different verdict. State v. McClary, — N.C. App. —, 679 S.E.2d 414, 2009 N.C. App. LEXIS 1104 (July 7, 2009).

Evidence of Touching Supported Only One Charge. — Trial court erred in denying motion to dismiss one of the two charges of indecent liberties because a single act could support only one conviction; the evidence showed that the sole act involved was touching and that there was no gap in time between defendant's touching of the victim's breasts and putting his hand inside the waistband of the victims' pants. State v. Laney, 178 N.C. App. 337, 631 S.E.2d 522, 2006 N.C. App. LEXIS 1398 (2006).

Defendant's Statements Concerning Prior Incidents. — In a case of first degree sexual offense and taking indecent liberties with two young boys, defendant's statement to detective concerning prior incidents of taking indecent liberties with two young girls was relevant to show defendant's unnatural lust, intent or state of mind. State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580, cert. denied, 331 N.C. 290, 417 S.E.2d 68 (1992).

Evidence Supported Finding of Abuse. — The trial court's findings of fact regarding child's status as an abused juvenile were supported by clear and convincing evidence where the child testified that her father had shown her a picture of a woman wearing a see-through dress, the child's friend drew a picture in court of what she had seen, i.e. the father's anatomy, a social worker testified that the child had told her that her father had "asked her to touch his penis," and a doctor testified that the child had told her that her father had asked her to look at a "dirty book." In re Cogdill, 137 N.C. App. 504, 528 S.E.2d 600 2000 N.C. App. LEXIS 425 (2000).

Victim's testimony that defendant tickled her in her private parts, that he was tickling her leg and would start going up to her private parts, provided substantial evidence in support conviction for taking indecent liberties with a child. State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005).

Evidence that the father became drunk, walked up to his minor daughter, grabbed the daughter from behind and fondled her breasts and that despite her protests the father continued to grope the child, and that on another occasion the father inappropriately touched the daughter in the vaginal area was sufficient to show that he sexually abused the daughter. In re M.G., 187 N.C. App. 536, 653 S.E.2d 581, 2007 N.C. App. LEXIS 2573 (2007), review granted, 666 S.E.2d 120, 2008 N.C. LEXIS 706 (N.C. 2008).

Evidence of Defendant's Age. — An officer's testimony that he had contacted the defendant and had taken a statement from him which provided the officer with the observation necessary to render his opinion as to the age of the defendant was admissible in a prosecution under this section. State v. Campbell, 51 N.C. App. 418, 276 S.E.2d 726 (1981).

Use of Anatomical Dolls to Illustrate Testimony. — The courts of this State have allowed the use of anatomical dolls in sexual abuse cases to illustrate the testimony of child witnesses; the practice is wholly consistent with existing rules governing the use of photographs and other items to illustrate testimony and it conveys the information sought to be elicited while permitting the child to use a familiar item, thereby making him more comfortable. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Even though dolls were used to illustrate the testimony of a social worker rather than the abused children, the evidence was still admissible; the demonstration illustrated the social worker's testimony as to the manner in which the children communicated the accounts of sexual abuse and the social worker's demonstration of what she observed each child do with the dolls also corroborated the testimony of each child. State v. Chandler, 324 N.C. 172, 376 S.E.2d 728 (1989).

Child's Nightmares and Mental Health Center Visits Held Relevant. — In a prosecution for taking indecent liberties with a five-year-old girl, from the fact that the child had had severe nightmares or night terrors and that her mother had taken her to a mental health center five times for treatment it was reasonable to infer that the child might have had some form of mental or emotional illness that might have affected her testimonial capacities. This was a subject relevant to the child's credibility as a witness. State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985).

Testimony about the nature of the child's nightmares, which tended to support defendant's contention that the child had a history of experiencing serious nightmares which may have had a sexual origin and nature, and that she accused defendant at night in a manner similar to that in which she behaved when she had her night terrors was relevant. While this evidence did not conclusively prove that the child fantasized the alleged crime, whether there was a connection between the night terrors and the child's accusation of defendant sufficient to absolve the defendant was a question of fact for the jury. State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985).

Child's Accusation of Others Held Relevant. — Where a few hours after she accused defendant, the child also told her mother and the defendant's girlfriend that her father had abused her in the same way, the child's accusation of the father was relevant to the child's credibility, and the trial judge abused his discretion and violated defendant's constitutional rights by ruling such a subject irrelevant and by completely foreclosing any discussion of it by the girlfriend before the jury. State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985).

Refusal to Allow Cross-Examination of Child Prevented Effective Cross-Examination. — Where the judge completely foreclosed any cross-examination of the child or her mother on the child's accusation of her father a few hours after her accusation of defendant and on the content of the child's nightmares, the child having had a history of nightmares, the defendant was deprived of his right to effective cross-examination, since these subjects, were relevant to the child's testimonial capacities. The jury would not have been confused or inflamed by carefully monitored cross-examination of the child or her mother on these topics. State v. Durham, 74 N.C. App. 159, 327 S.E.2d 920 (1985).

Evidence of Bias of Victim's Mother Properly Excluded. — In a prosecution of defendant for taking indecent liberties with a child, the trial court did not err in excluding testimony by defendant, his wife, and an employee of the county department of social services which was offered to show bias, interest, corruption, undue prejudice and influence on the part of the mother of the prosecuting witness, since the competency of the 10-year-old victim was determined by the trial judge after a voir dire hearing; her credibility was tested by careful cross-examination by defendant; defendant was unable to show on cross-examination that the prosecuting witness was biased or prejudiced against him or that her testimony was in any was influenced by her mother. State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980).

Leading Questions. — In prosecution for taking indecent liberties with a minor, trial judge did not abuse his discretion in permitting the district attorney to ask the 12-year-old victim two leading questions about the sexual acts committed upon her. State v. Sturgis, 74 N.C. App. 188, 328 S.E.2d 456 (1985).

Hearsay Testimony Held Sufficient. — Testimony of minor victim's counselor, examining nurse, and examining doctor as to victim's statements and physical condition was sufficient to withstand defendant's motion to dismiss five counts of indecent liberties with a minor child offenses after the victim refused to testify. State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568, 2001 N.C. App. LEXIS 1266 (2001), cert. denied, 355 N.C. 288, 561 S.E.2d 268 (2002).

Admission of hearsay evidence at trial does not violate the confrontation clause when the declarant is unavailable to testify and his statement bears adequate indicia of reliability. Thus, in a trial for taking indecent liberties with a four-year-old child, admission of evidence under an established exception to the hearsay rule did not violate defendant's right of confrontation under N.C. Const., Art. I, § 25. State v. Jones, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

Testimony by Child, Other Children, and Social Worker Held Sufficient. — Child victim's testimony of defendant's conduct and testimony by previous child victims of similar conduct, along with expert testimony of clinical social worker, was sufficient to convict defendant of taking indecent liberties with a child. State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316, 2001 N.C. App. LEXIS 1185 (2001), cert. denied, 355 N.C. 222, 560 S.E.2d 365 (2002), cert. denied, 536 U.S. 967, 122 S. Ct. 2680, 153 L. Ed. 2d 851 (2002).

Suppression of Social Workers' Testimony Held Proper. — In a case involving, inter alia, indecent liberties with a child, where social worker went beyond merely fulfilling her role as the victim's social worker and began working with the sheriff's department on the case prior to interviewing defendant, the social worker's role changed and became essentially like that of an agent of the State; accordingly, because the social worker did not advise defendant of her Miranda rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with the social worker. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Plethysmograph. — The evidence before the trial court by no means established the reliability of the plethysmograph; there is a substantial difference in opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy. State v. Spencer, 119 N.C. App. 662, 459 S.E.2d 812 (1995).

Evidence That Defendant Enjoyed Consensual Anal Sex With His Wife Improperly Admitted. — Defendant was granted a new trial on his convictions of first degree sex offense with a child, G.S. 14-27.4, and taking indecent liberties with a child, G.S. 14-202.1, because the trial court erred, pursuant to G.S. 8C-1, N.C. R. Evid. 404(b), in admitting testimony by defendant's wife that defendant enjoyed anal sex; the fact that defendant engaged in and liked consensual anal sex with his wife was not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both to be admissible under rule 404(b). State v. Dunston, 161 N.C. App. 468, 588 S.E.2d 540, 2003 N.C. App. LEXIS 2186 (2003).

Where there was no evidence that defendant had intended to molest an eight-year-old boy when he tried to grab his arm in a bathroom stall, his subsequent molestation of the child's younger brother in same bathroom was not proof of such intent, and the charge of taking indecent liberties with the eight-year-old should have been dismissed for insufficient evidence. State v. Shue, 163 N.C. App. 58, 592 S.E.2d 233, 2004 N.C. App. LEXIS 264 (2004), cert. denied, 358 N.C. 380, 597 S.E.2d 773 (2004), cert. dismissed, notice of appeal dismissed, — N.C. —, 623 S.E.2d 38 (2005).

Evidence Held Sufficient. — Although a nurse and doctor who examined an alleged rape victim testified that they did not find conclusive physical evidence that a sex act occurred, this medical testimony did not negate the victim's testimony that defendant committed numerous sexual acts against her, which was corroborated by the forensic evidence; also, the State presented evidence of seminal fluid collected from the victim's bedroom that matched defendant's DNA. Therefore, the State presented sufficient evidence from which a jury could find that defendant committed first-degree statutory rape under G.S. 14-27.2(a)(1), first-degree sexual offense under G.S. 14-27.4(a)(1), and indecent liberties with a child under G.S. 14-202.1. State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439, 2004 N.C. App. LEXIS 581 (2004).

Trial court did not err in dismissing for insufficiency of the evidence the taking indecent liberties with a minor child counts against defendant where defendant argued that the child victims' accounts contained conflicting details and, therefore, lacked credibility, as the appellate court, in a sufficiency of the evidence analysis, was required to resolve such discrepancies in favor of the State and was not permitted to weigh the evidence. State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1, 2005 N.C. App. LEXIS 1439 (2005).

Evidence that defendant was at least 16 years of age, that defendant was five years older than the victim, that defendant ran his hand up the victim's leg and tried to get his hand into the victim's pants but was unable to because the victim leaned up against the steering wheel, and that defendant attempted to do the aforementioned act for the purpose of arousing or gratifying defendant's sexual desire, was sufficient to support the denial of defendant's motion to dismiss. State v. Smith, 180 N.C. App. 86, 636 S.E.2d 267, 2006 N.C. App. LEXIS 2251 (2006).

Defendant's action in "French kissing" the victim was a lewd or lascivious act within the meaning of G.S. 14-202.1(a)(2), and the jury could have found that defendant's actions in telling the victim to "kiss me like you love me," while pulling the victim's face close to his and "French kissing" her, tended to arouse sexual desire in defendant, and so, substantial evidence of a lewd or lascivious act was presented to the jury. State v. Hammett, 182 N.C. App. 316, 642 S.E.2d 454, 2007 N.C. App. LEXIS 580 (2007), cert. denied, appeal dismissed, 361 N.C. 572, 2007 N.C. LEXIS 884 (2007).

There was sufficient evidence defendant took actions against the victim for the purposes of arousing or gratifying defendant's sexual desire for purposes of a taking indecent liberties with a child conviction as the victim had bite marks all over her body and extensive trauma to both her vagina and rectum; moreover, defendant told police that defendant did not remember biting the victim, but acknowledged that it was possible because defendant had bitten another woman before while "making love" with her. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Evidence was sufficient to convict defendant of taking indecent liberties with a child, as 1) soliciting sexual acts from a 15-year-old girl through sexually explicit language in a letter he gave her was behavior that the common sense of society would regard as indecent and improper, and 2) the fact that his actions were for the purpose of arousing or gratifying sexual desire could be inferred from the evidence of his actions. State v. McClary, — N.C. App. —, 679 S.E.2d 414, 2009 N.C. App. LEXIS 1104 (July 7, 2009).

Evidence Not Substantial. — There was not substantial evidence that defendant asked a child victim to perform fellatio to support defendant's taking indecent liberties with a child conviction under G.S. 14-202.1(a)(2) to send the case to the jury, as the victim never testified that defendant asked or attempted to place his penis in the victim's mouth; a pediatrician testified only that: (1) the victim specifically described the sexual abuse that the victim endured, and that defendant was the individual who performed the sexual acts upon the victim; and (2) the victim described that defendant wanted the victim to perform fellatio but the victim did not want to do that. State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440, 2007 N.C. App. LEXIS 1615 (2007).

IV. INSTRUCTIONS.

"Purpose of Arousing or Gratifying Sexual Desire". — Charge to the jury that defendant could be found guilty of taking an indecent liberty with a minor if it found that he "willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire" did not violate defendant's right to have a unanimous verdict, as the court merely allowed the jury to choose between two alternative purposes for which this single act might have been committed. State v. Jerrells, 98 N.C. App. 318, 390 S.E.2d 722, cert. denied, 326 N.C. 802, 393 S.E.2d 901 (1990).

Touching of Victim or Inducing Victim to Touch. — Trial judge correctly instructed jury that it could find immoral, improper, or indecent liberty upon a finding that defendant either improperly touched his son or induced his son to touch him; the instruction did not permit conviction by less than a unanimous verdict. State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990).

No Variance Between Indictment and Charge. — Where the State could have charged the defendant under subdivision (a)(1) or (a)(2) of this section, the evidence at trial supporting either charge, but indicted defendant under (a)(2), the trial court's inclusion in the jury instruction of language appearing in both subdivisions (a)(1) and (a)(2) did not constitute a fatal variance between the indictment and the charge. State v. Wilson, 87 N.C. App. 399, 361 S.E.2d 105 (1987), cert. denied, 321 N.C. 479, 364 S.E.2d 670 (1988).

Failure to Instruct on Corroborative Evidence. — Where the evidence clearly showed defendant engaged in sexual acts with the child on more than one occasion, the State focused the child's testimony on the incident in question and made it clear defendant was charged for committing that act, and the jury was charged solely as to this incident, there was no prejudicial error in failing to instruct on corroborative evidence. State v. Allen, 92 N.C. App. 168, 374 S.E.2d 119 (1988), cert. denied, 324 N.C. 544, 380 S.E.2d 772 (1989).

Failure to Charge on Willfulness. — In a prosecution of defendant for taking indecent liberties with a female under the age of 16, defendant being over 16 years old and more than five years older than the female child, the jury, by finding that defendant committed the crime, necessarily found that he acted willfully, and accordingly, the court's failure to charge on willfulness was harmless beyond a reasonable doubt. State v. Maxwell, 47 N.C. App. 658, 267 S.E.2d 582, appeal dismissed and cert. denied, 301 N.C. 102, 273 S.E.2d 307 (1980).

Failure to Define "Lewd or Lascivious Act." — The words "lewd or lascivious act" are ordinary words which the jury is presumed to understand. State v. Stell, 39 N.C. App. 75, 249 S.E.2d 480 (1978).

Since the words "lewd or lascivious act" are ordinary words which the jury is presumed to understand, there was no error in a prosecution under this section when the trial court failed to define the words in its charge to the jury. State v. Stell, 39 N.C. App. 75, 249 S.E.2d 480 (1978).

Failure to Specify Which Act Was at Issue. — Trustworthiness of defendant's extrajudicial confession that a victim attempted to perform fellatio was corroborated with respect to a charge of indecent liberties with a child because defendant testified that his penis was exposed while he was with the victim and the victim testified that defendant exposed himself on a separate occasion. Because the jury could have found that defendant's acts during the first or second occasion constituted an indecent liberty with a child, it was immaterial that the trial court did not give specific instructions as to which of those acts were at issue. State v. Smith, 362 N.C. 583, 669 S.E.2d 299, 2008 N.C. LEXIS 972 (2008).

Failure to Instruct on Acts Forming Bases for Charges. — Because a defendant may be convicted of an indecent liberties charge even when the indictment lacks details identifying specific incidents, and because the judge is under no requirement to identify specifically the acts that constitute the charge, a trial judge did not commit plain error by not requiring the State to identify the alleged acts forming the bases for indecent liberties charges and then identifying those acts as the bases for the charges in its instructions. State v. Carter, — N.C. App. —, 679 S.E.2d 457, 2009 N.C. App. LEXIS 1174 (July 21, 2009).

§ 14-202.2. Indecent liberties between children.

(a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child

of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

(b) A violation of this section is punishable as a Class 1 misdemeanor. (1995, c. 494, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 12.)

CASE NOTES

The element "for the purpose of arousing or gratifying sexual desire" may not be inferred solely from the act itself under this section. Without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting, sexual ambitions must not be assigned to a child's actions. In re T.S., 133 N.C. App. 272, 515 S.E.2d 230 (1999).

Evidence Held Sufficient. — Evidence was sufficient to support juvenile's adjudication as a delinquent for taking indecent liberties with a child where the juvenile undertook the act for the purpose of arousing or gratifying sexual desire. In re T.C.S., 148 N.C. App. 297, 558 S.E.2d 251, 2002 N.C. App. LEXIS 12 (2002).

Defendant's adjudication of indecent liberties between children was affirmed and the trial court did not err in denying defendant's motion to dismiss at the end of all the evidence, where: (1) defendant, who was 14 years old, told the victim, his 8-year-old step-sister, to come into his room; (2) when the victim entered the room, defendant pulled down her pants; (3) defendant then pulled down his own pants and touched the victim's vagina with his penis; (4) when he heard his step-mother coming, defendant ran to his closet while pulling up his pants; (4) the step-mother found the victim under the covers in defendant's bed not wearing pants or underwear; and (5) while the step-mother was in the room defendant hid in the closet was sufficient to support the adjudication. In re D.W., 171 N.C. App. 496, 615 S.E.2d 90, 2005 N.C. App. LEXIS 1358 (2005).

Uncorroborated testimony of a child victim was sufficient to convict a juvenile defendant for committing indecent liberties between children under G.S. 14-202.2(a)(1), since the State's evidence established that, at the time of the incident, the victim was seven and defendant was 15, and that defendant masturbated in front of the victim. Because the State established each element of the offense, the evidence was sufficient to support the conviction. In re B.E., 186 N.C. App. 656, 652 S.E.2d 344, 2007 N.C. App. LEXIS 2255 (2007).

Cited in In re Eades, 143 N.C. App. 712, 547 S.E.2d 146, 2001 N.C. App. LEXIS 334 (2001); State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603, 2002 N.C. App. LEXIS 653 (2002); In re Rikard, 161 N.C. App. 150, 587 S.E.2d 467, 2003 N.C. App. LEXIS 1997 (2003); In re C.B., 187 N.C. App. 803, 654 S.E.2d 21, 2007 N.C. App. LEXIS 2521 (2007).

§ 14-202.3. Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act.

(a) Offense. — A person is guilty of solicitation of a child by a computer if the person is 16 years of age or older and the person knowingly, with the intent to commit an unlawful sex act, entices, advises, coerces, orders, or commands, by means of a computer or any other device capable of electronic data storage or transmission, a child who is less than 16 years of age and at least five years younger than the defendant, or a person the defendant believes to be a child who is less than 16 years of age and who the defendant believes to be at least five years younger than the defendant, to meet with the defendant or any other person for the purpose of committing an unlawful sex act. Consent is not a defense to a charge under this section.

(b) Jurisdiction. — The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(c) Punishment. — A violation of this section is punishable as follows:

(1) A violation is a Class H felony except as provided by subdivision (2) of this subsection.

(2) If either the defendant, or any other person for whom the defendant was arranging the meeting in violation of this section, actually appears at the meeting location, then the violation is a Class G felony.

(1995 (Reg. Sess., 1996), c. 632, s. 1; 2005-121, s. 1; 2008-218, s. 5; 2009-336, s. 1.)

Editor's Note. — Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2008-218, s. 5, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "punishable as follows" for "a Class H felony" in subsection (c); and added subdivisions (c)(1) and (c)(2).

Session Laws 2009-336, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, in the section catchline, inserted "or certain other electronic devices"; and in subsection (a), in the first sentence, inserted "or any other device capable of electronic data storage or transmission" and substituted "five years" for "3 years" twice.

CASE NOTES

Attempted Computer Solicitation. — By also making attempted computer solicitation a felony under amended G.S. 14-202.3, the legislature merely increased the severity of the crime; it did not create the new crime of attempt. State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

Evidence proffered was sufficient to show that defendant committed the inchoate crime of attempted indecent liberties with children and attempted solicitation of a minor, even though the minor was an adult police officer posing as a child, because the warrant application recounted numerous sexually explicit instant message conversations between defendant and individuals who defendant believed were children, in which he asked to meet the "children" to engage in sexual conduct, and the warrant application also stated that defendant transmitted a video of himself masturbating. State v. Ellis, 188 N.C. App. 820, 657 S.E.2d 51, 2008 N.C. App. LEXIS 272 (2008).

Entrapment Instruction Not Required. — Entrapment instruction was not required as defendant's lack of a criminal record and lack of a record of molestation or other similar offensive acts did not show that defendant was not predisposed to violate G.S. 14-202.3 as defendant initiated all sexually charged contact with person on Internet (girl), whom he believed to be a 14-year-old girl, and defendant followed through on a plan for a meeting for sexual contact with the girl with little urging from undercover deputies. State v. Morse, — N.C. App. —, 671 S.E.2d 538, 2009 N.C. App. LEXIS 16 (2009).

§ 14-202.4. Taking indecent liberties with a student.

(a) If a defendant, who is a teacher, school administrator, student teacher, school safety officer, or coach, at any age, or who is other school personnel and is at least four years older than the victim, takes indecent liberties with a victim who is a student, at any time during or after the time the defendant and victim were present together in the same school but before the victim ceases to be a student, the defendant is guilty of a Class I felony, unless the conduct is covered under some other provision of law providing for greater punishment. A person is not guilty of taking indecent liberties with a student if the person is lawfully married to the student.

(b) If a defendant, who is school personnel, other than a teacher, school administrator, student teacher, school safety officer, or coach, and who is less than four years older than the victim, takes indecent liberties with a student as provided in subsection (a) of this section, the defendant is guilty of a Class A1 misdemeanor.

(c) Consent is not a defense to a charge under this section.

(d) For purposes of this section, the following definitions apply:

(1) "Indecent liberties" means:

a. Willfully taking or attempting to take any immoral, improper, or indecent liberties with a student for the purpose of arousing or gratifying sexual desire; or

b. Willfully committing or attempting to commit any lewd or lascivious act upon or with the body or any part or member of the body of a student.

For purposes of this section, the term indecent liberties does not include vaginal intercourse or a sexual act as defined by G.S. 14-27.1.

(1a) "Same school" means a school at which (i) the student is enrolled or is present for a school-sponsored or school-related activity and (ii) the school personnel is employed, volunteers, or is present for a school-sponsored or school-related activity.

(2) "School" means any public school, charter school, or nonpublic school under Parts 1 and 2 of Article 39 of Chapter 115C of the General Statutes.

(3) "School personnel" means any person included in the definition contained in G.S. 115C-332(a)(2), and any person who volunteers at a school or a school-sponsored activity.

(3a) "School safety officer" means any other person who is regularly present in a school for the purpose of promoting and maintaining safe and orderly schools and includes a school resource officer.

(4) "Student" means a person enrolled in kindergarten, or in grade one through grade 12 in any school. (1999-300, s. 1; 2003-98, s. 2; 2004-203, s. 19(a).)

Legal Periodicals. — For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

A school resource officer, who allegedly knew that a teacher was facilitating sexual liaisons between a 14-year-old girl and an 18-year-old boy, was not required, nor was he permitted, to weigh the safety interests of the public when he decided not to report the boy's possible statutory rape of the girl or the teacher's sexual exploitation of the girl and boy — rather, his duty to report abuse was imposed by statute and involved no deliberation or discretionary consideration; thus, his failure to report known child abuse was outside the scope of conduct generally associated with law enforcement and the public duty doctrine did not bar the claim. Smith v. Jackson County Bd. of Educ., 168 N.C. App. 452, 608 S.E.2d 399, 2005 N.C. App. LEXIS 347 (2005).

§ 14-202.5. Ban use of commercial social networking Web sites by sex offenders.

(a) Offense. — It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages on the commercial social networking Web site.

(b) For the purposes of this section, a "commercial social networking Web site" is an Internet Web site that meets all of the following requirements:

(1) Is operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site.

(2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.

(3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.

(4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger.

(c) A commercial social networking Web site does not include an Internet Web site that either:

(1) Provides only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform; or

(2) Has as its primary purpose the facilitation of commercial transactions involving goods or services between its members or visitors.

(d) Jurisdiction. — The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(e) Punishment. — A violation of this section is a Class I felony. (2008-218, s. 6; 2009-570, s. 4.)

Editor's Note. — Session Laws 2008-218, s. 11, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2009-570, s. 4, effective August 28, 2009, inserted "from" in subdivision (b)(1).

§ 14-202.5A. Liability of commercial social networking sites.

(a) A commercial social networking site, as defined in G.S. 14-202.5, that complies with G.S. 14-208.15A or makes other reasonable efforts to prevent a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes from accessing its Web site shall not be held civilly liable for damages arising out of a person's communications on the social networking site's system or network regardless of that person's status as a registered sex offender in North Carolina or any other jurisdiction.

(b) For the purposes of this section, "access" is defined as allowing the sex offender to do any of the activities or actions described in G.S. 14-202.5(b)(2) through G.S. 14-202.5(b)(4) by utilizing the Web site. (2008-218, s. 7; 2009-272, s. 1.)

Editor's Note. — Session Laws 2008-218, s. 11, makes this section effective May 1, 2009, and applicable to acts occurring on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

Effect of Amendments. — Session Laws 2009-272, s. 1, effective May 1, 2009, rewrote subsection (a).

§ 14-202.6. Ban on name changes by sex offenders.

It is unlawful for a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes to obtain a change of name under Chapter 101 of the General Statutes. (2008-218, s. 8.)

Editor's Note. — Session Laws 2008-218, s. 11, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-218, s. 10, is a severability clause.

§§ 14-202.7 through 14-202.9: Reserved for future codification purposes.

ARTICLE 26A.

Adult Establishments.

§ 14-202.10. Definitions.

As used in this Article:

(1) "Adult bookstore" means a bookstore:

a. Which receives a majority of its gross income during any calendar month from the sale or rental of publications (including books, magazines, other periodicals, videotapes, compact discs, other photographic, electronic, magnetic, digital, or other imaging medium) which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section; or

b. Having as a preponderance (either in terms of the weight and importance of the material or in terms of greater volume of materials) of its publications (including books, magazines, other periodicals, videotapes, compact discs, other photographic, electronic, magnetic, digital, or other imaging medium) which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theatre, adult mini motion picture theatre, adult live entertainment business, or massage business as defined in this section.

(3) "Adult live entertainment" means any performance of or involving the actual presence of real people which exhibits specified sexual activities or specified anatomical areas, as defined in this section.

(4) "Adult live entertainment business" means any establishment or business wherein adult live entertainment is shown for observation by patrons.

(5) "Adult motion picture theatre" means an enclosed building or premises used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein. "Adult motion picture theatre" does not include any adult mini motion picture theatre as defined in this section.

(6) "Adult mini motion picture theatre" means an enclosed building with viewing booths designed to hold patrons which is used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in this section, for observation by patrons therein.

(7) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(8) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(9) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphernalia that is designed principally for specified sexual activities but shall not mean any contraceptive device.

(10) "Specified anatomical areas" means:
  a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
  b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(11) "Specified sexual activities" means:
  a. Human genitals in a state of sexual stimulation or arousal;
  b. Acts of human masturbation, sexual intercourse or sodomy; or
  c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts. (1977, c. 987, s. 1; 1985, c. 731, s. 1; 1998-46, s. 4.)

Legal Periodicals. — For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

For article, "Pornography and the First Amendment," see 1986 Duke L.J. 589.

For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

CASE NOTES

Purpose of Article. — This Article is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

The essential regulation implemented by this Article is of location. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Constitutionality — No Equal Protection Violation. — This Article does not violate equal protection since the unequal treatment of commercial establishments involved in this Article is based most essentially on the different effects they are considered to have on their surroundings. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — U.S. Const., Amend. I Not Violated. — Under this Article the incidental restriction on interests protected by U.S. Const., Amend. I is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments is one of the least burdensome means the state could have chosen. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

On its face this Article is a permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

This Article is merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by U.S. Const., Amend. I. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

While U.S. Const., Amend. I sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, those limits are not exceeded by the relocation burden involved in this Article. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

This Article furthers an important or substantial interest. North Carolina has a substantial interest in maintaining a stable, healthful environment in its cities. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — Right of Privacy Not Violated. — This Article does not violate the constitutionally protected right of privacy. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct.

3028, 65 L. Ed. 2d 1124 (1980).

Constitutionality of City Ordinance. — City zoning ordinance, which did not ban adult establishment altogether but merely regulated their location, was content-neutral, designed to serve a substantial government interest, and did not unreasonably limit alternative avenues of communication. Mom N Pops, Inc. v. City of Charlotte, 979 F. Supp. 372 (W.D.N.C. 1997), aff'd, 162 F.3d 1155 (4th Cir. 1998).

Standing to Challenge This Article. — Adult establishments which clearly came within the terms of this Article lacked standing to challenge this Article for vagueness. But even were they granted standing to raise this issue, the statute would withstand a vagueness challenge. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

This Article is within the concept of the public welfare that defines the limits of the police power. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Whether or not this Article is a true zoning law, it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Relationship with Section 19-1. — This section and G.S. 19-1 should be construed in pari materia. South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (1998), cert. denied, 348 N.C. 501, 510 S.E.2d 656 (1998).

Preponderance. — The term "preponderance" as used in G.S. 14-202.10(1) and (6) denotes a superiority in weight which is a qualitative measurement, and since the amendment of G.S. 14-202.10 merely codified the Court of Appeals' explanations of what the word "preponderance" had meant, the amendment was not a substantive change in the law. Durham Video & News, Inc. v. Durham Bd. of Adjustment, 144 N.C. App. 236, 550 S.E.2d 212, 2001 N.C. App. LEXIS 426 (2001).

Construction of Term "Publications." — In interpreting this section with G.S. 19-1.1 it is almost impossible to construe the term "publications" as not including videotapes. South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (1998), cert. denied, 348 N.C. 501, 510 S.E.2d 656 (1998).

Emphasis on Anatomy or Sex. — In the context of zoning enforcement, it is reasonable to rely upon an analysis of the pictures and titles on the covers of magazines, videos, and other publications to decide whether such works emphasize the anatomical parts and sexual activities specified in G.S. 14-202.10(10) and (11). Durham Video & News, Inc. v. Durham Bd. of Adjustment, 144 N.C. App. 236, 550 S.E.2d 212, 2001 N.C. App. LEXIS 426 (2001).

Adult Bookstore. — Plaintiffs lacked standing to challenge a city ordinance regulating sexually oriented businesses for vagueness where the ordinance clearly applied to the plaintiffs; court-ordered expedited discovery demonstrated that most if not all of the novelty items and devices stocked or displayed for sale were clearly sexually oriented, and plaintiffs' proposed business fell within the definition of "adult bookstore." Mom N Pops, Inc. v. City of Charlotte, 979 F. Supp. 372 (W.D.N.C. 1997), aff'd, 162 F.3d 1155 (4th Cir. 1998).

Permissible Inference from Defendant's Refusal to Testify. — It was proper for the Town Board of Adjustment's to infer a violation of G.S. 14-202.11(a) from defendant-video store owner's refusal to testify and thus to conclude that his video store qualified as an "adult bookstore" under this section. Davis v. Board of Adjustment, 141 N.C. App. 489, 541 S.E.2d 183, 2000 N.C. App. LEXIS 1437 (2000).

Cited in Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981); Carolina Spirits, Inc. v. City of Raleigh, 127 N.C. App. 745, 493 S.E.2d 283 (1997); Fantasy World, Inc. v. Greensboro Bd. of Adjustment, 128 N.C. App. 703, 496 S.E.2d 825 (1998); Steakhouse, Inc. v. City of Raleigh, 166 F.3d 634 (4th Cir. 1999).

§ 14-202.11. Restrictions as to adult establishments.

(a) No person shall permit any building, premises, structure, or other facility that contains any adult establishment to contain any other kind of adult establishment. No person shall permit any building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained to contain any adult establishment.

(b) No person shall permit any viewing booth in an adult mini motion picture theatre to be occupied by more than one person at any time.

(c) Nothing in this section shall be deemed to preempt local government regulation of the location or operation of adult establishments or other sexually oriented businesses to the extent consistent with the constitutional protection afforded free speech. (1977, c. 987, s. 1; 1985, c. 731, s. 2; 1998-46, s. 5.)

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

CASE NOTES

Preemption of County Ordinance. — Provision of a county ordinance that prohibited the location of such businesses in any building located with 1000 feet of another building containing such a business was preempted by this section. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

Permissible Inference from Defendant's Refusal to Testify. — It was proper for the Town Board of Adjustment's to infer a violation of this section from defendant-video store owner's refusal to testify and thus to conclude that his video store qualified as an "adult bookstore" under G.S. 14-202.10(1). Davis v. Board of Adjustment, 141 N.C. App. 489, 541 S.E.2d 183, 2000 N.C. App. LEXIS 1437 (2000).

Cited in Onslow County v. Moore, 127 N.C. App. 546, 491 S.E.2d 670 (1997).

§ 14-202.12. Violations; penalties.

Any person who violates G.S. 14-202.11 shall be guilty of a Class 3 misdemeanor. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a Class 2 misdemeanor.

As used herein, "person" shall include:

(1) The agent in charge of the building, premises, structure or facility; or

(2) The owner of the building, premises, structure or facility when such owner knew or reasonably should have known the nature of the business located therein, and such owner refused to cooperate with the public officials in reasonable measures designed to terminate the proscribed use; provided, however, that if there is an agent in charge, and if the owner did not have actual knowledge, the owner shall not be prosecuted; or

(3) The owner of the business; or

(4) The manager of the business. (1977, c. 987, s. 1; 1985, c. 731, s. 3; 1993, c. 539, s. 132; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement. (1919, c. 215, s. 2; C.S., s. 4357.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For comment, "Prostitution and Obscenity: A Comment Upon the Attorney General's Report on Pornography," see 1987 Duke L.J. 123.

CASE NOTES

This section unequivocally defines prostitution as an act of sexual intercourse, and nothing else. Sexual intercourse is defined as, "the actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." State v. Richardson, 307 N.C. 692, 300 S.E.2d 379 (1983).

If the legislature wishes to include within G.S. 14-204 other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since the court is bound to construe a criminal statute strictly in favor of the defendant. State v. Richardson, 307 N.C. 692, 300 S.E.2d 379 (1983).

Employment as Consideration for Sex. — The exchange of sexual intercourse for the valuable economic benefit of a job fits within North Carolina's criminal prohibition. Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

North Carolina, sharing the nearly unanimous view of American jurisdictions, prohibits prostitution — "including the offering or receiving of the body for sexual intercourse for hire." Harrison v. Edison Bros. Apparel Stores, 924 F.2d 530 (4th Cir. 1991).

The sexual act of masturbation for hire is not included in the definition of prostitution, as found in this section and prohibited by G.S. 14-204. State v. Richardson, 307 N.C. 692, 300 S.E.2d 379 (1983).

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

Cited in State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942); State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970); State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975); State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980); State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985); Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993); Phillips v. J.P. Stevens & Co., 827 F. Supp. 349 (M.D.N.C. 1993).

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

It shall be unlawful:

(1) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

(2) To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

(3) To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

(4) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

(5) To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

(6) To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

(7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1; C.S., s. 4358.)

Cross References. — As to the crime of loitering for the purpose of violating this section, see G.S. 14-204.1. As to declaring houses of prostitution to be nuisances, see G.S. 19-1.

Legal Periodicals. — For article discussing model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

CASE NOTES

Purpose. — The enterprise sought to be proscribed by this section, the offering of the body for hire, has been fragmented into multiple substantive offenses. This fragmentation serves the laudable purpose of not only punishing those who, at any state, engage in the promotion of the enterprise, but is an obvious prosecutorial aid to those whose responsibility it is to suppress the vice. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Each Step a Separate Crime. — The legislature, by making each step taken in furtherance of the vice of offering the body for sexual hire a separate crime, has made it possible to obtain convictions where, given the nature of the activity, they would otherwise be most difficult to obtain. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The violation of subdivision (4) is complete when defendant directs and invites agent to her apartment for prostitution. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Same — Transporting. — Where defendants, taxi drivers, were apprehended in a clearing in the woods, each behind the wheel of his taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution. State v. Willis, 220 N.C. 712, 18 S.E.2d 118 (1942).

Meaning of "Solicit". — Nothing appears with regard to subdivision (5) of this section, from the context or otherwise, to indicate an intent to give the word "solicit" anything other than its ordinary meaning. State v. Haggard, 59 N.C. App. 727, 297 S.E.2d 635 (1982).

The violation of subdivision (6) is complete when defendant enters her apartment with a person for the stated purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Anyone who has violated subdivision (7) has most likely, in the process of doing so, violated one or more of the other subdivisions of this section. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Aiding and Abetting. — It is to be noted that subdivision (7) does not merely say "to aid or abet prostitution or assignation," but there are added the descriptive words "by any means whatsoever," thereby covering a multitude of acts. Thus, it is manifest that the legislature intended that these supplemental words should be given a meaning, and catch all other acts of aiding and abetting prostitution or assignation. Therefore in order to determine whether any offense be committed, it is essential that for the words of the statute "by any means whatsoever" to be given force and effect, there must be stated in the warrant the acts and circumstances of the particular charge, so that the court can see as a matter of law that a crime is charged. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

A warrant which charged that defendant did "aid and abet in prostitution and assignation" was defective since it failed to state wherein the defendant aided and abetted, and defendant's motion in arrest of judgment should have been granted. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

This section punishes all who aid and abet prostitution by the means set out in the statute or by "any means whatsoever" to the same extent that it punishes those who offer their bodies for that purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The sexual act of masturbation for hire is not included in the definition of prostitution, as found in G.S. 14-203 and prohibited by this section. State v. Richardson, 307 N.C. 692, 300 S.E.2d 379 (1983).

If the legislature wishes to include within this section other sexual acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since the court is bound to construe a criminal statute strictly in favor of the defendant. State v. Richardson, 307 N.C. 692, 300 S.E.2d 379 (1983).

Allegations in warrants charging violations of subdivisions (2), (4) and (6) can be so cast that neither offense is made an essential element of any other. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Competency of Evidence. — Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. State v. Waggoner, 207 N.C. 306, 176 S.E. 566 (1934).

Sufficiency of Evidence. — In a criminal prosecution for permitting property to be used for prostitution where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. State v. Herndon, 223 N.C. 208, 25 S.E.2d 611, cert. denied, 320 U.S. 759, 64 S. Ct. 67, 88 L. Ed. 452 (1943).

Applied in State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954); State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970); State v. Butler, 17 N.C. App. 167, 193 S.E.2d 117 (1972); State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Cited in State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961); In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970); State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

§ 14-204.1. Loitering for the purpose of engaging in prostitution offense.

(a) For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entrance ways to any building which fronts on any of those places, or a motor vehicle in or on any of those places.

(b) If a person remains or wanders about in a public place and

(1) Repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation; or

(2) Repeatedly stops or attempts to stop motor vehicles; or

(3) Repeatedly interferes with the free passage of other persons

for the purpose of violating any subdivision of G.S. 14-204 or 14-177, that person is guilty of a Class 1 misdemeanor. (1979, c. 873, s. 2; 1993, c. 539, s. 133; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Section Not Void for Overbreadth. — American courts have overwhelmingly upheld enactments such as this section which include an element of criminal intent. The North Carolina statute is functionally equivalent to these enactments, since intent or purpose ordinarily must be shown by circumstantial evidence. Accordingly, the North Carolina statute is not void for overbreadth. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Legislature Empowered to Punish Prostitute and Not Customer. — It is well within the power of the Legislature to punish the prostitute and provider of sexual services and not the customer. It is the organized and repeated provision of such services, not their use by unorganized and casual individuals, that constitutes the most readily eradicable social evil. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

§ 14-205. Prosecution; in what courts.

Prosecutions for the violation of any of the provisions of this Article shall be tried in the courts of this State wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the Constitution of this State that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C.S., s. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.

In the trial of any person charged with a violation of any of the provisions of this Article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C.S., s. 4360.)

CASE NOTES

Section Provides Exception to General Inadmissibility of Other Crimes. — Under North Carolina common law, evidence of other crimes is generally inadmissible, subject to certain well-defined exceptions. This section represents a legitimate legislative decision to broaden such rules. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

State Not Relieved of Its Burden of Proof. — This section does not of course relieve the state of its burden of coming forward and proving its case beyond a reasonable doubt. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

This section does not provide an "open door" for any evidence of other crimes or reputation. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Discretion of Trial Judge. — By enacting this section, the Legislature did not intend to remove entirely the trial judge's discretion to exclude irrelevant evidence. Evidence proffered on the state's case in chief under this section must remain relevant to the issues at hand. State v. Evans, 73 N.C. App. 214, 326 S.E.2d 303 (1985).

Cited in State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944).

§ 14-207. Degrees of guilt.

Any person who shall be found to have committed two or more violations of any of the provisions of G.S. 14-204 of this Article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C.S., s. 4361.)

CASE NOTES

Province of Judge. — When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926); State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

§ 14-208. Punishment; probation; parole.

Any person who shall be deemed guilty in the first degree, as set forth in G.S. 14-207, shall be guilty of a Class 1 misdemeanor: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Notwithstanding the previous paragraph, any person who shall be deemed guilty in the first degree, as set forth in G.S. 14-207, shall be guilty of a Class 1 misdemeanor. This paragraph applies only in cities with a population of 300,000 or over, according to the most recent decennial federal census, but shall only apply in a city within that class if the city has adopted an ordinance to that effect, which ordinance makes a finding that prostitution is a serious problem within the city.

Any person who shall be deemed guilty in the second degree, as set forth in G.S. 14-207, shall be guilty of a Class 1 misdemeanor: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this Article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer. (1919, c. 215, s. 5; C.S., s. 4362; 1921, c. 101; 1981, c. 969, ss. 1, 2; 1993, c. 539, s. 134; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Effect of Admission of Guilt on Time Limitation. — A defendant sentenced for the crime of prostitution upon his own admission of guilt may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

§§ 14-208.1 through 14-208.4: Reserved for future codification purposes.

Article 27A.

Sex Offender and Public Protection Registration Programs.

Part 1. Registration Programs, Purpose and Definitions Generally.

§ 14-208.5. Purpose.

The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.

The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.

Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article. (1995, c. 545, s. 1; 1997-516, s. 1.)

Editor's Note. — Session Laws 2006-247, s. 18, provides: "The Department of Correction shall study and develop a plan for offering mental health treatment for incarcerated sex offenders designed to reduce the likelihood of recidivism. The Department shall study appropriate and effective mental health treatment techniques and alternatives. Services must be best practices, as determined by the Department. The Department will consult various stakeholders from organizations dedicated to the prevention of sexual assault, victims' advocacy organizations, and experts in the field of treatment of sexual offenders. The Department shall consider the fiscal impact, if any, of implementing the plan developed pursuant to this study.

"The Department shall make a preliminary report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services no later than January 15, 2007, and a final report to the Joint Legislative Oversight Committee on Mental Health, Developmental Disabilities, and Substance Abuse Services and the General Assembly on or before October 1, 2007."

Session Laws 2008-117, s. 21.2, provides: "The Department of Justice shall study the guidelines issued by the United States Attorney for the federal Sex Offender Registration and Notification Act (SORNA) to determine whether North Carolina is in compliance with those guidelines. The Department of Justice shall identify any areas in which the State fails to comply with SORNA and the action required for compliance. The Attorney General, or his designee, shall report to the Joint Legislative Corrections, Crime Control, and Juvenile Justice Oversight Committee by December 1, 2008, regarding the status of the State's compliance with SORNA and recommend any actions or State legislation that may be required to satisfy the SORNA guidelines."

Session Laws 2008-181, ss. 39.1 through 39.3, provide: "39.1 There is created the Joint Legislative Study Committee on Civil Commitment of Sexual Predators Who Are Determined to be Incapable of Proceeding to Trial. The Committee shall consist of 10 members to be appointed as follows: the Speaker of the House of Representatives shall appoint five members of the House of Representatives and the President Pro Tempore of the Senate shall appoint five members the Senate.

"The Speaker of the House of Representatives shall appoint a cochair, and the President Pro Tempore of the Senate shall appoint a cochair for the Committee. The Committee may meet at any time upon the joint call of the cochairs. Vacancies on the Committee shall be filled by the same appointing authority as made the initial appointment.

"The Committee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4. The Committee may contract for professional, clerical, or consultant services as provided by G.S. 120-32.02.

"Subject to the approval of the Legislative Services Commission, the Committee may meet in the Legislative Building or the Legislative Office Building. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. The House of Representatives' and the Senate's Directors of Legislative Assistants shall assign clerical support staff to the Committee, and the expenses relating to the clerical employees shall be borne by the Committee. Members of the Committee shall receive subsistence and travel expenses at the rates set forth in G.S. 120-3.1, 138-5, or 138-6, as appropriate.

"39.2 The Committee shall study the State's current laws regarding defendants who are determined to be incapable of proceeding to trial and the State's current laws regarding involuntary commitment. The Committee shall further consider whether these laws adequately and appropriately address the public safety issues raised by certain defendants who are: (i) charged with committing a sex offense against a child, (ii) found incapable of proceeding to trial, and (iii) do not meet the criteria for involuntary commitment. In its study, the Committee shall review legislation adopted by other states addressing these issues. The Committee may also consider any other issues it deems relevant to this study.

"39.3 The Committee shall make a final report of its findings and recommendations to the 2009 General Assembly."

Legal Periodicals. — For comment, "The Amy Jackson Law — A Look at the Constitutionality of North Carolina's Answer to Megan's Law," see 20 Campbell L. Rev. 347 (1998).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Home Address for Registration Purposes. — "Home address" is defined, as it applies to the North Carolina Sex Offender and Public Protection Registration Programs, as a place where a registrant resides and where that registrant receives mail or other communication. This definition of home address is not synonymous with domicile, just as residence and domicile are not convertible terms. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008

N.C. App. LEXIS 1650 (2008).

G.S. 15A-1343(b2)(4) imposed a mandatory condition prohibiting defendant from living with a minor, and did not permit exceptions for defendant's own children; where defendant was convicted of taking indecent liberties with a child arising from his sexual misconduct with his minor sister-in-law, G.S. 15A-1343(b2)(4) was a valid probation condition, and did not violate due process even though it prohibited defendant from living with his own child. State v. Strickland, 169 N.C. App. 193, 609 S.E.2d 253, 2005 N.C. App. LEXIS 522 (2005).

A convicted sex offender's failure to inquire into a state's laws on registration requirement is neither entirely innocent nor wholly passive, particularly when combined with that sex offender's violation of his previous resident state's sex offender registration laws; convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

Town Ordinance Barring Sex Offenders from Parks. — Woodfin, N.C., Ordinance § 130.03 was constitutional under the Fourteenth Amendment of the United States Constitution and N.C. Const., Art. I, §§ 19 and 35 as: (1) a sex offender's alleged liberty interest to enter a park owned by a town to have barbecues and enjoy nature was not protected by the right to intrastate travel; (2) an asserted liberty interest to freely roam in parks was not a fundamental right; (3) a town had been delegated the authority to prohibit acts detrimental to its citizens' health, safety, or welfare by G.S. 160A-174; (4) G.S. 14-208.5 recognized that sex offenders posed a high risk of engaging in sex offenses; and (5) Woodfin, N.C., Ordinance § 130.03 was rationally related to a legitimate government interest in protecting children and other visitors to parks owned and operated by the town from sexual attacks. Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728, 2008 N.C. LEXIS 496 (2008).

Applied in State v. Wooten, — N.C. App. —, 669 S.E.2d 749, 2008 N.C. App. LEXIS 2232 (2008).

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005); State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

§ 14-208.6. Definitions.

The following definitions apply in this Article:

(1a) "Aggravated offense" means any criminal offense that includes either of the following: (i) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim of any age through the use of force or the threat of serious violence; or (ii) engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.

(1b) "County registry" means the information compiled by the sheriff of a county in compliance with this Article.

(1c) "Division" means the Division of Criminal Information of the Department of Justice.

(1d) "Electronic mail" means the transmission of information or communication by the use of the Internet, a computer, a facsimile machine, a pager, a cellular telephone, a video recorder, or other electronic means sent to a person identified by a unique address or address number and received by that person.

(1e) "Employed" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(1f) "Entity" means a business or organization that provides Internet service, electronic communications service, remote computing service, online service, electronic mail service, or electronic instant message or chat services whether the business or organization is within or outside the State.

(1g) "Instant Message" means a form of real-time text communication between two or more people. The communication is conveyed via computers connected over a network such as the Internet.

(1h) "Institution of higher education" means any postsecondary public or private educational institution, including any trade or professional institution, college, or university.

(1i) "Internet" means the global information system that is logically linked together by a globally unique address space based on the Internet Protocol or its subsequent extensions; that is able to support communications using the Transmission Control Protocol/Internet Protocol suite, its subsequent extensions, or other Internet Protocol compatible protocols; and that provides, uses, or makes accessible, either publicly or privately, high-level services layered on the communications and related infrastructure described in this subdivision.

(1j) "Mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of others.

(1k) "Nonresident student" means a person who is not a resident of North Carolina but who is enrolled in any type of school in the State on a part-time or full-time basis.

(1*l*) "Nonresident worker" means a person who is not a resident of North Carolina but who has employment or carries on a vocation in the State, on a part-time or full-time basis, with or without compensation or government or educational benefit, for more than 14 days, or for an aggregate period exceeding 30 days in a calendar year.

(1m) "Offense against a minor" means any of the following offenses if the offense is committed against a minor, and the person committing the offense is not the minor's parent: G.S. 14-39 (kidnapping), G.S. 14-41 (abduction of children), and G.S. 14-43.3 (felonious restraint). The term also includes the following if the person convicted of the following is not the minor's parent: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(1n) "Online identifier" means electronic mail address, instant message screen name, user ID, chat or other Internet communication name, but it does not mean social security number, date of birth, or pin number.

(2) "Penal institution" means:

a. A detention facility operated under the jurisdiction of the Division of Prisons of the Department of Correction;

b. A detention facility operated under the jurisdiction of another state or the federal government; or

c. A detention facility operated by a local government in this State or another state.

(2a) "Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment.

(2b) "Recidivist" means a person who has a prior conviction for an offense that is described in G.S. 14-208.6(4).

(3) "Release" means discharged or paroled.

(4) "Reportable conviction" means:

a. A final conviction for an offense against a minor, a sexually violent offense, or an attempt to commit any of those offenses unless the conviction is for aiding and abetting. A final conviction for aiding and abetting is a reportable conviction only if the court sentencing the individual finds that the registration of that individual under this Article furthers the purposes of this Article as stated in G.S. 14-208.5.

b. A final conviction in another state of an offense, which if committed in this State, is substantially similar to an offense against a minor or a sexually violent offense as defined by this section, or a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state.

c. A final conviction in a federal jurisdiction (including a court martial) of an offense, which is substantially similar to an offense against a minor or a sexually violent offense as defined by this section.

d. A final conviction for a violation of G.S. 14-202(d), (e), (f), (g), or (h), or a second or subsequent conviction for a violation of G.S. 14-202(a), (a1), or (c), only if the court sentencing the individual issues an order pursuant to G.S. 14-202(l) requiring the individual to register.

(5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.2A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is 13-, 14-, or 15-years-old where the defendant is at least six years older), G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-190.18 (promoting prostitution of a minor), G.S. 14-190.19 (participating in the prostitution of a minor), G.S. 14-202.1 (taking indecent liberties with children), G.S. 14-202.3 (Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act), G.S. 14-202.4(a) (taking indecent liberties with a student), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or conspiracy to commit any of these offenses; aiding and abetting any of these offenses.

(6) "Sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(7) "Sheriff" means the sheriff of a county in this State.

(8) "Statewide registry" means the central registry compiled by the Division in accordance with G.S. 14-208.14.

(9) "Student" means a person who is enrolled on a full-time or part-time basis, in any postsecondary public or private educational institution,

including any trade or professional institution, or other institution of higher education. (1995, c. 545, s. 1; 1997-15, ss. 1, 2; 1997-516, s. 1; 1999-363, s. 1; 2001-373, s. 1; 2002-147, s. 16; 2003-303, s. 2; 2004-109, s. 8; 2005-121, s. 2; 2005-130, s. 1; 2005-226, s. 2; 2006-247, ss. 1(b), 19(a), 20(d); 2008-117, s. 6.1; 2008-220, s. 1; 2009-498, s. 1.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, ss. 1(b) and 20(d), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 17, provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

"Session Laws 2008-220, s. 12, provides in part: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws

2008-117, s. 6.1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subdivision (5), inserted "G.S. 14-27.2A (rape of a child; adult offender)" and inserted "G.S. 14-27.4A (sex offense with a child; adult offender)".

Session Laws 2008-220, s. 1, effective May 1, 2009, added present subdivision (1d) and redesignated former subdivision (1d) as subdivision (1e); added subdivisions (1f) and (1g) and redesignated former subdivision (1e) as subdivision (1h); added subdivision (1i) and redesignated former subdivisions (1f) through (1i) as subdivisions (1j) through (1m); added subdivision (1n). For applicability, see Editor's note.

Session Laws 2009-498, s. 1, effective December 1, 2009, and applicable to all persons convicted of a violation of G.S. 14-202.4 on or after that date, and to all persons released from a penal institution on or after that date, substituted "G.S. 14-202.3 (Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act), G.S. 14-202.4(a) (taking indecent liberties with a student)" for "or G.S. 14-202.3 (Solicitation of child by computer to commit an unlawful sex act)" in the first sentence of subdivision (5).

Legal Periodicals. — For "Legislative Survey: Criminal Law," see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Reportable Offense. — Failing to register as a sexual offender was not a status but was a separate crime, and therefore defendant was not subjected to double jeopardy or a violation of the Structured Sentencing Act, G.S. 15A-1340.10, by including his rape conviction in calculating his prior record level for sentencing; defendant's conviction of failing to register as a sexual offender was affirmed. State v. Harrison, 165 N.C. App. 332, 598 S.E.2d 261, 2004 N.C. App. LEXIS 1153 (2004), cert. denied, — N.C. —, 604 S.E.2d 922 (2004).

Trial court properly determined that defendant was subject to satellite-based monitoring for the duration of his life when the offense on which defendant's recidivism determination was made, taking indecent liberties with a minor, was clearly one described in G.S. 14-208.5 even though it was not reportable because it predated the act; there is nothing in the statutory language that requires that the prior conviction in a recidivism determination must be for a reportable offense, and the code is clear that the prior conviction must be for an offense that is described in the statute defining reportable offenses. State v. Wooten, — N.C. App. —, 669 S.E.2d 749, 2008 N.C. App. LEXIS 2232 (2008).

Convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005); State v. Kilby, — N.C. App. —, 679 S.E.2d 430, 2009 N.C. App. LEXIS 1179 (July 21, 2009); State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Cited in State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001); State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005); Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007); State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008); State v. Worley, — N.C. App. —, 677 S.E.2d 540, 2009 N.C. App. LEXIS 757 (2009); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009); State v. Lark, — N.C. App. —, 678 S.E.2d 693, 2009 N.C. App. LEXIS 1101 (July 7, 2009); State v. Anderson, — N.C. App. —, 679 S.E.2d 165, 2009 N.C. App. LEXIS 1106 (July 7, 2009).

Applied in State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

OPINIONS OF ATTORNEY GENERAL

Who Must Register. — An individual convicted of the federal offense of sexual abuse of a ward is required to register as a sex offender. See opinion of Attorney General to Sheriff Johnny M. Williams, Warren County Sheriff's Office, 2002 N.C. AG LEXIS 19 (6/24/02).

Effect of Sexually Violent Predator Classification on Sentencing Issues. — While G.S. 14.208.6(6) provides a definition for a sexually violent predator, nothing in that statute, nor in G.S. 14.208.20 regarding the procedure for determining if an individual is a sexually violent predator, or G.S. 14.208.23 and G.S. 14.208.6A regarding sex offender registration, sets out any sentencing implications that would allow a trial court to extend a defendant's sentence on a rape charge beyond the preseumptive range for that crime; thus, a trial court's labeling of defendant as a "predator" was not a proper factor in enhancing defendant's rape conviction sentence. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

§ 14-208.6A. Lifetime registration requirements for criminal offenders.

It is the objective of the General Assembly to establish a 30-year registration requirement for persons convicted of certain offenses against minors or sexually violent offenses with an opportunity for those persons to petition in superior court to shorten their registration time period after 10 years of registration. It is the further objective of the General Assembly to establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators.

To accomplish this objective, there are established two registration programs: the Sex Offender and Public Protection Registration Program and the Sexually Violent Predator Registration Program. Any person convicted of an offense against a minor or of a sexually violent offense as defined by this Article shall register in person as an offender in accordance with Part 2 of this Article. Any person who is a recidivist, who commits an aggravated offense, or who is determined to be a sexually violent predator shall register in person as such in accordance with Part 3 of this Article.

The information obtained under these programs shall be immediately shared with the appropriate local, State, federal, and out-of-state law enforcement officials and penal institutions. In addition, the information designated under G.S. 14-208.10(a) as public record shall be readily available to and accessible by the public. However, the identity of the victim is not public record and shall not be released as a public record. (1997-516, s. 1; 2001-373, s. 2; 2006-247, s. 2(a); 2008-117, s. 7.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

The second paragraph, as amended by Session Laws 2006-247, s. 2(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 7, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "30-year" for "10-year," and inserted "with an opportunity for those persons to petition in superior court to shorten their registration time period after 10 years of registration" in the first paragraph.

CASE NOTES

Effect of Sexually Violent Predator Classification on Sentencing Issues. — While G.S. 14.208.6(6) provides a definition for a sexually violent predator, nothing in that statute, nor in G.S. 14.208.20 regarding the procedure for determining if an individual is a sexually violent predator, or G.S. 14.208.23 and G.S. 14.208.6A regarding sex offender registration, sets out any sentencing implications that would allow a trial court to extend a defendant's sentence on a rape charge beyond the preseumptive range for that crime; thus, a trial court's labeling of defendant as a "predator" was not a proper factor in enhancing defendant's rape conviction sentence. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

§ 14-208.6B. Registration requirements for juveniles transferred to and convicted in superior court.

A juvenile transferred to superior court pursuant to G.S. 7B-2200 who is convicted of a sexually violent offense or an offense against a minor as defined in G.S. 14-208.6 shall register in person in accordance with this Article just as an adult convicted of the same offense must register. (1997-516, s. 1; 1998-202, s. 13(e); 2006-247, s. 3(a).)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides, "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, s. 3(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-208.6C. Discontinuation of registration requirement.

The period of registration required by any of the provisions of this Article shall be discontinued only if the conviction requiring registration is reversed, vacated, or set aside, or if the registrant has been granted an unconditional pardon of innocence for the offense requiring registration. (2001-373, s. 3.)

Part 2. Sex Offender and Public Protection Registration Program.

§ 14-208.7. Registration.

(a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. If the person moves to North Carolina from outside this State, the person shall register within three business days of establishing residence in this State, or whenever the person has been present in the State for 15 days, whichever comes first. If the person is a current resident of North Carolina, the person shall register:

(1) Within three business days of release from a penal institution or arrival in a county to live outside a penal institution; or

(2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.

(a1) A person who is a nonresident student or a nonresident worker and who has a reportable conviction, or is required to register in the person's state of residency, is required to maintain registration with the sheriff of the county where the person works or attends school. In addition to the information required under subsection (b) of this section, the person shall also provide information regarding the person's school or place of employment as appropriate and the person's address in his or her state of residence.

(b) The Division shall provide each sheriff with forms for registering persons as required by this Article. The registration form shall require all of the following:

(1) The person's full name, each alias, date of birth, sex, race, height, weight, eye color, hair color, drivers license number, and home address.

(2) The type of offense for which the person was convicted, the date of conviction, and the sentence imposed.

(3) A current photograph taken by the sheriff, without charge, at the time of registration.

(4) The person's fingerprints taken by the sheriff, without charge, at the time of registration.

(5) A statement indicating whether the person is a student or expects to enroll as a student within a year of registering. If the person is a student or expects to enroll as a student within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is a student or expects to enroll as a student.

(6) A statement indicating whether the person is employed or expects to be employed at an institution of higher education within a year of registering. If the person is employed or expects to be employed at an institution of higher education within a year of registration, then the registration form shall also require the name and address of the educational institution at which the person is or expects to be employed.

(7) Any online identifier that the person uses or intends to use.

(c) When a person registers, the sheriff with whom the person registered shall immediately send the registration information to the Division in a manner determined by the Division. The sheriff shall retain the original registration form and other information collected and shall compile the information that is a public record under this Part into a county registry.

(d) Any person required to register under this section shall report in person at the appropriate sheriff's office to comply with the registration requirements set out in this section. The sheriff shall provide the registrant with written proof of registration at the time of registration. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 4; 2002-147, s. 17; 2006-247, s. 5(a); 2008-117, s. 8; 2008-220, s. 2.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Subsections (a) and (d), as amended and added, respectively, by Session Laws 2006-247, s. 5(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-117, s. 8, amended this section to replace what was originally a 10-year minimum registration requirement with a 30-year registration requirement that can be reduced to 10 years. Session Laws 2008-117, s. 22, made the 30-year requirement applicable to registrations made on or after December 1, 2008."

Session Laws 2008-220, s. 10, provides: "By December 1, 2008, the Administrative Office of the Courts, in consultation with the North Carolina Department of Justice, the North Carolina Department of Correction, and the North Carolina Sheriffs' Association shall develop a procedure to ensure timely notification to the Division of Criminal Information, Department of Justice, and to sheriffs regarding any person subject to registration under Article 27A of Chapter 14 of the General Statutes who does not receive an active term of imprisonment, as specified in G.S. 14-208.7(a)."

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the

State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 8, substituted "three business days" for "10 days" in the introductory paragraph of subsection (a) and in subdivision (a)(1); in the concluding paragraph of subsection (a), substituted "30 years" for "10 years" and added "unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A" at the end. For applicability provision, see Editor's note.

Session Laws 2008-220, s. 2, effective May 1, 2009, and applicable to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date, rewrote subsection (b).

CASE NOTES

Home Address for Registration Purposes. — "Home address" is defined, as it applies to the North Carolina Sex Offender and Public Protection Registration Programs, as a place where a registrant resides and where that registrant receives mail or other communication. This definition of home address is not synonymous with domicile, just as residence and domicile are not convertible terms. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

For purposes of G.S. 14-208.7, 14-208.9, and 14-208.11 of the North Carolina Sex Offender and Public Protection Registration Program, the North Carolina Supreme Court concludes that the legislature intended the definition of address to carry an ordinary meaning of describing or indicating the location where someone lives, and as such, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

Convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

Applied in State v. Williams, 190 N.C. App. 173, 660 S.E.2d 200, 2008 N.C. App. LEXIS 870 (2008).

Cited in State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009);

State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001); State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005); State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006); Standley v. Town of Woodfin, 186 N.C. App. 134, 650 S.E.2d 618, 2007 N.C. App. LEXIS 2121 (2007); State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008); State v. Worley, — N.C. App. —, 677 S.E.2d 540, 2009 N.C. App. LEXIS 757 (2009); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.8. Prerelease notification.

(a) At least 10 days, but not earlier than 30 days, before a person who will be subject to registration under this Article is due to be released from a penal institution, an official of the penal institution shall do all of the following:

(1) Inform the person of the person's duty to register under this Article and require the person to sign a written statement that the person was so informed or, if the person refuses to sign the statement, certify that the person was so informed.

(2) Obtain the registration information required under G.S. 14-208.7(b)(1), (2), (5), (6), and (7), as well as the address where the person expects to reside upon the person's release.

(3) Send the Division and the sheriff of the county in which the person expects to reside the information collected in accordance with subdivision (2) of this subsection.

(b) If a person who is subject to registration under this Article does not receive an active term of imprisonment, the court pronouncing sentence shall conduct, at the time of sentencing, the notification procedures specified in subsection (a) of this section. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 18; 2008-220, s. 3.)

Editor's Note. — Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article

27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-220, s. 3, effective May 1, 2009, inserted "do all of the following" in the introductory paragraph in subsection (a); inserted "and (7)" in subdivision (a)(2); made minor grammatical changes. For applicability, see Editor's note.

CASE NOTES

Oral Notification Sufficient. — Detective's testimony that he advised defendant of the registration requirements of G.S. 14-208.11 when defendant initially registered as a sex offender was sufficient to satisfy the notification requirements under G.S. 14-208.8. State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

Untimely notification of requirement. — Although the penal institution failed to inform defendant that he was required to register as a sex offender until five days prior to release from prison, the late notice did not eliminate the registration requirement. State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

Convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

§ 14-208.8A. Notification requirement for out-of-county employment if temporary residence established.

(a) Notice Required. — A person required to register under G.S. 14-208.7 shall notify the sheriff of the county with whom the person is registered of the person's place of employment and temporary residence, which includes a hotel, motel, or other transient lodging place, if the person meets both of the following conditions:

(1) Is employed or carries on a vocation in a county in the State other than the county in which the person is registered for more than 10 business days within a 30-day period, or for an aggregate period exceeding 30 days in a calendar year, on a part-time or full-time basis, with or without compensation or government or educational benefit.

(2) Maintains a temporary residence in that county for more than 10 business days within a 30-day period, or for an aggregate period exceeding 30 days in a calendar year.

(b) Time Period. — The notice required by subsection (a) of this section shall be provided within 72 hours after the person knows or should know that he or she will be working and maintaining a temporary residence in a county other than the county in which the person resides for more than 10 business days within a 30-day period, or within 10 days after the person knows or should know that he or she will be working and maintaining a temporary residence in a county other than the county in which the person resides for an aggregate period exceeding 30 days in a calendar year.

(c) Notice to Division. — Upon receiving the notice required under subsection (a) of this section, the sheriff shall immediately forward the information to the Division. The Division shall notify the sheriff of the county where the person is working and maintaining a temporary residence of the person's place of employment and temporary address in that county. (2006-247, s. 4(a); 2007-484, s. 2.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 4(b), makes this section effective June 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-208.9. Change of address; change of academic status or educational employment status; change of online identifier.

(a) If a person required to register changes address, the person shall report in person and provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the person had last registered. If the person moves to another county, the person shall also report in person to the sheriff of the new county and provide written notice of the person's address not later than the tenth day after the change of address. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. When the Division receives notice from a sheriff that a person required to register is moving to another county in the State, the Division shall inform the sheriff of the new county of the person's new residence.

(b) If a person required to register intends to move to another state, the person shall report in person to the sheriff of the county of current residence at least three business days before the date the person intends to leave this State to establish residence in another state or jurisdiction. The person shall provide to the sheriff a written notification that includes all of the following information: the address, municipality, county, and state of intended residence.

(1) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to update the registration.

(2) The sheriff shall inform the person that the person must comply with the registration requirements in the new state of residence. The sheriff shall also immediately forward the information included in the notification to the Division, and the Division shall inform the appropriate state official in the state to which the registrant moves of the person's notification and new address.

(b1) A person who indicates his or her intent to reside in another state or jurisdiction and later decides to remain in this State shall, within three business days after the date upon which the person indicated he or she would leave this State, report in person to the sheriff's office to which the person reported the intended change of residence, of his or her intent to remain in this State. If the sheriff is notified by the sexual offender that he or she intends to remain in this State, the sheriff shall promptly report this information to the Division.

(c) If a person required to register changes his or her academic status either by enrolling as a student or by terminating enrollment as a student, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status. The written notice shall include the name and address of the institution of higher education at which the student is or was enrolled. The sheriff shall immediately forward this information to the Division.

(d) If a person required to register changes his or her employment status either by obtaining employment at an institution of higher education or by terminating employment at an institution of higher education, then the person shall, within three business days, report in person to the sheriff of the county with whom the person registered and provide written notice of the person's new status not later than the tenth day after the change to the sheriff of the county with whom the person registered. The written notice shall include the name and address of the institution of higher education at which the person is or was employed. The sheriff shall immediately forward this information to the Division.

(e) If a person required to register changes an online identifier, or obtains a new online identifier, then the person shall, within 10 days, report in person to the sheriff of the county with whom the person registered to provide the new or changed online identifier information to the sheriff. The sheriff shall immediately forward this information to the Division. (1995, c. 545, s. 1; 1997-516, s. 1; 2001-373, s. 5; 2002-147, s. 19; 2006-247, s. 6(a); 2007-213, s. 9A; 2007-484, s. 42(b); 2008-117, s. 9; 2008-220, ss. 4, 5.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, s. 6(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 9, effective December 1, 2008 and applicable to offenses committed on or after that date, substituted "the third business day" for "the tenth day" in subsection (a); and substituted "three business days" for "10 days" throughout the section.

Session Laws 2008-220, ss. 4 and 5, effective May 1, 2009, inserted "change of online identifier" in the section heading; and added subsection (e). For applicability, see Editor's note.

CASE NOTES

Sex offender registration statutes, G.S. 14-208.9(a) and 14-208.11(a)(2), operate on the premise that everyone does, at all times, have an address of some sort, even if it is a homeless shelter, a location under a bridge, or some similar place; the contention that there are occasionally times when a registered sex offender lacks a reportable address for purposes of §§ 14-208.9(a) and 14-208.11(a)(2) is rejected. State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Evidence supported defendant's G.S. 14-208.9(a) and 14-208.11(a)(2) conviction as defendant was evicted, and the locks were changed on the public housing apartment defendant was living in, and defendant did not timely report the new address; defendant had an address, even if it was temporary, after the locks were changed, which defendant was required to report. State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Home Address for Registration Purposes. — "Home address" is defined, as it applies to the North Carolina Sex Offender and Public Protection Registration Programs, as a place where a registrant resides and where that registrant receives mail or other communication. This definition of home address is not synonymous with domicile, just as residence and domicile are not convertible terms. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

For purposes of G.S. 14-208.7, 14-208.9, and 14-208.11 of the North Carolina Sex Offender and Public Protection Registration Program, the North Carolina Supreme Court concludes that the legislature intended the definition of address to carry an ordinary meaning of describing or indicating the location where someone lives, and as such, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

Double Jeopardy Not Shown. — Defendant could have his post-release supervision revoked because defendant left his residence without notifying his post-release officer and be prosecuted for the offense of failing to notify the sheriff of defendant's change of address as a sex offender under G.S. 14-208.9 and in violation of G.S. 14-208.11 without defendant's double jeopardy rights being violated. Revocation of post-release supervision was not a criminal proceeding and the revocation related to defendant's conviction for sex offenses rather than the State's prosecution of defendant for failing to notify the sheriff of defendant's change of address. State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

Form of Notice. — Reading G.S. 14-208.11(a)(2) in pari materia with G.S. 14-208.9, a sex offender required to register his address with the sheriff who fails to notify the sheriff with whom he last registered of a change of address in writing may be found guilty of a class F felony. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

Motion to Dismiss Properly Denied. — Denial of defendant's motion to dismiss a failure to register as a sex offender charge was proper as defendant's confession permitted the jury to infer that defendant had not lived at the registered address within 10 days of his arrest, and there was evidence that on June 2, 1998, defendant was released from a prison sentence imposed for taking indecent liberties with a child. State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

Applied in State v. Worley, — N.C. App. —, 677 S.E.2d 540, 2009 N.C. App. LEXIS 757 (2009).

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-208.9A. Verification of registration information.

(a) The information in the county registry shall be verified semiannually for each registrant as follows:

(1) Every year on the anniversary of a person's initial registration date, and again six months after that date, the Division shall mail a nonforwardable verification form to the last reported address of the person.

(2) The person shall return the verification form in person to the sheriff within three business days after the receipt of the form.

(3) The verification form shall be signed by the person and shall indicate the following:

a. Whether the person still resides at the address last reported to the sheriff. If the person has a different address, then the person shall indicate that fact and the new address.

b. Whether the person still uses or intends to use any online identifiers last reported to the sheriff. If the person has any new or different online identifiers, then the person shall provide those online identifiers to the sheriff.

(3a) If it appears to the sheriff that the record photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, then the sheriff shall take a photograph of the offender to include with the verification form.

(4) If the person fails to return the verification form in person to the sheriff within three business days after receipt of the form, the person is subject to the penalties provided in G.S. 14-208.11. If the person fails to report in person and provide the written verification as provided by this section, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. If the person cannot be found at the registered address and has failed to report a change of address, the person is subject to the penalties provided in G.S. 14-208.11, unless the person reports in person to the sheriff and proves that the person has not changed his or her residential address.

(b) Additional Verification May Be Required. — During the period that an offender is required to be registered under this Article, the sheriff is authorized to attempt to verify that the offender continues to reside at the address last registered by the offender.

(c) Additional Photograph May Be Required. — If it appears to the sheriff that the current photograph of the sex offender no longer provides a true and accurate likeness of the sex offender, upon in-person notice from the sheriff, the sex offender shall allow the sheriff to take another photograph of the sex offender at the time of the sheriff's request. If requested by the sheriff, the sex offender shall appear in person at the sheriff's office during normal business hours within three business days of being requested to do so and shall allow the sheriff to take another photograph of the sex offender. A person who willfully fails to comply with this subsection is guilty of a Class 1 misdemeanor. (1997-516, s. 1; 2006-247, s. 7(a); 2008-117, s. 10; 2008-220, s. 6.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as rewritten by Session Laws 2006-247, s. 7(a), effective December 1, 2006, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." This act became effective December 1, 2006.

Session Laws 2008-117, s. 21.1 is a severability clause.

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 10, effective December 1, 2008 and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in subdivisions (a)(2) and (a)(4); and substituted "three business days" for "72 hours" in subsection (c).

Session Laws 2008-220, s. 6, effective May 1, 2009, redesignated former subdivision (a)(3) as present subdivisions (a)(3) and (a)(3)a, and added "the following" in the introductory language of subdivision (a)(3); and added subdivision (a)(3)b. For applicability, see Editor's note.

CASE NOTES

Home Address for Registration Purposes. — "Home address" is defined, as it applies to the North Carolina Sex Offender and Public Protection Registration Programs, as a place where a registrant resides and where that registrant receives mail or other communication. This definition of home address is not synonymous with domicile, just as residence and domicile are not convertible terms. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

§ 14-208.10. Registration information is public record; access to registration information.

(a) The following information regarding a person required to register under this Article is public record and shall be available for public inspection: name, sex, address, physical description, picture, conviction date, offense for which registration was required, the sentence imposed as a result of the conviction, and registration status. The information obtained under G.S. 14-208.22 regarding a person's medical records or documentation of treatment for the person's mental abnormality or personality disorder shall not be a part of the public record.

The sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person, but shall not release the identity of the victim of the offense that required registration under this Article.

(b) Any person may obtain a copy of an individual's registration form, a part of the county registry, or all of the county registry, by submitting a written request for the information to the sheriff. However, the identity of the victim of an offense that requires registration under this Article shall not be released. The sheriff may charge a reasonable fee for duplicating costs and for mailing costs when appropriate. (1995, c. 545, s. 1; 1997-516, s. 1.)

CASE NOTES

Convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

§ 14-208.11. Failure to register; falsification of verification notice; failure to return verification form; order for arrest.

(a) A person required by this Article to register who willfully does any of the following is guilty of a Class F felony:

(1) Fails to register as required by this Article.

(2) Fails to notify the last registering sheriff of a change of address as required by this Article.

(3) Fails to return a verification notice as required under G.S. 14-208.9A.

(4) Forges or submits under false pretenses the information or verification notices required under this Article.

(5) Fails to inform the registering sheriff of enrollment or termination of enrollment as a student.

(6) Fails to inform the registering sheriff of employment at an institution of higher education or termination of employment at an institution of higher education.

(7) Fails to report in person to the sheriff's office as required by G.S. 14-208.7, 14-208.9, and 14-208.9A.

(8) Reports his or her intent to reside in another state or jurisdiction but remains in this State without reporting to the sheriff in the manner required by G.S. 14-208.9.

(9) Fails to notify the registering sheriff of out-of-county employment if temporary residence is established as required under G.S. 14-208.8A.

(10) Fails to inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use.

(a1) If a person commits a violation of subsection (a) of this section, the probation officer, parole officer, or any other law enforcement officer who is aware of the violation shall immediately arrest the person in accordance with G.S. 15A-401, or seek an order for the person's arrest in accordance with G.S. 15A-305.

(b) Before a person convicted of a violation of this Article is due to be released from a penal institution, an official of the penal institution shall conduct the prerelease notification procedures specified under G.S. 14-208.8(a)(2) and (3). If upon a conviction for a violation of this Article, no active term of imprisonment is imposed, the court pronouncing sentence shall, at the time of sentencing, conduct the notification procedures specified under G.S. 14-208.8(a)(2) and (3).

(c) A person who is unable to meet the registration or verification requirements of this Article shall be deemed to have complied with its requirements if:

(1) The person is incarcerated in, or is in the custody of, a local, State, private, or federal correctional facility,

(2) The person notifies the official in charge of the facility of their status as a person with a legal obligation or requirement under this Article and

(3) The person meets the registration or verification requirements of this Article no later than 10 days after release from confinement or custody. (1995, c. 545, s. 1; 1997-516, s. 1; 2002-147, s. 20; 2006-247, ss. 8(a), 8(b); 2008-220, s. 7.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, s. 8, effective December 1, 2006, is applicable to offenses committed on or after that date and subdivision (a)(9), as added by Session Laws 2006-247, s. 8(b), effective June 1, 2007, is applicable to offenses committed on or after that date."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." This act became effective December 1, 2006.

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-220, s. 7, effective May 1, 2009, added subdivision (a)(10). For applicability, see Editor's note.

CASE NOTES

This statute is unconstitutional as applied to an adjudicated incompetent, because it fails to provide him with sufficient notice or knowledge to overcome due process requirements. State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000), cert. denied, 353 N.C. 397, 547 S.E.2d 429 (2001), appeal dismissed, 353 N.C. 397, 547 S.E.2d 429 (2001).

This statute is unconstitutional as applied to a person convicted in another state who has moved to North Carolina and lacks notice of his duty to register in North Carolina, because the statute provides neither actual or constructive notice of the duty to register. State v. Bryant, 163 N.C. App. 478, 594 S.E.2d 202, 2004 N.C. App. LEXIS 403 (2004), cert. granted, 358 N.C. 734, 601 S.E.2d 864 (2004).

This statute is facially constitutional as applied to a convicted sex offender from another jurisdiction, who subsequently moved to North Carolina, because such a defendant has actual notice of his or her lifelong duty to register as a result of his or her out-of-state conviction, which provides a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

No Double Jeopary Violation. — Failing to register as a sexual offender was not a status but was a separate crime, and therefore defendant was not subjected to double jeopardy or a violation of the Structured Sentencing Act, G.S. 15A-1340.10, by including his rape conviction in calculating his prior record level for sentencing; defendant's conviction of failing to register as a sexual offender was affirmed. State v. Harrison, 165 N.C. App. 332, 598 S.E.2d 261, 2004 N.C. App. LEXIS 1153 (2004), cert. denied, — N.C. —, 604 S.E.2d 922 (2004).

Defendant could have his post-release supervision revoked because he left his residence without notifying his post-release officer and be prosecuted for the offense of failing to notify the sheriff of his change of address as a sex offender under G.S. 14-208.9 and in violation of G.S. 14-208.11 without defendant's double jeopardy rights being violated. Revocation of post-release supervision was not a criminal proceeding and the revocation related to defendant's conviction for sex offenses rather than the State's prosecution of defendant for failing to notify the sheriff of defendant's change of address. State v. Sparks, 362 N.C. 181, 657 S.E.2d 655, 2008 N.C. LEXIS 149 (2008).

Elements of Violation. — To meet its burden under G.S. 14-208.11(a)(2) of proving a sex offender's felonious failure to notify a sheriff of a change in his address, the State must prove that (1) defendant is a sex offender who is required to register; and (2) defendant failed to notify the last registering sheriff of a change of address in writing. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

Knowledge and Intent Not Required. — As a matter of statutory construction, the State was not required, under G.S. 14-208.11, to prove defendant's knowledge or intent to convict him of failure to comply with the sex offender registration requirements. State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

Form of Notice. — Reading G.S. 14-208.11(a)(2) in pari materia with G.S. 14-208.9, a sex offender required to register his address with the sheriff who fails to notify the sheriff with whom he last registered of a change of address in writing may be found guilty of a class F felony. State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26, 2002 N.C. App. LEXIS 285 (2002).

Defendant did not appear to have made any good faith effort to conform his conduct to the law — even to those laws with which he unquestionably had the knowledge and ability to comply, such as G.S. 14-208.11; therefore, defendant's indictment should not be dismissed due to a perceived deficiency of fair notice based on North Carolina's lack of Sex Offender Registration and Notification Act implementation. United States v. David, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 38613 (W.D.N.C. May 9, 2008).

Oral Notification by Detective Sufficient. — Detective's testimony that he advised defendant of the registration requirements of G.S. 14-208.11 when defendant initially registered as a sex offender was sufficient to satisfy due process. State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

Untimely Notice Did Not Mandate Dismissal of Charges. — Failure to inform defendant that he was required to register as a sex offender until five days prior to release from prison did not require dismissal of charge for failure to register; the late notice was not fatal as defendant was not prejudiced. State v. Harris, 171 N.C. App. 127, 613 S.E.2d 701, 2005 N.C. App. LEXIS 1169 (2005).

Motion to Dismiss Properly Denied. — Denial of defendant's motion to dismiss a failure to register as a sex offender charge was proper as defendant's confession permitted the jury to infer that defendant had not lived at the registered address within 10 days of his arrest, and there was evidence that on June 2, 1998, defendant was released from a prison sentence imposed for taking indecent liberties with a child. State v. Wise, 178 N.C. App. 154, 630 S.E.2d 732, 2006 N.C. App. LEXIS 1293 (2006).

Denial of defendant's motion to dismiss was proper, because defendant's conviction for violating G.S. 14-208.11(a)(2) was supported by evidence showing that defendant moved from defendant's old address, not intending to return, and knew defendant only had 10 days to notify the sheriff's department, but defendant did not notify the sheriff's department of the change of address until at least a month later, more than 10 days after moving to a new location. State v. Worley, — N.C. App. —, 677 S.E.2d 540, 2009 N.C. App. LEXIS 757 (2009).

False Address Given. — Evidence was sufficient to show that defendant submitted information under false pretenses to the sexual offender registry when he registered his address on release from prison as being that of his estranged wife when he actually lived in another county with his sister. State v. Parks, 147 N.C. App. 485, 556 S.E.2d 20, 2001 N.C. App. LEXIS 1184 (2001).

Sex offender registration statutes, G.S. 14-208.9(a) and 14-208.11(a)(2), operate on the premise that everyone does, at all times, have an address of some sort, even if it is a homeless shelter, a location under a bridge, or some similar place; the contention that there are occasionally times when a registered sex offender lacks a reportable address for purposes of §§ 14-208.9(a) and 14-208.11(a)(2) is rejected. State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Evidence Insufficient for Conviction. — Evidence was insufficient to support defendant's conviction for failing to register a change of address because defendant was only staying temporarily with defendant's father due to defendant's stress while intending to return to defendant's burglarized residence. Defendant maintained personal possessions and a personal telephone number at the registered residence and would return to the residence to gather mail, do laundry, pick up fresh clothes, and feed defendant's pets. State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

Interstate Commerce and Travel Sufficient to Require Registration. — Defendant traveled in interstate commerce and turned up in North Carolina where he was not registered under the Sex Offender Registration and Notification Act (SORNA) or any other registration scheme; further, he admitted, via his plea agreement, that he was required to register under SORNA. Defendant had actual notice of his lifelong duty to register as a sex offender in the state where he was convicted, as well as actual notice of his continuing duty to update his registration as he moved from state to state; thus, defendant had sufficient notice of his duty to register under N.C.'s sex offender registration statute. United States v. David, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 38613 (W.D.N.C. May 9, 2008).

Evidence Sufficient for Conviction. —. — Evidence supported defendant's G.S. §§ 14-208.9(a) and 14-208.11(a)(2) conviction as defendant was evicted, and the locks were changed on the public housing apartment defendant was living in, and defendant did not timely report the new address; defendant had an address, even if it was temporary, after the locks were changed, which defendant was required to report. State v. Worley, — N.C. App. —, 679 S.E.2d 857, 2009 N.C. App. LEXIS 1167 (July 21, 2009).

Evidence Sufficient. — State presented sufficient evidence that defendant, a convicted sex offender, changed her address and failed to comply with the registration requirements of G.S. 14-208.11 of the Sex Offender and Public Protection Registration Program, as there was evidence that she at least temporarily changed her actual place of abode. State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

Home Address For Registration Purposes. — For purposes of G.S. 14-208.7, 14-208.9, and 14-208.11 of the North Carolina Sex Offender and Public Protection Registration Program, the North Carolina Supreme Court concludes that the legislature intended the definition of address to carry an ordinary meaning of describing or indicating the location where someone lives, and as such, a sex offender's address indicates his or her residence, meaning the actual place of abode where he or she lives, whether permanent or temporary. State v. Abshire, 363 N.C. 322, 677 S.E.2d 444, 2009 N.C. LEXIS 611 (June 18, 2009).

Cited in State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731, 2004 N.C. App. LEXIS 297 (2004); State v. Verrier, 173 N.C. App. 123, 617 S.E.2d 675, 2005 N.C. App. LEXIS 1899 (2005); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.11A. Duty to report noncompliance of a sex offender; penalty for failure to report in certain circumstances.

(a) It shall be unlawful and a Class H felony for any person who has reason to believe that an offender is in violation of the requirements of this Article, and who has the intent to assist the offender in eluding arrest, to do any of the following:

(1) Withhold information from, or fail to notify, a law enforcement agency about the offender's noncompliance with the requirements of this Article, and, if known, the whereabouts of the offender.

(2) Harbor, attempt to harbor, or assist another person in harboring or attempting to harbor, the offender.

(3) Conceal, or attempt to conceal, or assist another person in concealing or attempting to conceal, the offender.

(4) Provide information to a law enforcement agency regarding the offender that the person knows to be false information.

(b) This section does not apply if the offender is incarcerated in or is in the custody of a local, State, private, or federal correctional facility. (2006-247, s. 9.1(a).)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 9.1(b), makes this section effective December 1, 2006, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-208.12: Repealed by S.L. 1997-516, s. 1, effective April 1, 1998.

§ 14-208.12A. Request for termination of registration requirement.

(a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court in the district where the person resides to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

(a3) If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement. If the court grants the petition to terminate the registration requirement, the clerk of court shall forward a certified copy of the order to the Division to have the person's name removed from the registry.

(b) If there is a subsequent offense, the county registration records shall be retained until the registration requirement for the subsequent offense is terminated by the court under subsection (a1) of this section. (1997-516, s. 1; 2006-247, s. 10(a); 2008-117, s. 11.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, s. 10(a), effective December 1, 2006, is applicable to persons for whom the period of registration would terminate on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 11, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (a), inserted "Ten years from the date of initial county registration" at the beginning, inserted "30-year" preceding "registration requirement" and deleted "10 years from the date of initial county registration" thereafter. For note on applicability of 30-year registration period, see Editor's note under G.S. 14-208.7.

§ 14-208.13. File with Police Information Network.

(a) The Division shall include the registration information in the Police Information Network as set forth in G.S. 114-10.1.

(b) The Division shall maintain the registration information permanently even after the registrant's reporting requirement expires. (1995, c. 545, s. 1; 1997-516, s. 1.)

§ 14-208.14. Statewide registry; Division of Criminal Statistics designated custodian of statewide registry.

(a) The Division of Criminal Statistics shall compile and keep current a central statewide sex offender registry. The Division is the State agency designated as the custodian of the statewide registry. As custodian the Division has the following responsibilities:

(1) To receive from the sheriff or any other law enforcement agency or penal institution all sex offender registrations, changes of address, changes of academic or educational employment status, and prerelease notifications required under this Article or under federal law. The Division shall also receive notices of any violation of this Article, including a failure to register or a failure to report a change of address.

(2) To provide all need-to-know law enforcement agencies (local, State, campus, federal, and those located in other states) immediately upon receipt by the Division of any of the following: registration information, a prerelease notification, a change of address, a change of academic or educational employment status, or notice of a violation of this Article.

(2a) To notify the appropriate law enforcement unit at an institution of higher education as soon as possible upon receipt by the Division of relevant information based on registration information or notice of a change of academic or educational employment status. If an institution of higher education does not have a law enforcement unit, then the Division shall provide the information to the local law enforcement agency that has jurisdiction for the campus.

(3) To coordinate efforts among law enforcement agencies and penal institutions to ensure that the registration information, changes of address, prerelease notifications, and notices of failure to register or to report a change of address are conveyed in an appropriate and timely manner.

(4) To provide public access to the statewide registry in accordance with this Article.

(5) To maintain a system allowing an entity to access a list of online identifiers of persons in the central sex offender registry.

(b) The statewide registry shall include the following:

(1) Registration information obtained by a sheriff or penal institution under this Article or from any other local or State law enforcement agency.

(2) Registration information received from a state or local law enforcement agency or penal institution in another state.

(3) Registration information received from a federal law enforcement agency or penal institution. (1997-516, s. 1; 2002-147, s. 21; 2008-220, s. 8.)

Editor's Note. — Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2008-220, s. 12, provides: "Sections 10 and 12 of this act are effective when they become law. Section 11 of this act becomes effective July 1, 2008. The provision in Section 1 of this act amending G.S. 14-208.6(5) becomes effective December 1, 2008, and applies to all persons convicted on or after that date, and to all persons released from a penal institution on or after that date. The remainder of this act becomes effective May 1, 2009, and applies to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date. The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-220, s. 8, effective May 1, 2009, added subdivision (a)(5). For applicability, see Editor's note.

§ 14-208.15. Certain statewide registry information is public record: access to statewide registry.

(a) The information in the statewide registry that is public record is the same as in G.S. 14-208.10. The Division shall release any other relevant information that is necessary to protect the public concerning a specific person, but shall not release the identity of the victim of the offense that required registration under this Article.

(b) The Division shall provide free public access to automated data from the statewide registry, including photographs provided by the registering sheriffs, via the Internet. The public will be able to access the statewide registry to view an individual registration record, a part of the statewide registry, or all of the statewide registry. The Division may also provide copies of registry information to the public upon written request and may charge a reasonable fee for duplicating costs and mailings costs. (1997-516, s. 1.)

CASE NOTES

Convicted sex offender from another jurisdiction who subsequently moved to North Carolina had actual notice of his lifelong duty to register with South Carolina, which led a reasonable individual to inquire of a duty to register in any state upon relocation. State v. Bryant, 359 N.C. 554, 614 S.E.2d 479, 2005 N.C. LEXIS 647 (2005).

§ 14-208.15A. Release of online identifiers to entity; fee.

(a) The Division may release registry information regarding a registered offender's online identifier to an entity for the purpose of allowing the entity to prescreen users or to compare the online identifier information with information held by the entity as provided by this section.

(b) An entity desiring to prescreen its users or compare its database of registered users to the list of online identifiers of persons in the statewide registry may apply to the Division to access the information. An entity that complies with the criteria developed by the Division regarding the release and use of the online identifier information and pays the fee may screen new users or compare its database of registered users to the list of online identifiers of persons in the statewide registry as frequently as the Division may allow for the purpose of identifying a registered user associated with an online identifier contained in the statewide registry.

(c) The Division may charge an entity that submits a request for the online identifiers of persons in the statewide registry an annual fee of one hundred dollars ($100.00). Fees collected under this section shall be credited to the Department of Justice and applied to the cost of providing this service.

(d) The Division shall develop standards regarding the release and use of online identifier information. The standards shall include a requirement that the information obtained from the statewide registry shall not be disclosed for any purpose other than for prescreening its users or comparing the database of registered users of the entity against the list of online identifiers of persons in the statewide registry.

(e) An entity that receives:

(1) A complaint from a user of the entity's services that a person uses its service to solicit a minor by computer to commit an unlawful sex act as defined in G.S. 14-202.3, or

(2) A report that a user may be violating G.S. 14-190.17 or G.S. 14-190.17A by posting or transmitting material that contains a visual representation of a minor engaged in sexual activity,

shall report that information and the online identifier information of the person allegedly committing the offense, including whether that online identifier is included in the statewide registry, to the Cyber Tip Line at the National Center for Missing and Exploited Children, which shall forward that report to an appropriate law enforcement official in this State. The offense is committed in the State for purposes of determining jurisdiction, if the transmission that constitutes the offense either originates in the State or is received in the State.

(f) An entity that complies with this section in good faith is immune from civil or criminal liability resulting from either of the following:

(1) The entity's refusal to provide system service to a person on the basis that the entity reasonably believed that the person was subject to registration under State sex offender registry laws.

(2) A person's criminal or tortious acts against a minor with whom the person had communicated on the entity's system. (2008-220, s. 9; 2009-272, s. 2.)

Editor's Note. — Session Laws 2008-220, s. 12, makes this section effective May 1, 2009, and applicable to persons who are required to be registered under Article 27A of Chapter 14 of the General Statutes on or after that date.

Session Laws 2008-220, s. 12, further provides: "The requirements related to online identifiers apply to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after May 1, 2009, and to persons who are registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continue to be registered on May 1, 2009. However, any person registered under Article 27 of Chapter 14 of the General Statutes prior to May 1, 2009, and continuing to be registered on May 1, 2009, shall not be in violation of the online identifier requirements if they provide the required information at the first verification of information that occurs on or after May 1, 2009."

Session Laws 2008-220, s. 11(a)-(e), as amended by Session Laws 2009-451, s. 17.4A, and as amended by Session Laws 2009-575, s. 17, provides: "(a) Funds allocated by S.L. 2008-107 to the Governor's Crime Commission shall be used for award as a grant to the North Carolina Sheriffs' Association, Inc., to assist the sheriffs of North Carolina with training and technical assistance in the enforcement of the State's sex offender laws. The grant shall be awarded specifically to enhance and support law enforcement efforts by sheriffs to do the following: (i) process and conduct in-person sex offender registrations, (ii) monitor compliance of sex offenders as required under Article 27A of Chapter 14 of the General Statutes, and (iii) conduct activities to investigate and apprehend persons who commit reportable offenses as defined under Article 27A of Chapter 14 of the General Statutes.

"(b) Repealed by Session Laws 2009-451, s. 17.4A, as amended by Session Laws 2009-575, s. 17.

"(c) The funds for this grant shall not revert to the General Fund but shall remain with the Commission for the purposes described in this section.

"(d) The grant shall be subject to established fiscal controls, annual reporting, and accountability requirements specified by the Commission.

"(e) There is appropriated from the General Fund to the Department of Crime Control and Public Safety the sum of two hundred fifty thousand dollars ($250,000) for fiscal year 2008-2009 to be allocated to the Governor's Crime Commission to award the grant specified by this section to assist with the enforcement of the State's sex offender laws."

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2009-2011 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2009-2011 fiscal biennium."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-272, s. 2, effective May 1, 2009, in subsection (d), substituted "standards" for "criteria and adopt rules" in the first sentence, and substituted "standards" for "criteria" in the second sentence.

§ 14-208.16. Residential restrictions.

(a) A registrant under this Article shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located.

(b) As used in this section, "school" does not include home schools as defined in G.S. 115C-563 or institutions of higher education, and the term "child care center" is defined by G.S. 110-86(3). The term "registrant" means a person who is registered, or is required to register, under this Article.

(c) This section does not apply to child care centers that are located on or within 1,000 feet of the property of an institution of higher education where the registrant is a student or is employed.

(d) Changes in the ownership of or use of property within 1,000 feet of a registrant's registered address that occur after a registrant establishes residency at the registered address shall not form the basis for finding that an offender is in violation of this section. For purposes of this subsection, a residence is established when the registrant does any of the following:

(1) Purchases the residence or enters into a specifically enforceable contract to purchase the residence.

(2) Enters into a written lease contract for the residence and for as long as the person is lawfully entitled to remain on the premises.

(3) Resides with an immediate family member who established residence in accordance with this subsection. For purposes of this subsection, "immediate family member" means a child or sibling who is 18 years of age or older, or a parent, grandparent, legal guardian, or spouse of the registrant.

(e) Nothing in this section shall be construed as creating a private cause of action against a real estate agent or landlord for any act or omission arising out of the residential restriction in this section.

(f) A violation of this section is a Class G felony. (2006-247, s. 11(a); 2007-213, s. 10.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 11(c), provides in part: "Subsection (a) of this section becomes effective December 1, 2006, and applies to all persons registered or required to register on or after that date. Subsection (a) of this section does not apply to a person who has established a residence prior to the effective date of this subsection in accordance with the provisions in G.S. 14-208.16 (d)(1), (2), or (3) as enacted by this act. This subsection is effective when this act becomes law." The remainder of this section is effective December 1, 2006, and is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-208.17. Sexual predator prohibited from working or volunteering for child-involved activities; limitation on residential use.

(a) It shall be unlawful for any person required to register under this Article to work for any person or as a sole proprietor, with or without compensation, at any place where a minor is present and the person's responsibilities or activities would include instruction, supervision, or care of a minor or minors.

(b) It shall be unlawful for any person to conduct any activity at his or her residence where the person:

(1) Accepts a minor or minors into his or her care or custody from another, and

(2) Knows that a person who resides at that same location is required to register under this Article.

(c) A violation of this section is a Class F felony. (2006-247, s. 11(b).)

Editor's Note. — Session Laws 2006-247, s. 1(a), provided: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 11(c), made this section effective December 1, 2006, and applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-208.18. Sex offender unlawfully on premises.

(a) It shall be unlawful for any person required to register under this Article, if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

(b) Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.

(c) Subsection (a) of this section is applicable only to persons required to register under this Article who have committed any of the following offenses:

(1) Any offense in Article 7A of this Chapter.

(2) Any offense where the victim of the offense was under the age of 16 years at the time of the offense.

(d) A person subject to subsection (a) of this section who is a parent or guardian of a student enrolled in a school may be present on school property if all of the following conditions are met:

(1) The parent or guardian is on school property for the purpose for one of the following:

a. To attend a conference at the school with school personnel to discuss the academic or social progress of the parents' or guardians' child; or

b. The presence of the parent or guardian has been requested by the principal or his or her designee for any other reason relating to the welfare or transportation of the child.

(2) The parent or guardian complies with all of the following:

a. Notice: The parent or guardian shall notify the principal of the school of the parents' or guardians' registration under this Article and of his or her presence at the school unless the parent or guardian has permission to be present from the superintendent or the local board of education, or the principal has granted ongoing permission for regular visits of a routine nature. If permission is granted by the superintendent or the local board of education, the superintendent or chairman of the local board of education shall inform the principal of the school where the parents' or guardians' will be present. Notification includes the nature of the parents' or guardians' visit and the hours when the parent or guardian will be present at the school. The parent or guardian is responsible for notifying the principal's office upon arrival and upon departure. Any permission granted under this sub-subdivision shall be in writing.

b. Supervision: At all times that a parent or guardian is on school property, the parent or guardian shall remain under the direct supervision of school personnel. A parent or guardian shall not be on school property even if the parent or guardian has ongoing permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion.

(e) A person subject to subsection (a) of this section who is eligible to vote may be present at a location described in subsection (a) used as a voting place as defined by G.S. 163-165 only for the purposes of voting and shall not be outside the voting enclosure other than for the purpose of entering and exiting the voting place. If the voting place is a school, then the person subject to subsection (a) shall notify the principal of the school that he or she is registered under this Article.

(f) A person subject to subsection (a) of this section who is eligible under G.S. 115C-378 to attend public school may be present on school property if permitted by the local board of education pursuant to G.S. 115C-391(d)(2).

(g) A juvenile subject to subsection (a) of this section may be present at a location described in that subsection if the juvenile is at the location to receive medical treatment or mental health services and remains under the direct supervision of an employee of the treating institution at all times.

(h) A violation of this section is a Class H felony. (2008-117, s. 12; 2009-570, s. 5.)

Editor's Note. — Session Laws 2008-117, s. 22, makes this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2009-570, s. 5, effective August 28, 2009, substituted "subsection (c)" for "subsection (b)" in the introductory language of subsection (a).

§ 14-208.19. Community and public notification.

The licensee for each licensed day care center and the principal of each elementary school, middle school, and high school shall register with the North Carolina Sex Offender and Public Protection Registry to receive e-mail notification when a registered sex offender moves within a one-mile radius of the licensed day care center or school. (2008-117, s. 13.)

Editor's Note. — Session Laws 2008-117, s. 13, enacted this section as G.S. 14-208.25A. It has been recodified as 14-208.19 at the direction of the Revisor of Statutes.

Session Laws 2008-117, s. 22, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

§ 14-208.19A. Commercial drivers license restrictions.

(a) The Division of Motor Vehicles, in compliance with G.S. 20-37.14A, shall not issue or renew a commercial drivers license with a P or S endorsement to any person required to register under this Article.

(b) The Division of Motor Vehicles, in compliance with G.S. 20-37.13(f) shall not issue a commercial driver learner's permit with a P or S endorsement to any person required to register under this Article.

(c) A person who is convicted of a violation that requires registration under Article 27A of Chapter 14 of the General Statutes is disqualified under G.S. 20-17.4 from driving a commercial motor vehicle that requires a commercial drivers license with a P or S endorsement for the period of time during which the person is required to maintain registration under Article 27A of Chapter 14 of the General Statutes.

(d) A person who drives a commercial passenger vehicle or a school bus and who does not have a commercial drivers license with a P or S endorsement because the person was convicted of a violation that requires registration under Article 27A of Chapter 14 of the General Statutes shall be punished as provided by G.S. 20-27.1. (2009-491, s. 1.)

Editor's Note. — Session Laws 2009-491, s. 1, enacted this section as G.S. 14-208.19. It has been renumbered as this section at the direction of the Revisor of Statutes.

Session Laws 2009-491, s. 7, provides: "This act becomes effective December 1, 2009. This act applies to persons whose initial registration under Article 27A of Chapter 14 of the General Statutes occurs on or after December 1, 2009, and to persons who are registered under Article 27A of Chapter 14 of the General Statutes prior to December 1, 2009, and continue to be registered on or after December 1, 2009. The criminal penalties enacted by this act apply to offenses occurring on or after December 1, 2009."

Part 3. Sexually Violent Predator Registration Program.

§ 14-208.20. Sexually violent predator determination; notice of intent; presentence investigation.

(a) When a person is charged by indictment or information with the commission of a sexually violent offense, the district attorney shall decide whether to seek classification of the offender as a sexually violent predator if the person is convicted. If the district attorney intends to seek the classification of a sexually violent predator, the district attorney shall within the time provided for the filing of pretrial motions under G.S. 15A-952 file a notice of the district attorney's intent. The court may for good cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make other appropriate orders.

(b) Prior to sentencing a person as a sexually violent predator, the court shall order a presentence investigation in accordance with G.S. 15A-1332(c). However, the study of the defendant and whether the defendant is a sexually violent predator shall be conducted by a board of experts selected by the Department of Correction. The board of experts shall be composed of at least four people. Two of the board members shall be experts in the field of the behavior and treatment of sexual offenders, one of whom shall be selected from a panel of experts in those fields provided by the North Carolina Medical Society and not employed with the Department of Correction or employed on a full-time basis with any other State agency. One of the board members shall be a victims' rights advocate, and one of the board members shall be a representative of law enforcement agencies.

(c) When the defendant is returned from the presentence commitment, the court shall hold a sentencing hearing in accordance with G.S. 15A-1334. At the sentencing hearing, the court shall, after taking the presentencing report under advisement, make written findings as to whether the defendant is classified as a sexually violent predator and the basis for the court's findings. (1997-516, s. 1; 2001-373, s. 6.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Effect of Sexually Violent Predator Classification on Sentencing Issues. — While G.S. 14.208.6(6) provides a definition for a sexually violent predator, nothing in that statute, nor in G.S. 14.208.20 regarding the procedure for determining if an individual is a sexually violent predator, or G.S. 14.208.23 and G.S. 14.208.6A regarding sex offender registration, sets out any sentencing implications that would allow a trial court to extend a defendant's sentence on a rape charge beyond the preseumptive range for that crime; thus, a trial court's labeling of defendant as a "predator" was not a proper factor in enhancing defendant's rape conviction sentence. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

§ 14-208.21. Lifetime registration procedure; application of Part 2 of this Article.

Unless provided otherwise by this Part, the provisions of Part 2 of this Article apply to a person classified as a sexually violent predator, a person who is a recidivist, or a person who is convicted of an aggravated offense. The procedure for registering as a sexually violent predator, a recidivist, or a person convicted of an aggravated offense is the same as under Part 2 of this Article. (1997-516, s. 1; 2001-373, s. 7.)

CASE NOTES

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.22. Additional registration information required.

(a) In addition to the information required by G.S. 14-208.7, the following information shall also be obtained in the same manner as set out in Part 2 of this Article from a person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator:

(1) Identifying factors.
(2) Offense history.
(3) Documentation of any treatment received by the person for the person's mental abnormality or personality disorder.

(b) The Division shall provide each sheriff with forms for registering persons as required by this Article.

(c) The Department of Correction shall also obtain the additional information set out in subsection (a) of this section and shall include this information in the prerelease notice forwarded to the sheriff or other appropriate law enforcement agency. (1997-516, s. 1; 2001-373, s. 8.)

CASE NOTES

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.23. Length of registration.

A person who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator shall maintain registration for the person's life. Except as provided under G.S. 14-208.6C, the requirement of registration shall not be terminated. (1997-516, s. 1; 2001-373, s. 9.)

CASE NOTES

Effect of Sexually Violent Predator Classification on Sentencing Issues. — While G.S. 14.208.6(6) provides a definition for a sexually violent predator, nothing in that statute, nor in G.S. 14.208.20 regarding the procedure for determining if an individual is a sexually violent predator, or G.S. 14.208.23 and G.S. 14.208.6A regarding sex offender registration, sets out any sentencing implications that would allow a trial court to extend a defendant's sentence on a rape charge beyond the preseumptive range for that crime; thus, a trial court's labeling of defendant as a "predator" was not a proper factor in enhancing defendant's rape conviction sentence. State v. Harris, 166 N.C. App. 386, 602 S.E.2d 697, 2004 N.C. App. LEXIS 1779 (2004).

§ 14-208.24. Verification of registration information.

(a) The information in the county registry shall be verified by the sheriff for each registrant who is a recidivist, who is convicted of an aggravated offense, or who is classified as a sexually violent predator every 90 days after the person's initial registration date.

(b) The procedure for verifying the information in the criminal offender registry is the same as under G.S. 14-208.9A, except that verification shall be every 90 days as provided by subsection (a) of this section. (1997-516, s. 1; 2001-373, s. 10.)

§ 14-208.25: Repealed by Session Laws 2001-373, s. 11, effective October 1, 2001.

Part 4. Registration of Certain Juveniles Adjudicated for Committing Certain Offenses.

§ 14-208.26. Registration of certain juveniles adjudicated delinquent for committing certain offenses.

(a) When a juvenile is adjudicated delinquent for a violation of G.S. 14-27.2

(first degree rape), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.5 (second degree sexual offense), or G.S. 14-27.6 (attempted rape or sexual offense), and the juvenile was at least eleven years of age at the time of the commission of the offense, the court shall consider whether the juvenile is a danger to the community. If the court finds that the juvenile is a danger to the community, then the court shall consider whether the juvenile should be required to register with the county sheriff in accordance with this Part. The determination as to whether the juvenile is a danger to the community and whether the juvenile shall be ordered to register shall be made by the presiding judge at the dispositional hearing. If the judge rules that the juvenile is a danger to the community and that the juvenile shall register, then an order shall be entered requiring the juvenile to register. The court's findings regarding whether the juvenile is a danger to the community and whether the juvenile shall register shall be entered into the court record. No juvenile may be required to register under this Part unless the court first finds that the juvenile is a danger to the community.

A juvenile ordered to register under this Part shall register and maintain that registration as provided by this Part.

(a1) For purposes of this section, a violation of any of the offenses listed in subsection (a) of this section includes all of the following: (i) the commission of any of those offenses, (ii) the attempt, conspiracy, or solicitation of another to commit any of those offenses, (iii) aiding and abetting any of those offenses.

(b) If the court finds that the juvenile is a danger to the community and must register, the presiding judge shall conduct the notification procedures specified in G.S. 14-208.8. The chief court counselor of that district shall file the registration information for the juvenile with the appropriate sheriff. (1997-516, s. 1; 1999-363, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

§ 14-208.27. Change of address.

If a juvenile who is adjudicated delinquent and required to register changes address, the juvenile court counselor for the juvenile shall provide written notice of the new address not later than the third business day after the change to the sheriff of the county with whom the juvenile had last registered. Upon receipt of the notice, the sheriff shall immediately forward this information to the Division. If the juvenile moves to another county in this State, the Division shall inform the sheriff of the new county of the juvenile's new residence. (1997-516, s. 1; 2001-490, s. 2.36; 2008-117, s. 14.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 14, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "the third business day" for "the tenth day."

§ 14-208.28. Verification of registration information.

The information provided to the sheriff shall be verified semiannually for each juvenile registrant as follows:

(1) Every year on the anniversary of a juvenile's initial registration date and six months after that date, the sheriff shall mail a verification form to the juvenile court counselor assigned to the juvenile.

(2) The juvenile court counselor for the juvenile shall return the verification form to the sheriff within three business days after the receipt of the form.

(3) The verification form shall be signed by the juvenile court counselor and the juvenile and shall indicate whether the juvenile still resides at the address last reported to the sheriff. If the juvenile has a different address, then that fact and the new address shall be indicated on the form. (1997-516, s. 1; 2001-490, s. 2.37; 2006-247, s. 13; 2008-117, s. 15.)

Editor's Note. — Session Laws 2006-247, s. 1(a), provided: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

This section, as amended by Session Laws 2006-247, s. 13, effective December 1, 2006, is applicable to persons for whom the period of registration would terminate on or after that date.

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions." This act became effective December 1, 2006.

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 15, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "three business days" for "10 days" in subdivision (2).

§ 14-208.29. Registration information is not public record; access to registration information available only to law enforcement agencies and local boards of education.

(a) Notwithstanding any other provision of law, the information regarding a juvenile required to register under this Part is not public record and is not available for public inspection.

(b) The registration information of a juvenile adjudicated delinquent and required to register under this Part shall be maintained separately by the sheriff and released only to law enforcement agencies and local boards of education. Registry information for any juvenile enrolled in the local school administrative unit shall be forwarded to the local board of education. Under no circumstances shall the registration of a juvenile adjudicated delinquent be included in the county or statewide registries, or be made available to the public via internet. (1997-516, s. 1; 2008-117, s. 12.2.)

Editor's Note. — Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 12.2, effective December 1, 2008, and applicable to offenses committed on or after that date, added "and local boards of education" in the section heading; and inserted "and local boards of education. Registry information for any juvenile enrolled in the local school administrative unit shall be forwarded to the local board of education" in subsection (b).

CASE NOTES

Cited in In re M.E.B., 153 N.C. App. 278, 569 S.E.2d 683, 2002 N.C. App. LEXIS 1135 (2002).

§ 14-208.30. Termination of registration requirement.

The requirement that a juvenile adjudicated delinquent register under this Part automatically terminates on the juvenile's eighteenth birthday or when the jurisdiction of the juvenile court with regard to the juvenile ends, whichever occurs first. (1997-516, s. 1.)

§ 14-208.31. File with Police Information Network.

(a) The Division shall include the registration information in the Police Information Network as set forth in G.S. 114-10.1.

(b) The Division shall maintain the registration information permanently even after the registrant's reporting requirement expires; however, the records shall remain confidential in accordance with Article 32 of Chapter 7B of the General Statutes. (1997-516, s. 1; 1998-202, s. 14.)

§ 14-208.32. Application of Part.

This Part does not apply to a juvenile who is tried and convicted as an adult for committing or attempting to commit a sexually violent offense or an offense against a minor. A juvenile who is convicted of one of those offenses as an adult is subject to the registration requirements of Part 2 and Part 3 of this Article. (1997-516, s. 1.)

§§ 14-208.33 through 14-208.39: Reserved for future codification purposes.

Part 5. Sex Offender Monitoring.

§ 14-208.40. Establishment of program; creation of guidelines; duties.

(a) The Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program. The program shall be designed to monitor three categories of offenders as follows:

(1) Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) and who is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

(2) Any offender who satisfies all of the following criteria: (i) is convicted of a reportable conviction as defined by G.S. 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) has committed an offense involving the physical, mental, or sexual abuse of a minor, and (iv) based on the Department's risk assessment program requires the highest possible level of supervision and monitoring.

(3) Any offender who is convicted of G.S. 14-27.2A or G.S. 14-27.4A, who shall be enrolled in the satellite-based monitoring program for the offender's natural life upon termination of the offender's active punishment.

(b) In developing the guidelines for the program, the Department shall require that any offender who is enrolled in the satellite-based program submit to an active continuous satellite-based monitoring program, unless an active program will not work as provided by this section. If the Department determines that an active program will not work as provided by this section, then the Department shall require that the defendant submit to a passive continuous satellite-based program that works within the technological or geographical limitations.

(c) The satellite-based monitoring program shall use a system that provides all of the following:

(1) Time-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology.

(2) Reporting of subject's violations of prescriptive and proscriptive schedule or location requirements. Frequency of reporting may range from once a day (passive) to near real-time (active).

(d) The Department may contract with a single vendor for the hardware services needed to monitor subject offenders and correlate their movements to reported crime incidents. The contract may provide for services necessary to implement or facilitate any of the provisions of this Part. (2006-247, s. 15(a); 2007-213, s. 1; 2007-484, s. 42(b); 2008-117, s. 16.)

Editor's Note. — This section was enacted as G.S. 14-208.33 by Session Laws 2006-247, s. 15(a), and was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 1(a), provides: "This act shall be known as 'An Act To Protect North Carolina's Children/Sex Offender Law Changes.'"

Session Laws 2006-247, s. 15(j), provides: "The Department of Correction shall have the program enacted by subsection (a) of this section established by January 1, 2007."

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2006-247, s. 16, provides: "The Department of Correction shall either issue an RFP prior to signing a contract, or with prior approval by the State Chief Information Officer or his designee, enter into a contract through an approved contracting alliance or consortium for a passive and active Global Positioning System. The system shall be for use as an intermediate sanction and to help supervise certain sex offenders who are placed on probation, parole, or post-release supervision. If an RFP is issued, the contract shall be awarded by October 1, 2006 for contract terms to begin January 1, 2007. The Department of Correction shall report by November 1, 2006 to the Chairs of the House of Representatives and Senate Appropriations Committees and the Chairs of the House of Representatives and Senate Appropriations Subcommittees on Justice and Public Safety on the details of the awarded contract."

Session Laws 2006-247, s. 17, provides: "No later than January 1, 2007, the Department of Correction shall develop a graduated risk assessment program that identifies, assesses, and closely monitors a high-risk sex offender who, while not classified as a sexually violent predator, a recidivist, or convicted of an aggravated offense as those terms are defined in G.S. 14-208.6, may still require extraordinary supervision and may be placed on probation, parole, or post-release supervision only on the conditions provided in G.S. 15A-1343(b2) or G.S. 15A-1368.4(b1)."

Session Laws 2006-247, s. 21 is a severability clause.

Session Laws 2006-247, s. 22, provides, in part: "Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 16, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (a), substituted "three categories" for "two categories"; and added subdivision (a)(3).

CASE NOTES

Constitutionality. — Lifetime satellite-based monitoring pursuant to G.S. 14-208.40(a)(1) did not violate double jeopardy because its imposition was not a punishment.

State v. Anderson, — N.C. App. —, 679 S.E.2d 165, 2009 N.C. App. LEXIS 1106 (July 7, 2009).

Prior Conviction in a Recidivism Determination Does Not Have to Be for a Reportable Offense. — Trial court properly determined that defendant was subject to satellite-based monitoring for the duration of his life when the offense on which defendant's recidivism determination was made, taking indecent liberties with a minor, was clearly one described in G.S. 14-208.5 even though it was not reportable because it predated the act; there is nothing in the statutory language that requires that the prior conviction in a recidivism determination must be for a reportable offense, and the code is clear that the prior conviction must be for an offense that is described in the statute defining reportable offenses. State v. Wooten, — N.C. App. —, 669 S.E.2d 749, 2008 N.C. App. LEXIS 2232 (2008).

Order for Satellite-Based Monitoring Improper. — Trial court's order that defendant enroll in satellite-based monitoring pursuant to G.S. 14-208.40A was improper because the trial court made no findings justifying the conclusion that defendant required the highest possible level of supervision and monitoring and the trial court erred by doing so; the State presented no evidence which supported a determination of a higher level of risk than the "moderate" rating assigned by the Department of Corrections, and, therefore, there was no need to remand the matter to the trial court for additional findings of fact as requested by the State. State v. Kilby, — N.C. App. —, 679 S.E.2d 430, 2009 N.C. App. LEXIS 1179 (July 21, 2009).

Applied in State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.40A. Determination of satellite-based monitoring requirement by court.

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), during the sentencing phase, the district attorney shall present to the court any evidence that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor. The district attorney shall have no discretion to withhold any evidence required to be submitted to the court pursuant to this subsection.

The offender shall be allowed to present to the court any evidence that the district attorney's evidence is not correct.

(b) After receipt of the evidence from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in G.S. 14-208.40(a), and if so, shall make a finding of fact of that determination, specifying whether (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, or (v) the offense involved the physical, mental, or sexual abuse of a minor.

(c) If the court finds that the offender has been classified as a sexually violent predator, is a recidivist, has committed an aggravated offense, or was convicted of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in a satellite-based monitoring program for life.

(d) If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court.

(e) Upon receipt of a risk assessment from the Department pursuant to subsection (d) of this section, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court. (2007-213, s. 2; 2008-117, s. 16.1.)

Editor's Note. — Session Laws 2007-213, s. 15, made this section effective December 1, 2007, and applicable to sentences entered on or after that date.

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 16.1, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsections (a) and (b), inserted clause (iv) and renumbered former clause (iv) as clause (v); in subsection (c), inserted "or was convicted of G.S. 14-27.2A or G.S. 14-27.4A"; in subsection (d), inserted "or a violation of G.S. 14-27.2A or G.S. 14-27.4A"; and made minor stylistic changes.

CASE NOTES

Applied in State v. Abshire, — N.C. App. —, 666 S.E.2d 657, 2008 N.C. App. LEXIS 1650 (2008).

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Order for Satellite-Based Monitoring Improper. — Trial court's order that defendant enroll in satellite-based monitoring pursuant to G.S. 14-208.40A was improper because the trial court made no findings justifying the conclusion that defendant required the highest possible level of supervision and monitoring and the trial court erred by doing so; the State presented no evidence which supported a determination of a higher level of risk than the "moderate" rating assigned by the Department of Corrections, and, therefore, there was no need to remand the matter to the trial court for additional findings of fact as requested by the State. State v. Kilby, — N.C. App. —, 679 S.E.2d 430, 2009 N.C. App. LEXIS 1179 (July 21, 2009).

§ 14-208.40B. Determination of satellite-based monitoring requirement in certain circumstances.

(a) When an offender is convicted of a reportable conviction as defined by G.S. 14-208.6(4), and there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring, the Department shall make an initial determination on whether the offender falls into one of the categories described in G.S. 14-208.40(a).

(b) If the Department determines that the offender falls into one of the categories described in G.S. 14-208.40(a), the district attorney, representing the Department, shall schedule a hearing in superior court for the county in which the offender resides. The Department shall notify the offender of the Department's determination and the date of the scheduled hearing by certified mail sent to the address provided by the offender pursuant to G.S. 14-208.7. The hearing shall be scheduled no sooner than 15 days from the date the notification is mailed. Receipt of notification shall be presumed to be the date indicated by the certified mail receipt. Upon the court's determination that the offender is indigent and entitled to counsel, the court shall assign counsel to represent the offender at the hearing pursuant to rules adopted by the Office of Indigent Defense Services.

(c) At the hearing, the court shall determine if the offender falls into one of the categories described in G.S. 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to G.S. 14-208.40A.

If the court finds that (i) the offender has been classified as a sexually violent predator pursuant to G.S. 14-208.20, (ii) the offender is a recidivist, (iii) the conviction offense was an aggravated offense, or (iv) the conviction offense was a violation of G.S. 14-27.2A or G.S. 14-27.4A, the court shall order the offender to enroll in satellite-based monitoring for life.

If the court finds that the offender committed an offense that involved the physical, mental, or sexual abuse of a minor, that the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A, and the offender is not a recidivist, the court shall order that the Department do a risk assessment of the offender. The Department shall have a minimum of 30 days, but not more than 60 days, to complete the risk assessment of the offender and report the results to the court. The Department may use a risk assessment of the offender done within six months of the date of the hearing.

Upon receipt of a risk assessment from the Department, the court shall determine whether, based on the Department's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court. (2007-213, s. 3; 2007-484, s. 42(b); 2008-117, s. 16.2; 2009-387, s. 4.)

Editor's Note. — Session Laws 2007-213, s. 15, as amended by Session Laws 2007-484, s. 42(b), made this section effective December 1, 2007.

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 16.2, effective December 1, 2008, and applicable to offenses committed on or after that date, in subsection (c), inserted clause (iv) in the second paragraph and made a related change, and substituted "the offense is not an aggravated offense or a violation of G.S. 14-27.2A or G.S. 14-27.4A" for "offense is not an aggravated offense" in the third paragraph.

Session Laws 2009-387, s. 4, effective July 31, 2009, in subsection (b), substituted "the district attorney, representing the Department, shall schedule a hearing in superior court for" for "the Department shall schedule a hearing in the court of," in the first sentence, and added the last sentence.

CASE NOTES

Constitutionality. — Retroactive application of the satellite-based monitoring (SBM) provision in G.S. 14-208.40B did not violate the state or federal ex post facto clause, because the restrictions imposed by the SBM provisions did not negate the legislature's expressed civil intent and defendant failed to show that the effects of SBM were sufficiently punitive to transform the civil remedy into a criminal punishment. State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Jurisdiction Properly Exercised. — Trial court properly exercised jurisdiction and determined that defendant was subject to satellite-based monitoring (SBM) for the duration of his life because defendant was a person who fit the criteria the legislature intended for participation in the SBM program when the legislation became effective 16 August 2006, and defendant completed his sentence for taking indecent liberties with a minor, a Class F felony, and was eligible for release, but not eligible for post-release supervision, after the effective date of the legislation; G.S. 14-208.40B seeks to encompass multiple categories of offenders at different stages in the judicial process, and the notice provisions found in G.S. 14-208.40B(b) are merely that, notice provisions to protect the due process rights of offenders who are not currently incarcerated. State v. Wooten, — N.C. App. —, 669 S.E.2d 749, 2008 N.C. App. LEXIS 2232 (2008).

Satellite-Based Monitoring is Not Punitive in Nature. — Fact that satellite-based monitoring (SBM) can be one of the conditions imposed upon an offender who did not complete probation, parole, or post-release supervision did not mean that SBM alone was intended as punitive. State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Prior Conviction in a Recidivism Determination Does Not Have to Be for a Reportable Offense. — Trial court properly determined that defendant was subject to satellite-based monitoring for the duration of his life when the offense on which defendant's recidivism determination was made, taking indecent liberties with a minor, was clearly one described in G.S. 14-208.5 even though it was not reportable because it predated the act; there is nothing in the statutory language that requires that the prior conviction in a recidivism determination must be for a reportable offense, and the code is clear that the prior conviction must be for an offense that is described in the statute defining reportable offenses. State v. Wooten, — N.C. App. —, 669 S.E.2d 749, 2008 N.C. App. LEXIS 2232 (2008).

Imposition of continuous satellite-based monitoring for the remainder of an offender's life was reasonable in light of the objective to protect the public, Imposition of continuous satellite-based monitoring (SBM) for the remainder of an offender's life was reasonable in light of the objective to protect the public, particularly in light of the fact that the Post-Release Supervision and Parole Commission had authority to terminate SBM upon request of certain offenders who had served their sentence and completed any period of probation, parole, or post-release supervision. State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Order for Satellite-Based Monitoring Improper. — Trial court's order that defendant enroll in satellite-based monitoring pursuant to G.S. 14-208.40A was improper because the trial court made no findings justifying the conclusion that defendant required the highest possible level of supervision and monitoring and the trial court erred by doing so; the State presented no evidence which supported a determination of a higher level of risk than the "moderate" rating assigned by the Department of Corrections, and, therefore, there was no need to remand the matter to the trial court for additional findings of fact as requested by the State. State v. Kilby, — N.C. App. —, 679 S.E.2d 430, 2009 N.C. App. LEXIS 1179 (July 21, 2009).

§ 14-208.40C. Requirements of enrollment.

(a) Any offender required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B who receives an active sentence shall be enrolled and receive the appropriate equipment immediately upon the offender's release from the Division of Prisons.

(b) Any offender required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B who receives an intermediate punishment shall, immediately upon sentencing, report to the Division of Community Corrections for enrollment in the satellite-based monitoring program, and, if necessary, shall return at any time designated by that Division to receive the appropriate equipment. If the intermediate sentence includes a required period of imprisonment, the offender shall not be required to be enrolled in the satellite-based monitoring program during the period of imprisonment.

(c) Any offender required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B who receives a community punishment shall, immediately upon sentencing, report to the Division of Community Corrections for enrollment in the satellite-based monitoring program, and, if necessary, shall return at any time designated by that Division to receive the appropriate equipment. (2007-213, s. 4; 2007-484, s. 42(b).)

§ 14-208.41. Enrollment in satellite-based monitoring programs mandatory; length of enrollment.

(a) Any person described by G.S. 14-208.40(a)(1) shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the registration period imposed under G.S. 14-208.23 which is the person's life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

(b) Any person described by G.S. 14-208.40(a)(2) who is ordered by the court pursuant to G.S. 14-208.40A or G.S. 14-208.40B to enroll in a satellite-based monitoring program shall do so with the Division of Community Corrections office in the county where the person resides. The person shall remain enrolled in the satellite-based monitoring program for the period of time ordered by the court.

(c) Any person described by G.S. 14-208.40(a)(3), upon completion of active punishment, shall enroll in a satellite-based monitoring program with the Division of Community Corrections office in the county where the person resides. The person shall enroll in the satellite-based monitoring program for the entire period of post-release supervision and shall remain enrolled in the satellite-based monitoring program for the person's life, unless the requirement to enroll in the satellite-based monitoring program is terminated pursuant to G.S. 14-208.43. (2006-247, s. 15(a); 2007-213, s. 13; 2007-484, s. 42(b); 2008-117, s. 17; 2008-187, s. 5.)

Editor's Note. — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.34. It was recodified as this section at the direction of the Revisor of Statutes.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 17, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (c).

Session Laws 2008-187, s. 5, effective August 7, 2008, in subsection (b), deleted "required by the Department pursuant to" preceding "G.S. 14 208.40B" and deleted "or the period of time specified by the Department" at the end.

§ 14-208.42. Offenders required to submit to satellite-based monitoring required to cooperate with Department upon completion of sentence.

Notwithstanding any other provision of law, when an offender is required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B, upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, the offender shall continue to be enrolled in the satellite-based monitoring program for the period required by G.S. 14-208.40A or G.S. 14-208.40B unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

The Department shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program. The offender shall cooperate with the Department and the requirements of the satellite-based monitoring program until the offender's requirement to enroll is terminated and the offender has returned all monitoring equipment to the Department. (2006-247, s. 15(a); 2007-213, s. 5; 2007-484, s. 42(b).)

Editor's Note. — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.35. It was recodified as this section at the direction of the Revisor of Statues.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

CASE NOTES

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.43. Request for termination of satellite-based monitoring requirement.

(a) An offender described by G.S. 14-208.40(a)(1) or G.S. 14-208.40(a)(3) who is required to submit to satellite-based monitoring for the offender's life may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission. The request to terminate the satellite-based monitoring requirement and to terminate the accompanying requirement of unsupervised probation may not be submitted until at least one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence.

(b) Upon receipt of the request for termination, the Commission shall review documentation contained in the offender's file and the statewide registry to determine whether the person has complied with the provisions of this Article. In addition, the Commission shall conduct fingerprint-based state and federal criminal history record checks to determine whether the person has been convicted of any additional reportable convictions.

(c) If it is determined that the person has not received any additional reportable convictions during the period of satellite-based monitoring and the person has substantially complied with the provisions of this Article, the Commission may terminate the monitoring requirement if the Commission finds that the person is not likely to pose a threat to the safety of others.

(d) If it is determined that the person has received any additional reportable convictions during the period of satellite-based monitoring or has not substantially complied with the provisions of this Article, the Commission shall not order the termination of the monitoring requirement.

(d1) Notwithstanding the provisions of this section, if the Commission is notified by the Department of Correction that the offender has been released, pursuant to G.S. 14-208.12A, from the requirement to register under Part 2 of Article 27A of this Chapter, upon request of the offender, the Commission shall order the termination of the monitoring requirement.

(e) The Commission shall not consider any request to terminate a monitoring requirement except as provided by this section. The Commission has no authority to consider or terminate a monitoring requirement for an offender described in G.S. 14-208.40(a)(2). (2006-247, s. 15(a); 2007-213, s. 11; 2007-484, s. 42(b); 2008-117, s. 18.)

Editor's Note. — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.36. It was recodified as this section at the direction of the Revisor of Statues.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2008-117, s. 21.1 is a severability clause.

Effect of Amendments. — Session Laws 2008-117, s. 18, effective December 1, 2008, and applicable to offenses committed on or after that date, substituted "14-208.40(a)(1) or G.S. 14-208.40(a)(3)" for "14-308.40(a)(1)" in subsection (a).

CASE NOTES

Applied in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 14-208.44. Failure to enroll; tampering with device.

(a) Any person required to enroll in a satellite-based monitoring program who fails to enroll shall be guilty of a Class F felony.

(b) Any person who intentionally tampers with, removes, vandalizes, or otherwise interferes with the proper functioning of a device issued pursuant to a satellite-based monitoring program to a person duly enrolled in the program shall be guilty of a Class E felony.

(c) Any person required to enroll in a satellite-based monitoring program who fails to provide necessary information to the Department, or fails to cooperate with the Department's guidelines and regulations for the program shall be guilty of a Class 1 misdemeanor.

(d) For purposes of this section, "enroll" shall include appearing, as directed by the Department, to receive the necessary equipment. (2006-247, s. 15(a); 2007-213, s. 6.)

Editor's Note. — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.37. It was recodified as this section at the direction of the Revisor of Statues.

Subsection (b), as amended, and subsections (c) and (d), as added by Session Laws 2007-213, s. 6, effective December 1, 2007, is applicable to offenses committed on or after that date.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

§ 14-208.45. Fees.

(a) Except as provided in subsections (b) and (b1) of this section, each person required to enroll pursuant to this Part shall pay a one-time fee of ninety dollars ($90.00). The fee shall be payable to the clerk of superior court, and the fees shall be remitted quarterly to the Department of Correction. This fee is intended to offset only the costs associated with the time-correlated tracking of the geographic location of subjects using the location tracking crime correlation system.

(b) When a court determines a person is required to enroll pursuant to G.S. 14-208.40A or G.S. 14-208.40B, the court may exempt a person from paying the fee required by subsection (a) of this section only for good cause and upon motion of the person required to enroll in satellite-based monitoring. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by those methods.

(c) When a person is required to enroll based on a determination by the Department pursuant to G.S. 14-208.40B, the Department shall have the authority to exempt the person from paying the fee only for good cause and upon request of the person required to enroll in satellite-based monitoring. The Department may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by those methods. (2006-247, s. 15(a); 2007-213, s. 12; 2007-484, ss. 42(a), (b).)

Editor's Note. — Session Laws 2006-247, s. 15(a), enacted this section as G.S. 14-208.38. It was recodified as this section at the direction of the Revisor of Statues.

Session Laws 2006-247, s. 15(l), provides: "Unless otherwise provided in the section, this section is effective when it becomes law [August 16, 2006] and applies to offenses committed on or after that date. This section also applies to any person sentenced to intermediate punishment on or after that date and to any person released from prison by parole or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established."

Session Laws 2007-213, s. 12, and Session Laws 2007-484, s. 42(a) both amended G.S. 14-208.45. However, the amendment by Session Laws 2007-484, s. 42(a) did not account for all of the changes made by Session Laws 2007-213, s. 12, and the section has been set out in the form above at the direction of the Revisor of Statutes.

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

Article 28.

Perjury.

§ 14-209. Punishment for perjury.

If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be punished as a Class F felon. (1791, c. 338, s. 1, P.R.; R.C., c. 34, s. 49; Code, s. 1092; Rev., s. 3615; C.S., s. 4364; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1202; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to swearing falsely to official reports, see G.S. 14-232. As to form of bill for perjury, see G.S. 15-145. For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to making false affidavits in applications for motor vehicle licenses, see G.S. 20-31. As to false swearing by creditor in assignment for benefit of creditors, see G.S. 23-9. As to punishment for making false statement in any financial or other statement required under the provisions of the insurance statutes, see G.S. 58-2-180. As to false swearing in an investigation of trusts and combinations in restraint of trade, see G.S. 75-12. As to perjury in application for oyster license, see G.S. 113-203. As to perjury prosecution for knowingly making an untrue certification under Article 22A of Chapter 163, relating to contributions and expenses in political campaigns, see G.S. 163-278.32.

CASE NOTES

Purpose. — Law of perjury was intended to afford defendant greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Definition of Perjury. — Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949); State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

Essential Elements. — Elements essential to constitute perjury are substantially these: A false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. To constitute materiality essential to sustain a charge of perjury the false testimony must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962).

The administration of an oath is an essential element of perjury. State v. Glisson, 93 N.C. 506 (1885).

As is jurisdiction of the court. Boling v. Luther, 4 N.C. 635 (1816); State v. Alexander, 11 N.C. 182 (1825); Governor ex rel. Halcombe v. Deaver, 3 N.C. 56 (1842).

Offense Must Be Willfull and Corrupt. — Where the defendant swears to an answer in a civil action before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. State v. Dowd, 201 N.C. 714, 161 S.E. 205 (1931).

What Statements Are Not Perjurious. — False statements made unintentionally or with the honest belief that one is telling the truth are not perjurious. Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990).

False Statement Must Be Material to Issue. — A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

One of the essential elements of the crime of perjury is that the false statement must be material to an issue or point in question. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962). See also, State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Materiality of False Testimony Is a Question of Law. — In a trial for perjury, the question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury. State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Solicitation to commit perjury is a felony within the terms of G.S. 14-3(b) and is properly within the jurisdiction of the superior court. State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604, cert. denied, 306 N.C. 389, 294 S.E.2d 215 (1982).

Acquittal No Shield from Charge of Perjury. — To hold that a person could go into a court of justice and by perjured testimony secure an acquittal and by that acquittal be shielded from a charge of perjury would be a dangerous doctrine. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

A verdict of acquittal is not equivalent to an affirmative finding that all of defendant's testimony at a former trial was true. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

Former acquittal of malicious injury to personal property under G.S. 14-160 would not support a plea of former jeopardy in a prosecution for perjury committed at the trial, since the crimes are not the same either in fact or in law and the charge of perjury was not based on the assumption that defendant was guilty of the charge of malicious injury, and his acquittal upon the latter charge did not necessarily establish the fact that all material evidence given by him in that case was true. State v. Leonard, 236 N.C. 126, 72 S.E.2d 1 (1952), cert. denied, 344 U.S. 916, 73 S. Ct. 339, 97 L. Ed. 706 (1953).

Civil Action Will Not Lie. — Aside from defamation and malicious prosecution, the courts refuse to recognize any injury from false testimony on which a civil action for damages can be maintained, and no action for damages lies for false testimony in a civil suit, whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

It seems to be the general rule that a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

Perjured testimony and the subornation of perjured testimony are criminal offenses, but neither are torts supporting a civil action for damages. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Vacating Judgment Because of Perjured Testimony. — A judgment cannot be vacated because of perjured testimony unless the party charged with perjury has been indicted and convicted or he has passed beyond the jurisdiction of courts and is not amenable to criminal process. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Irregularity of Warrant Immaterial. — When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

Burden of Proof on State. — The burden is not on the defendant in perjury to show the truth of the matter at issue, but the burden is on the State to show that it is false. State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909), overruled on other grounds in State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

Corroborative Evidence Required. — To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954). See also State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956); State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

To sustain a conviction for perjury, the falsity of the oath must be directly proved by one witness and there must be corroborating evidence of independent and supplemental character, sufficient to resolve "the dilemma of weighing [one] oath against [another]." State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

In a prosecution for perjury, North Carolina required that the falsity of the oath be established by the testimony of at least two witnesses, or from the testimony of one witness, along with corroborating circumstances, and if the state relied upon the testimony of only one witness, then the falsity of the statement had to be directly proved by the witness and there had to be independent corroborating evidence of the falsity. State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006), rev'd, in part, aff'd in part, 361 N.C. 662, 652 S.E.2d 212 (2007), State v. Denny, — N.C. App. —, 635 S.E.2d 438, 2006 N.C. App. LEXIS 2158 (2006).

Circumstantial evidence of perjury alone is not sufficient. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Evidence Must Relate to Statement upon Which Indictment Predicated. — Testimony of two or more witnesses as to conflicting statements made by defendant while under oath in courts of competent jurisdiction, but without evidence that the statement upon which the bill of indictment was predicated was the false testimony, is insufficient to be submitted to the jury in a prosecution for perjury. State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

Legal contentions made by defendants in the motion stage of the lawsuit were not statements of material fact made under oath or affirmation, and thus were not actionable under the perjury or the Racketeer Influenced and Corrupt Organizations Act statutes. Jenkins v. Trs. of Sandhills Cmty. College, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25252 (M.D.N.C. Dec. 3, 2002).

Evidence Sufficient. — The direct oath of one witness and proof of declarations of the prisoner in an action for perjury are sufficient to convict. State v. Molier, 12 N.C. 263 (1827).

Substantial evidence supported a conviction for perjury under G.S. 14-209, as the evidence permitted a finding that defendant made a false statement that he had no real estate assets in a sworn indigency affidavit and that he made such statement knowingly to avoid reporting assets that could affect his child support obligations and to increase his likelihood of receiving court-appointed counsel in child support proceedings. State v. Denny, 361 N.C. 662, 652 S.E.2d 212, 2007 N.C. LEXIS 1095 (2007).

Applied in Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

Cited in Grudger v. Penland, 108 N.C. 593, 13 S.E. 168 (1891); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985).

§ 14-210. Subornation of perjury.

If any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in G.S. 14-209, the person so offending shall be punished as a Class I felon. (1791, c. 338, s. 2, P.R.; R.C., c. 34, s. 50; Code, s. 1093; Rev., s. 3616; C.S., s. 4365; 1993, c. 539, s. 1203; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to bill and form of indictment for subornation of perjury, see G.S. 15-146.

CASE NOTES

Elements of Offense. — The crime of subornation of perjury consists of two elements, namely, the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

In a prosecution under this section, the State was required to establish, inter alia, that the alleged perjurer made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The crime of subornation of perjury consists of two elements, the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The guilt of both the suborned and the suborner must be proved on the trial of the latter. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. State v. Cannon, 227 N.C. 338, 42 S.E.2d 344 (1947).

How Falsity of Alleged Perjurer's Oath Established. — In a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

In a prosecution for perjury or subornation of perjury, it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called adminicular circumstances. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966); State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

The requirement of proving by independent circumstances the commission of perjury does not apply to the procurement element of the offense of subornation of perjury. State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

Solicitation to commit perjury is a felony within the terms of G.S. 14-3(b) and is properly within the jurisdiction of the superior court. State v. Huff, 56 N.C. App. 721, 289 S.E.2d 604, cert. denied, 306 N.C. 389, 294 S.E.2d 215 (1982).

Competency of Corroborative Evidence. — See State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Instructions held erroneous for failure to instruct the jury that the alleged perjury must be established by the testimony of two witnesses, or by one witness and corroborating circumstances and failure to instruct that the State was required to establish, inter alia, that the alleged perjurer testified as charged in the bill of indictment. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985).

§ 14-211. Perjury before legislative committees.

If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee or commission of either house of the General Assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the Superior

Court of Wake County, shall be punished as a Class I felon. (1869-70, c. 5, s. 4; Code, s. 2857; Rev., s. 3611; C.S., s. 4366; 1977, c. 344, s. 4; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1204; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-212: Repealed by Session Laws 1994, Extra Session, c. 14, s. 71(7).

§§ 14-213 through 14-216: Repealed by Session Laws 1989 (Regular Session, 1990), c. 1054, s. 6.

Cross References. — For provisions relating to insurance fraud, embezzlement and false statements, and punishment for making false statements, see now G.S. 58-2-160 to 58-2-163, 58-2-180, 58-8-1, and 58-24-180(e).

ARTICLE 29.

Bribery.

§ 14-217. Bribery of officials.

(a) If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, which lay within the scope of his official authority and was connected with the discharge of his official and legal duties, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be punished as a Class F felon.

(b) Indictments issued under these provisions shall specify:

(1) The thing of value or personal advantage sought to be obtained; and

(2) The specific act or omission sought to be obtained; and

(3) That the act or omission sought to be obtained lay within the scope of the defendant's official authority and was connected with the discharge of his official and legal duties.

(c) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 539, s. 1207, effective October 1, 1994. (1868-9, c. 176, s. 2; Code, s. 991; Rev., s. 3568; C.S., s. 4372; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1050, s. 1; 1993, c. 539, ss. 1206, 1207; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to bank examiners accepting bribes, see G.S. 14-233. As to bribing agents and servants to violate duties owed employers, see G.S. 14-353. As to bribery of baseball players, umpires, and officials, see G.S. 14-373 et seq. For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Bribery Defined. — Bribery is the voluntary offering, giving, receiving or soliciting of any sum of money or thing of value with the corrupt intent to influence the recipient's action as a public officer or official in the discharge of a public legal duty. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

A person is guilty of bribery if, while holding a public office, he receives something of value for omitting to perform an official act with the express or implied understanding that his official action or inaction was to be influenced by the thing of value. State v. Stanley, 60 N.C. App. 568, 299 S.E.2d 464 (1983).

The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

Necessity of Proving Corrupt Intent. — On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

And Receipt of Anything of Value Influencing Official Acts. — This section has an essential element of the offense of bribery of officials the receipt of anything of value with the express or implied understanding that his official acts are to be in any degree influenced thereby. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Sufficiency of Indictment. — An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. State v. Wynne, 118 N.C. 1206, 24 S.E. 216 (1896).

Evidence Sufficient for Submission to Jury. — Evidence in this case of one defendant's guilt of paying or delivering money or merchandise, directly and through agents, to each of defendant policemen to influence them in the performance of their duties, and of the acceptance by each defendant policeman of such payments or delivering with intent and understanding that his actions as a police officer would be influenced thereby, was held sufficient to be submitted to the jury as to each defendant. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Applied in State v. Cofer, 205 N.C. 653, 172 S.E. 176 (1934).

Cited in United States v. Hayes, 775 F.2d 1279 (4th Cir. 1985); State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

§ 14-218. Offering bribes.

If any person shall offer a bribe, whether it be accepted or not, he shall be punished as a Class F felon. (1870-1, c. 232; Code, s. 992; Rev., s. 3569; C.S., s. 4373; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1208; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Indictment. — The general rule that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, does not apply where the words of the statute, as in this section, do not set forth all the essential elements necessary to constitute the offense sought to be charged. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Evidence Held Sufficient. — The offer of money to an Alcohol Beverage Control (ABC) enforcement officer with the request that the officer arrest or stop a person for driving while impaired is a bribe within the meaning of this section. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

State's evidence was sufficient to allow the jury to find that co-defendant and defendant together, offered to share a portion of defendant's claimed $ 400,000 settlement with the officer if the officer would ignore the drugs found on co-defendant's person, and defendant's motion to dismiss at the close of all the evidence was properly denied. State v. Weaver, 160 N.C. App. 61, 584 S.E.2d 345, 2003 N.C. App. LEXIS 1671 (2003).

A corrupt intent means a wrongful design to acquire some pecuniary profit or other advantage. State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (1994).

An indictment for offering a bribe or bribery must allege by definite and particular statement, and not as a mere conclusion, that the acts were done to influence the performance of some public legal duty, and it must further appear, at least as a reasonable inference, that defendant had knowledge of the official character of him to whom the bribe was offered. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Where an indictment for bribing or offering a bribe to a State highway patrolman fails to allege the official act the accused intended to influence, defendant's motion to quash should be allowed. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Same — Not Necessary to Charge That Bribed Juror Received Fee. — In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe. State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933).

Competency of Evidence. — Evidence is competent which shows the quo animo, intent, design, guilty knowledge or scienter with which the defendant charged under this section gave money or other things of value to an official. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Evidentiary issues — co-defendant's statements to the office that defendant; who was expecting a large legal settlement, would pay a large sum for the officer to "forget" the drug offense, to which defendant replied in the affirmative, was not inadmissible hearsay, because the statements were "operative facts," or "verbal acts" excluded from the hearsay rule, and alternatively, the statements were adoptive admissions. State v. Weaver, 160 N.C. App. 61, 584 S.E.2d 345, 2003 N.C. App. LEXIS 1671 (2003).

Cited in State v. Barkley, 198 N.C. 349, 151 S.E. 733 (1930); State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734 (1955); United States v. Hayes, 775 F.2d 1279 (4th Cir. 1985).

§ 14-219: Repealed by Session Laws 1983, c. 780, s. 1.

Cross References. — As to bribery under the Legislative Ethics Act, see G.S. 120-86.

§ 14-220. Bribery of jurors.

If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a State prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be punished as a Class F felon. (5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12; R.C., c. 34, s. 34; Code, s. 990; Rev., s. 3697; C.S., s. 4375; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1209; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Stanley, 19 N.C. App. 684, 200 S.E.2d 223 (1973); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

ARTICLE 30.

Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.

If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be punished as a Class F felon. (1893, c. 461, s. 1; Rev., s. 3698; C.S., s. 4376; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1210; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to investigation of lynchings, see G.S. 114-15. As to sheriff's duty to protect prisoner, see G.S. 162-23.

CASE NOTES

Conviction of Attempt. — On an indictment under this section as construed with former G.S. 15-128 and G.S. 15-170, the defendant may be found guilty of an attempt. State v. Rumple, 178 N.C. 717, 100 S.E. 622 (1919).

Specific Intent Is Element of Offense. — All of the codified obstruction of justice offenses found at G.S. 14-221 through G.S. 14-227 are specific intent crimes, requiring that the state present evidence that the defendant acted willfully or with purpose in committing the offense. State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

Indictment Need Not Charge Accomplices. — It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Indictment in Adjoining County. — In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

Any person who breaks or enters any building, structure, compartment, vehicle, file, cabinet, drawer, or any other enclosure wherein evidence relevant to any criminal offense or court proceeding is kept or stored with the purpose of altering, destroying or stealing such evidence; or any person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be punished as a Class I felon.

As used in this section, the word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence. (1975, c. 806, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Illegal to Destroy Any Relevant Evidence. — This section makes it illegal to destroy evidence no matter what that evidence is (a green vegetable material or actually marijuana) so long as it is "evidence relevant to any criminal offense." State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

Conviction of defendant was not obtained in violation of this section where unidentifiable fingerprints lifted from the scene of the crime were thrown away by the State as irrelevant. State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981), appeal dismissed, 304 N.C. 732, 288 S.E.2d 804 (1982).

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-221.2. Altering court documents or entering unauthorized judgments.

Any person who without lawful authority intentionally enters a judgment upon or materially alters or changes any criminal or civil process, criminal or civil pleading, or other official case record is guilty of a Class H felony. (1979, c. 526; 1979, 2nd Sess., c. 1316, s. 14; 1981, c. 63, s. 1; c. 179, s. 14.)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-222: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(12).

§ 14-223. Resisting officers.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor. (1889, c. 51, s. 1; Rev., s. 3700; C.S., s. 4378; 1969, c. 1224, s. 1; 1993, c. 539, s. 136; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note on interfering with police officer as obstructing justice, see 36 N.C.L. Rev. 489 (1958).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Nature and Evidence of Offense.
III. Indictments and Warrants.
IV. Instructions.

I. GENERAL CONSIDERATION.

This section is not unconstitutionally vague. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

Section Provides Fair Notice of Proscribed Conduct. — This section gives a person of ordinary intelligence fair notice of the behavior it proscribes. The legislature has drafted with reasonable precision a comprehensible rule of conduct. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

This section is not so generally phrased that it proscribes innocent but orderly communication with police officers. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

Communications simply intended to assert rights, seek clarification or obtain information in a peaceful way are not chilled by this section. Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995).

Term "unlawfully" in this section is conclusory but does not make the statute as a whole unconstitutionally vague. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

Purpose of Section. — The purpose of this section is to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law, and the provisions of this section provide for safeguards that are essential to the welfare of the public. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Construction with Federal Law. — Defendants were entitled to summary judgment as to plaintiff's 42 U.S.C. § 1983 claim for unlawful arrest, where officers had probable cause to believe that plaintiff had committed, at least, three offenses; that is, discharging a firearm in violation of a county ordinance, resisting, obstructing, and delaying an officer in carrying out his duties, and threatening bodily harm to an officer. Bell v. Dawson, 144 F. Supp. 2d 454, 2001 U.S. Dist. LEXIS 5629 (W.D.N.C. 2001).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an office and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his officer are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

There is a distinction between the offenses of resisting an officer under this section and assault on an officer under former G.S. 14-33(b)(4). In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Resisting Arrest Is Not Necessarily a Lesser Included Offense of Assaulting an Officer. — The offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office. This does not eliminate the possibility that the facts in a given case might constitute a violation of both statutes. In such a case the defendant could not be punished twice for the same conduct. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

But Conviction of Both Resisting and Assaulting on Same Evidence Violates Double Jeopardy. — Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence, the defendant was twice convicted and sentenced for the same criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Where a defendant had been tried under two warrants, one for violating this section and the other for violating former G.S. 14-33(c)(4), and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody, the defendant was twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protected him from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Thus State Must Elect Between Duplicate Charges. — In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. State v. Hardy, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977), aff'd in part, rev'd in part, 298 N.C. 191, 257 S.E.2d 426 (1979).

Trial court did not violate the Double Jeopardy Clause by admitting evidence of events occurring after defendant left a patrol car in defendant's subsequent trial for obstruction and delay of a public officer under G.S. 14-223, even though defendant had been acquitted of an assault upon a government officer charge under G.S. 14-33(c)(4), as the acquittal could have resulted from findings that defendant did not attempt to do immediate physical injury to the officer, did not use sufficient force to put a reasonable person in fear of immediate bodily harm, or was defending herself from the excessive use of force; as there was more than one possible explanation from for the acquittal, defendant failed to meet her burden to establish collateral estoppel. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Superior court erred in dismissing a charge against defendant of resisting, delaying or obstructing a public officer (RDO) pursuant to G.S. 14-223 because defendant was not placed in double jeopardy where the evidence required to convict defendant on the RDO charge was not the same as for the assault on a government official charge. State v. Newman, 186 N.C. App. 382, 651 S.E.2d 584, 2007 N.C. App. LEXIS 2201 (2007).

Persons Aiding and Abetting. — See State v. Morris, 10 N.C. 388 (1824).

Applied in State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964); State v. Maness, 264 N.C. 358, 141 S.E.2d 470 (1965); State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204 (1971); State v. Tilley, 18 N.C. App. 341, 196 S.E.2d 549 (1973); State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974); State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979); State v. Dudley, 45 N.C. App. 295, 265 S.E.2d 235 (1980); State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484

(1992); State v. Jones, 157 N.C. App. 472, 579 S.E.2d 408, 2003 N.C. App. LEXIS 751 (2003).

Cited in State v. McClure, 166 N.C. 321, 81 S.E. 458 (1914); State v. Scoggins, 199 N.C. 821, 155 S.E. 927 (1930); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Wray, 217 N.C. 167, 7 S.E.2d 468 (1940); State v. Waddell, 4 N.C. App. 517, 167 S.E.2d 6 (1969); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); In re Jacobs, 33 N.C. App. 195, 234 S.E.2d 639 (1977); State v. Stephens, 35 N.C. App. 335, 241 S.E.2d 382 (1979); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1978); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. McNeil, 54 N.C. App. 454, 283 S.E.2d 565 (1981); State v. Rhodes, 305 N.C. 294, 287 S.E.2d 898 (1982); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983); Fowler v. Valencourt, 108 N.C. App. 106, 423 S.E.2d 785 (1992); Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993); Burton v. City of Durham, 118 N.C. App. 676, 457 S.E.2d 329 (1995); In re Allison, 143 N.C. App. 586, 547 S.E.2d 169, 2001 N.C. App. LEXIS 329 (2001); State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453, 2002 N.C. App. LEXIS 268 (2002); Ellis v. White, 156 N.C. App. 16, 575 S.E.2d 809, 2003 N.C. App. LEXIS 34 (2003); State v. Brewington, 170 N.C. App. 264, 612 S.E.2d 648, 2005 N.C. App. LEXIS 1011 (2005); State v. Teel, 180 N.C. App. 446, 637 S.E.2d 288, 2006 N.C. App. LEXIS 2380 (2006).

II. NATURE AND EVIDENCE OF OFFENSE.

"Resist, Delay or Obstruct." — The words "delay" and "obstruct" appear to be synonymous as used in this section. And perhaps the word "resist" would infer more direct and forceful action. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

This section will apply to cases falling within any one of the descriptive words, since the words describing the act are joined by the disjunctive "or". State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

In order to convict a person of a violation of this section, the State does not have to show that a defendant resisted, delayed and obstructed an officer. It is sufficient if a defendant unlawfully and willfully resists, or delays, or obstructs an officer. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

"Public Officer" — An alcoholic beverage control officer is a "public officer" within the meaning of this section. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

Same — Collector of Back Tax. — See State v. Alston, 127 N.C. 518, 37 S.E. 137 (1900).

Same — A State highway patrolman, when acting as such, is a public officer within the purview of this section. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

"Discharging a Duty of His Office". — A deputy sheriff is discharging or attempting to discharge a duty of his office when he begins an investigation of a crime reported to him by eyewitnesses, under circumstances which appear to threaten a further breach of the peace. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

A police officer attempting to preserve the peace by placing the defendant under arrest for disorderly conduct was performing a duty of his office when the defendant resisted arrest. State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

"Arrest". — The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

In criminal procedure an arrest consists in the taking into custody of another person under real or assumed authority for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

An "arrest" does not necessarily terminate the instant a person is taken into custody; arrest also includes "bringing the person personally within the custody and control of the law." State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

The defendant's contention that at the time he was in the magistrate's office his arrest had been consummated, and that the acts alleged to have occurred between the magistrate's office and the jail were not in connection with his arrest, and that, therefore, he was not guilty of resisting arrest, was rejected. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Resisting Officer in Performance of Some Duty Is Primary Conduct Proscribed. — In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by this section, and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defense. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

Conduct Not Limited to Resisting Arrest. — The conduct proscribed under this section is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties. State v. Lynch, 94 N.C. App. 330, 380 S.E.2d 397 (1989).

There does not have to be an assault on or actual physical interference with the officer in order to constitute a crime under this section. Neither does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

No actual assault or force or violence is necessary to complete the offense described by this section. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

This section prohibits only willful resistance, delay or obstruction of a police officer in attempting to discharge or in discharging a duty of his office. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

Not Mere Disagreement or Criticism. — An individual who disagrees with or criticizes a police officer, but who does not intend to resist, obstruct or delay the officer's performance of his duty cannot be convicted under this section. State v. Singletary, 73 N.C. App. 612, 327 S.E.2d 11 (1985).

Conduct Not Constituting Obstruction of Officer. — Merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971); State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972). Citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing or delaying the officer in the performance of his duty. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Vague, intemperate language used without apparent purpose is not sufficient to constitute the offense of resisting, delaying and obstructing an officer. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Where defendant was merely arguing with the officer and protesting the confiscation of his property, he had committed no offense and the officer had no authority to arrest him. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Preventing Road Overseer Cutting Ditch. — See State v. New, 130 N.C. 731, 41 S.E. 1033 (1902).

Duty to Submit Peaceably to Lawful Arrest. — When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest. State v. Summrell, 13 N.C. App. 1, 185 S.E.2d 241 (1971), aff'd, 282 N.C. 157, 192 S.E.2d 569 (1972).

Where State's evidence showed that defendant continued to struggle after the officers apprehended him, evidence was sufficient to sustain defendant's conviction for resisting a public officer. State v. Lynch, 94 N.C. App. 330, 380 S.E.2d 397 (1989).

A person resisting an illegal arrest is not resisting an officer within the discharge of his official duties. Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

Right to Resist Unlawful Arrest. — The offense of resisting arrest presupposes a lawful arrest both at common law and under this section. And every person has the right to resist an unlawful arrest by the use of force. But such right to use force is not unlimited, and only such force may be used as reasonably appears to be necessary to prevent unlawful restraint of liberty. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted as in self-defense, and in such case the person resisting cannot be convicted under this section of the offense of resisting an officer engaged in the discharge of his duties. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968); aff'd, 274 N.C. 380, 163 S.E.2d 897 (1968).

Every person has the right to resist an unlawful arrest and he may use such force as reasonably appears to be necessary to prevent the unlawful arrest. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

The offense of resisting arrest, both at common law and under this section, presupposes a lawful arrest. Every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Every person has the right to resist an unlawful arrest. Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

Flight from unlawful arrest may not be used to establish probable cause. A person is entitled to resist an illegal, but not a legal, arrest. Not only may a person resist, but his subsequent flight from an unlawful arrest can not be considered as a circumstance to establish probable cause for an arrest. State v. Swift, 105 N.C. App. 550, 414 S.E.2d 65 (1992).

Officer Must Have Authority and Notify the Party Thereof. — If the officer has no authority to make the arrest, or, having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. State v. Kirby, 24 N.C. 201 (1842); State v. Bryant, 65 N.C. 327 (1871); State v. Belk, 76 N.C. 10 (1877).

Process Must Be Legal. — A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. State v. Curtis, 2 N.C. 471 (1797).

Where police officers attempt an arrest under an invalid arrest warrant, the person sought to be arrested has a legal right to resist, and in such instances, in prosecutions for resisting arrest, the defendant's motion for judgment as of nonsuit should be granted. State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908, cert. denied, 285 N.C. 759, 209 S.E.2d 283 (1974).

But Defective Process Which Is Sufficient on Its Face May Not Be Resisted. — A person may not resist an arrest by an officer acting under authority of a court process which is sufficient on its face to show its purpose, even though the process may be defective or irregular in some respect. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56, aff'd, 274 N.C. 380, 163 S.E.2d 897 (1968).

Right to Resist Illegal Entry. — Decisions of the Supreme Court recognize the right to resist illegal conduct of an officer and officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Mere verbal refusal to provide social security number was insufficient to establish probable cause for the charge of resisting arrest. Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

Defendant may not rely on self-defense where State's evidence is that defendant provoked the incident after his lawful arrest, and the officer used only the amount of force necessary to bring the situation under control. State v. Wells, 59 N.C. App. 682, 298 S.E.2d 73 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

Presumption of Validity of Arrest. — Failure of State to introduce evidence tending to prove validity of warrant of arrest, in a prosecution for resisting arrest, does not justify nonsuit when defendant does not challenge the validity of the warrant, since, in the absence of a showing to the contrary, it will be presumed that the warrant and order of arrest were legally adequate. State v. Honeycutt, 237 N.C. 595, 75 S.E.2d 525 (1953).

Defendant was entitled to dismissal of the charge of resisting a public officer because a reasonable person would have felt free to ignore the detective's presence to go about their business since the detective made no show of force or otherwise communicated that cooperation was required; defendant's flight from the consensual encounter could not be used as evidence that defendant was resisting, delaying, or obstructing the detective. State v. Sinclair, 191 N.C. App. 485, 663 S.E.2d 866, 2008 N.C. App. LEXIS 1473 (2008).

Resistance Held Lawful. — Defendant was not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognizance and failed to appear. State v. Queen, 66 N.C. 615 (1872).

The defendant was not guilty of resisting arrest by closing his door to officers who were arresting him on a civil warrant which was not in their possession, and they entered his home illegally to arrest him. State v. Hewson, 88 N.C. App. 128, 362 S.E.2d 574 (1987).

Resistance Not Warranted. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman could survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under U.S. Const., Amend. IV. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Where the evidence is sufficient for the jury to find that a defendant unlawfully and willfully, by loud and abusive language directed at an officer, delayed him in making his investigation, this requires the submission of the case to the jury. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

Trial court did not err in finding defendant delinquent for resisting, delaying, and obstructing an officer because the State provided substantial evidence to support the adjudication; defendant consented to the officer's search of his person, he refused to comply when the officer asked him to open his mouth, he attempted to swallow what he had in his mouth, and he willfully engaged in a physical confrontation with the officer and attempted to flee. In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414, 2008 N.C. App. LEXIS 1481 (2008).

Evidence of Acquittal on Assault Charge Not Relevant to Charge of Resistance. — Trial court did not err in refusing to allow defendant to introduce evidence of her acquittal on an assaulting a government officer charge as the acquittal on the assault charge had no relevance as to whether defendant was guilty of obstructing and delaying a public officer. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Evidence Sufficient to Withstand Dismissal. — Trial court did not err in denying defendant's motion to dismiss an obstruction and delay of a public officer charge under G.S. 14-223 as: (1) defendant inserted herself into an investigation of a school fight, (2) she interfered with the school safety officer's attempts to secure a student in his patrol car by physically blocking him from closing his car door, and repeatedly ignoring his instructions to step away, (3) she attempted to incite the gathering crowd to interfere, (4) at her own car, she again refused to cooperate with the officer to the point of running across the street, with the result that the student was left alone in the patrol car, and (5) the officer was unable to continue with his investigation of the fight, and he was required to seek back-up. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

Facts of the case, when viewed in the light most favorable to the State, supported the inference that the officer was discharging official duties by observing defendant, telling defendant to remain in the vehicle, and asking to search defendant after defendant reluctantly answered that defendant did not have any weapons; this evidence was sufficiently substantial to survive defendant's motion to dismiss the resisting an officer charge. State v. Shearin, 170 N.C. App. 222, 612 S.E.2d 371, 2005 N.C. App. LEXIS 1002 (2005), appeal dismissed, cert. denied, — N.C. —, 624 S.E.2d 369 (2005).

III. INDICTMENTS AND WARRANTS.

Allegations Required, Generally. — A warrant or bill of indictment charging a violation of this section must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging a violation of this section must: (a) Identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute; (b) indicate the official duty he was discharging or attempting to discharge; and (c) state in a general way the manner in which accused resisted, delayed or obstructed such officer. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967); State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

The prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest are set forth in State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967) and State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

One of the prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest is that the affidavit upon which the order of arrest is based shall identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Victim Must Be Named. — In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Official Duty Being Performed Must Be Specified. — For a warrant to charge a defendant with resisting, delaying, or obstructing an officer in discharging or attempting to discharge a duty of his office in violation of this section, the warrant must indicate the official duty the officer was discharging or attempting to discharge. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

A bill of indictment is defective that does not charge the official duty the named officer was discharging or attempting to discharge. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

To charge a violation of this section, the warrant or bill must indicate the specific official duty the officer was discharging or attempting to discharge. State v. Wells, 59 N.C. App. 682, 298 S.E.2d 73 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983); State v. Davis, 90 N.C. App. 185, 368 S.E.2d 52 (1988).

Bill of indictment charging defendant with violating G.S. 14-223 was insufficient, because it failed to describe the duties the arresting officer was discharging or attempting to discharge when defendant resisted arrest. State v. Ellis, 168 N.C. App. 651, 608 S.E.2d 803, 2005 N.C. App. LEXIS 449 (2005).

General Description of Defendant's Actions. — An indictment for resisting arrest must only include a general description of the defendant's actions. State v. Baldwin, 59 N.C.

App. 430, 297 S.E.2d 188 (1982), cert. denied, 307 N.C. 698, 301 S.E.2d 390 (1983).

Allegations Held Sufficient. — Warrant charging that defendant did resist, delay, and obstruct named police officers in the making of a lawful arrest "by shoving said officers and refusing to go" is sufficient to charge a violation of this section. State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

Allegations Held Insufficient. — The charge that defendant "did resist arrest" neither charged the offense in the language of this section, nor specifically set forth the facts constituting the offense created by the section. It was wholly insufficient to support the verdict and judgment rendered. State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952).

A warrant alleging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by this section. This allegation and the additional allegation that the defendant interfered "with an officer while legally performing the duties of his office" did not suffice to impute to defendant a violation of the section. These allegations did not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

An indictment charging that defendant did unlawfully "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office . . ." was insufficient to charge the offense of resisting arrest. State v. Scott, 241 N.C. 178, 84 S.E.2d 654 (1954).

Indictment is fatally defective though it identifies public officer by name where it fails to indicate the official duty he was discharging or attempting to discharge and does not point out even in a general way the manner in which the defendant is charged with having resisted, delayed or obstructed such public officer. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Harvey, 242 N.C. 111, 86 S.E.2d 793 (1955). See State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734 (1955).

An indictment charging defendant with resisting an officer in the language of this section was held insufficient. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

Warrant held insufficient to charge a violation of this section. State v. White, 266 N.C. 361, 145 S.E.2d 872 (1966).

Warrant was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

An instrument setting forth the charge of assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A "North Carolina Uniform Traffic Ticket" setting forth the charge of resisting arrest by using only the two words "resist arrest" was not sufficient to charge the offense. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

An order granting motion to amend warrant so as to charge the violation in the words of the statute cannot cure fatal defects in the warrant in failing to charge the offense when the amendment is not actually made, since neither the motion nor the order sets out the contemplated wording of the proposed amendment and therefore could not be self-executing. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953); State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

Indictment in Two Counts. — An indictment having two counts, one against one person under this section, and the other against several persons under former G.S. 14-224, was defective, but, where not objected to before a verdict which convicted on one count and acquitted on the other, was not sufficient grounds for arrest of judgment, as the acquittal was equivalent to a nol pros. State v. Perdue, 107 N.C. 853, 12 S.E. 253 (1890).

Quashing Indictment Insufficient Under This Section If Sufficient to Convict of Assault. — Where an indictment for resisting an officer is defective, as such, it ought not to be quashed if the defendant may be convicted thereon for a simple assault. State v. Dunn, 109 N.C. 839, 13 S.E. 881 (1891).

IV. INSTRUCTIONS.

Instruction on Self-Defense. — Where, in a prosecution charging defendant with resisting arrest and with obstructing an officer in the performance of his duties, the defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the actions which resulted in the charges against him, the trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense; the court's instruction merely that the jury "will take into consideration in arriving at your verdict" the defendant's lawful exercise of self-defense was insufficient and was reversible error. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Instruction Held Expression of Opinion. — In prosecution charging resisting lawful arrest in violation of this section, statement of the trial court during the instructions that "the offense charged here was committed in violation of G.S. 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C.

App. 210, 166 S.E.2d 509 (1969).

Lesser Included Offense Instruction Properly Denied. — Defendant was not entitled to a jury instruction on a lesser included offense, where defendant was prosecuted for financial identity fraud under G.S. 14-113.20, and defendant sought a lesser included offense instruction for obstruction or delay of an officer under G.S. 14-223; because all of the elements of the offense of obstructing or delay an officer were not included in financial identity fraud, obstructing or delaying an officer was not a lesser included offense. State v. Dammons, 159 N.C. App. 284, 583 S.E.2d 606, 2003 N.C. App. LEXIS 1539 (2003), review denied, 357 N.C. 579, 589 S.E.2d 133 (2003), cert. denied, 541 U.S. 951, 124 S. Ct. 1691, 158 L. Ed. 2d 382 (2004).

Instruction Properly Refused. — Trial court did not err in refusing defendant's request for a jury instruction that the incident that occurred at the patrol car was separate from that occurring at defendant's car and that evidence of the latter was not proof that defendant obstructed and delayed the officer, as the offenses of assaulting a government officer and obstruction and delay of a public officer were separate; the jury could find, without violating the Double Jeopardy Clause, that the evidence of defendant's conduct that occurred after she left the patrol car was supportive of a charge of obstructing and delaying, even though the district court had found that the same conduct was insufficient to constitute an assault. State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824, 2004 N.C. App. LEXIS 742 (2004).

OPINIONS OF ATTORNEY GENERAL

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

§ 14-224: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15. For present provisions as to assistance to law-enforcement officers by private persons, see G.S. 15A-405.

§ 14-225. False reports to law enforcement agencies or officers.

Any person who shall willfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty, shall be guilty of a Class 2 misdemeanor. (1941, c. 363; 1969, c. 1224, s. 3; 1993, c. 539, s. 137; 1994, Ex. Sess., c. 23, ss. 1-3; c. 24, s. 14(c).)

Legal Periodicals. — For comment on this enactment, see 19 N.C.L. Rev. 477 (1941).

CASE NOTES

Insufficient Evidence. — While the State's evidence showed that defendant willfully made a false report to the police, absent any evidence that she did so with any malicious purpose, or intent to interfere with a law enforcement agency or hindering or obstructing the officer in the performance of his duties, her conviction under G.S. 14-225 was reversed. State v. Dietze, 190 N.C. App. 198, 660 S.E.2d 197, 2008 N.C. App. LEXIS 834 (2008).

Cited in State v. Hughes, 353 N.C. 200, 539 S.E.2d 625, 2000 N.C. LEXIS 899 (2000).

§ 14-225.1. Picketing or parading.

Any person who, with intent to interfere with, obstruct, or impede the administration of justice, or with intent to influence any justice or judge of the General Court of Justice, juror, witness, district attorney, assistant district attorney, or court officer, in the discharge of his duty, pickets, parades, or uses any sound truck or similar device within 300 feet of an exit from any building housing any court of the General Court of Justice, or within 300 feet of any building or residence occupied or used by such justice, judge, juror, witness, district attorney, assistant district attorney, or court officer, shall upon plea or conviction be guilty of a Class 1 misdemeanor. (1977, c. 266, s. 1; 1993, c. 539, s. 138; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutional Challenge to Section Held Moot. — In an action to contest the constitutionality of this section under the Declaratory Judgment Act when his license to picket was voided, plaintiff was granted a temporary restraining order which allowed the picketing to proceed; therefore, where it was over a year later when the lower court granted plaintiff's motion for summary judgment and over two years before the case was heard on appeal, the case was moot, both at the time it was before the lower court and on appeal; plaintiff had yet to be arrested or refused a permit for a similar demonstration, and the case did not fall under the exception "capable of repetition, yet evading review." Crumpler v. Thornburg, 92 N.C. App. 737, 375 S.E.2d 708, cert. denied, 324 N.C. 543, 380 S.E.2d 770 (1989).

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-225.2. Harassment of and communication with jurors.

(a) A person is guilty of harassment of a juror if he:

(1) With intent to influence the official action of another as a juror, harasses, intimidates, or communicates with the juror or his spouse; or

(2) As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.

(b) In this section "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror.

(c) A person who commits the offense defined in subdivision (a)(1) of this section is guilty of a Class H felony. A person who commits the offense defined in subdivision (a)(2) of this section is guilty of a Class I felony. (1977, c. 711, s. 16; 1979, 2nd Sess., c. 1316, s. 15; 1981, c. 63, s. 1; c. 179, s. 14; 1985, c. 691; 1993, c. 539, s. 1211; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Communication which constitutes harassment of jurors is not protected speech. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Obstruction of Justice. — Complaint of plaintiffs who had served as jurors in a medical malpractice case against defendant doctor who had subsequently sent their names and addresses to practitioners at regional medical center sufficiently alleged a cause of action for obstruction of justice in violation of this section. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Cited in In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983).

§ 14-226. Intimidating or interfering with witnesses.

(a) If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a Class H felony.

(b) A defendant in a criminal proceeding who threatens a witness in the defendant's case with the assertion or denial of parental rights shall be in violation of this section. (1891, c. 87; Rev., s. 3696; C.S., s. 4380; 1977, c. 711, s. 16; 1993, c. 539, s. 1212; 1994, Ex. Sess., c. 24, s. 14(c); 2004-128, s. 15; 2006-264, s. 2.)

CASE NOTES

This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases. In re Young, 137 N.C. 552, 50 S.E. 220 (1905).

The gist of the offense under this section is the obstruction of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969); State v. Rogers, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

It is an offense, at common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying on the trial of a cause, and such conduct may be made an offense by statute. The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

It is immaterial that person procured to absent himself was not regularly summoned or legally bound to attend as a witness. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

Evidence Sufficient. — Sufficient evidence existed to establish that juvenile attempted to intimate a witness in violation of G.S. 14-226, after a court counselor witnessed the juvenile mouth the words, "I'm going to kick your ass," while in court at his adjudication hearing after the witness testified against the juvenile with regard to breaking and entering and trespass charges. In re R.D.R., 175 N.C. App. 397, 623 S.E.2d 341, 2006 N.C. App. LEXIS 52 (2006).

Voice mail message defendant left, in which defendant called the victim names and said that defendant was going to give the victim a taste of the victim's own medicine once released, only supported one charge of intimidating a witness by threats; however, the victim's testimony that defendant told her on at least 10 occasions not to testify was not sufficient to show that defendant threatened the victim. State v. Braxton, 183 N.C. App. 36, 643 S.E.2d 637, 2007 N.C. App. LEXIS 834 (2007).

Evidence Insufficient. — Letter defendant wrote to a witness set to testify against a friend defendant made in jail was insufficient to support a conviction for attempting to intimidate a witness, because the letter was neither threatening, coercive, or menacing, and the letter did not hint at bodily harm or violence against the witness, contained no cursing, vulgarity, or threatening language, and maintained a courteous tone throughout. State v. Williams, 186 N.C. App. 233, 650 S.E.2d 607, 2007 N.C. App. LEXIS 2122 (2007).

Applied in State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327 (1981).

Cited in State v. Hodge, 142 N.C. 665, 55 S.E. 626 (1906); In re Kivett, 309 N.C. 635, 309 S.E.2d 442 (1983); State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984); Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985); State v. Melvin, 326 N.C. 173, 388 S.E.2d 72 (1990); Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

§ 14-226.1. Violating orders of court.

Any person who shall willfully disobey or violate any injunction, restraining order, or any order lawfully issued by any court for the purpose of maintaining or restoring public safety and public order, or to afford protection for lives or property during times of a public crisis, disaster, riot, catastrophe, or when such condition is imminent, or for the purpose of preventing and abating disorderly conduct as defined in G.S. 14-288.4 shall be guilty of a Class 3 misdemeanor which may include a fine not to exceed two hundred fifty dollars ($250.00). This section shall not in any manner affect the court's power to punish for contempt. (1969, c. 1128; 1993, c. 539, s. 139; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-226.2. Harassment of participant in neighborhood crime watch program.

Any person who willfully threatens or intimidates an identifiable member or a resident in the same household as the member of a neighborhood crime watch program for the purpose of intimidating or retaliating against that person for the person's participation in a neighborhood crime watch program is guilty of a Class 1 misdemeanor including a fine of at least three hundred dollars ($300.00). It is a violation of this section for a person to threaten or intimidate an identifiable member or a resident in the same household as the member of a neighborhood crime watch program while that member is traveling to or from a neighborhood crime watch meeting, actively participating in a neighborhood crime watch program activity, or actively participating in an ongoing criminal investigation. (2006-181, s. 3.)

§ 14-226.3. Interference with electronic monitoring devices.

(a) For purposes of this section, the term "electronic monitoring device" includes any electronic device that is used to track the location of a person.

(b) It is unlawful for any person to knowingly and without authority remove, destroy, or circumvent the operation of an electronic monitoring device that is being used for the purpose of monitoring a person who is:

(1) Complying with a house arrest program;
(2) Wearing an electronic monitoring device as a condition of bond or pretrial release;
(3) Wearing an electronic monitoring device as a condition of probation;
(4) Wearing an electronic monitoring device as a condition of parole; or
(5) Wearing an electronic monitoring device as a condition of post-release supervision.

(c) It is unlawful for any person to knowingly and without authority request or solicit any other person to remove, destroy, or circumvent the operation of an electronic monitoring device that is being used for the purposes described in subsection (b) of this section.

(d) This section does not apply to persons who are being monitored by an electronic monitoring device pursuant to the provisions of Article 27A of Chapter 14 of the General Statutes, or Chapter 7B of the General Statutes.

(e) Violation of this section by a person who is required to comply with electronic monitoring as a result of a conviction for a criminal offense is a felony one class lower than the most serious underlying felony or a misdemeanor one class lower than the most serious underlying misdemeanor, except that, if the most serious underlying felony is a Class I felony, then violation of this section is a Class A1 misdemeanor. Violation of this section by a person who is required to comply with electronic monitoring as a condition of bond or pretrial release is a Class 1 misdemeanor. Violation of this section by any other person is a Class 2 misdemeanor. (2009-415, s. 1.)

Editor's Note. — Session Laws 2009-415, s. 2, made this section effective December 1, 2009, and applicable to acts committed on or after that date.

§ 14-227. Failing to attend as witness before legislative committees.

If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the General Assembly, either select or committee of the whole, he shall be guilty of a Class 3 misdemeanor and fined not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000). (1869-70, c. 5, s. 2; Code, s. 2854; Rev., s. 3692; C.S., s. 4381; 1993, c. 539, s. 140; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 30A.

Secret Listening.

§ 14-227.1. Secret listening to conference between prisoner and his attorney.

(a) It shall be unlawful for any person willfully to overhear, or procure any other person to overhear, or attempt to overhear any spoken words between a person who is in the physical custody of a law-enforcement agency or other public agency and such person's attorney, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of all persons engaging in the conversation.

(b) No evidence procured in violation of this section shall be admissible over objection against any person participating in such conference in any court in this State. (1967, c. 187, s. 1.)

§ 14-227.2. Secret listening to deliberations of grand or petit jury.

It shall be unlawful for any person willfully to overhear, or procure any other person to overhear, or attempt to`overhear the investigations and deliberations of, or the taking of votes by, a grand jury or a petit jury in a criminal case, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of said grand jury or petit jury. (1967, c. 187, s. 1.)

§ 14-227.3. Violation made misdemeanor.

All persons violating the provisions of G.S. 14-227.1 or 14-227.2 shall be guilty of a Class 2 misdemeanor. (1967, c. 187, s. 2; 1969, c. 1224, s. 6; 1993, c. 539, s. 141; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 31.

Misconduct in Public Office.

§ 14-228. Buying and selling offices.

If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office, or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a Class I felony. (5, 6 Edw. VI, c. 16, ss. 1, 5; R.C., c. 34, s. 33; Code, s. 998; Rev., s. 3571; C.S., s. 4382; 1993, c. 539, s. 1213; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to validity of bargain to sell in office, see G.S. 128-3. As to sheriff letting to farm his office, see G.S. 162-24.

§ 14-229. Acting as officer before qualifying as such.

If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a Class 1 misdemeanor and shall be ejected from his office. (Code, s. 79; Rev., s. 3565; C.S., s. 4383; 1999-408, s. 2.)

§ 14-230. Willfully failing to discharge duties.

If any clerk of any court of record, sheriff, magistrate, school board member, county commissioner, county surveyor, coroner, treasurer, or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1 misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense. (1901, c. 270, s. 2; Rev., s. 3592; C.S., s. 4384; 1943, c. 347; 1973, c. 108, s. 5; 1993, c. 539, s. 142; 1994, Ex. Sess., c. 24, s. 14(c); 2009-107, s. 1.)

Cross References. — As to failure of sheriff to make return, see G.S. 14-242. As to prosecution of officers failing to discharge duties, see G.S. 128-16 et seq.

Effect of Amendments. — Session Laws 2009-107, s. 1, effective December 1, 2009, inserted "school board member" near the beginning of the first sentence.

Legal Periodicals. — For article, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

In General. — The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners, 4 N.C. 419 (1816); State v. Williams, 34 N.C. 172 (1851); State v. Furguson, 76 N.C. 197 (1877). If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office. State ex rel. Battle v. City of Rocky Mount, 156 N.C. 329, 72 S.E. 354 (1911).

History of Section. — See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Sections 7A-173 and 7A-376 are not irreconcilably in conflict with this section. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

Effect of Section on Common-Law Crime of Official Oppression. — It is futile to attempt to mark the extent, if any, the common-law crime of official oppression has been modified or superseded by this section, as there is no exact common-law definition of official oppression, and the possible acts which may constitute the crime are as many and varied as the forms of corruption that may exist in public office. State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967).

An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Failure to Establish Defendant Was an Official. — Where the State failed to show any instance where the defendant could exercise sovereign power at any time in the course of his employment and failed to show that the defendant's position of senior administrator at school for the blind was created by statute, constitution, or delegation of state authority, the state failed to establish he was an official of a state institution. State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (1994).

Elements of Offense. — The offense described in this section has two components: (1) That the defendant be an official of a State institution, and (2) that he willfully fail to discharge the duties of his office; additionally, injury to the public is a judicially recognized element of the crime. State v. Birdsong, 325 N.C. 418, 384 S.E.2d 5 (1989).

Injury to the public must occur as a consequence of the omission, neglect or refusal. State v. Rhome, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

Willful Neglect and Injury to Public Required. — It is to be observed that the essentials of the crime as prescribed are first, a willful neglect in the discharge of official duty, and second, injury to the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Liability for Honest Errors. — It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powers, 75 N.C. 281 (1876).

If the illegal act be done mala fide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only. State v. Snuggs, 85 N.C. 541 (1881).

Accused Must Show Good Faith. — Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is willful, and makes it incumbent upon him to rebut the presumption. State v. Heaton, 77 N.C. 505 (1877).

And Public Will Be Protected Against Carelessness. — However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injuries the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

A duly appointed policeman of a city is an officer of such city within the meaning of this section. State v. Fesperman, 264 N.C. 160, 141 S.E.2d 255 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. Fesperman, 264 N.C. 168, 141 S.E.2d 252 (1965).

As Is Chief of Police. — A chief of police as well as a policeman is an officer of the municipality which engages his services, within the meaning of the provisions of this section. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

And Captain of Detectives. — A captain of detectives of a police department of a city is an officer of such city within the meaning of this section. State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

Magistrates Not Exempted. — The legislature did not intend to exempt magistrates from indictment and criminal prosecution under this section when it included magistrates under the sanctions of G.S. 7A-173 and 7A-376. This section applies to misconduct in office unless another statute provides for the "indictment" of the officer, but neither G.S. 7A-173 nor 7A-376 provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. State v. Greer, 308 N.C. 515, 302 S.E.2d 774 (1983).

Proceedings of Forfeiture Under § 1-515. — Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment where the clerk has been convicted of a misdemeanor under this section in willfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under G.S. 1-515. State v. Norman, 82 N.C. 687 (1880).

Sufficiency of Bill of Indictment. — See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Two Theories Alleged in Single Count of Indictment. — Where, in a single count of an indictment, the State alleged two factual underpinnings for, or factual theories of, conviction for a violation of this section it was not required to prove both; proof of only one factual theory was legally sufficient and at most placed the State at risk of failing to persuade the jury of defendant's guilt. State v. Birdsong, 325 N.C. 411, 384 S.E.2d 5 (1989).

Warrant Falling Short of Alleging Malfeasance in Office in Violation of Section. — See Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

Applied in State v. Hucks, 264 N.C. 160, 141 S.E.2d 299 (1965); State v. Stanley, 60 N.C. App. 568, 299 S.E.2d 464 (1983); Structural Components Int. Inc. v. City of Charlotte, 154 N.C. App. 119, 573 S.E.2d 166, 2002 N.C. App. LEXIS 1418 (2002).

Cited in Moffitt v. Davis, 205 N.C. 565, 172 S.E. 317 (1934); State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980); State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291 (1980); State v. Jarvis, 50 N.C. App. 679, 274 S.E.2d 852 (1981).

§ 14-231. Failing to make reports and discharge other duties.

If any State or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a Class 1 misdemeanor. (Rev., s. 3576; C.S., s. 4385; 1993, c. 539, s. 143; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to embezzlement by officers, see G.S. 14-92. As to failure of sheriff to make return, see G.S. 14-242. As to liability on official bonds, see G.S. 58-76-5 et seq.

CASE NOTES

Injurious Effects Not Necessary. — The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N.C. 176 (1800).

Honesty of Purpose. — There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. Turner v. McKee, 137 N.C. 251, 49 S.E. 330 (1904).

Enforcing Unconstitutional Law. — An officer is not liable for obeying the mandates of an unconstitutional statute. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Manager of Elections. — Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. State v. Cole, 156 N.C. 618, 72 S.E. 221 (1911).

§ 14-232. Swearing falsely to official reports.

If any clerk, sheriff, register of deeds, county commissioner, county treasurer, magistrate or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, State or school revenue, he shall be guilty of a Class 1 misdemeanor. (1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; Code, s. 731; Rev., s. 3605; C.S., s. 4386; 1973, c. 108, s. 6; 1993, c. 539, s. 144; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-233. Making of false report by bank examiners; accepting bribes.

If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be punished as a Class I felon. (1903, c. 275, s. 24; Rev., s. 3324; 1921, c. 4, s. 79; C.S., s. 4387; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1214; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

As to bank examiners making false reports, see also G.S. 53-124.

CASE NOTES

Constitutionality. — Because under this section an officer could consider speech that was not fighting words as disorderly or not peaceable, the section impermissibly criminalizes protected speech. Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Because the petitioner's comments did not fall within the narrowly defined class of fighting words so devoid of value as to be unprotected under the first amendment, the possibility existed that he was convicted for his speech and not his actions, and the danger that the jury based its verdict on protected activity required that the petitioner's conviction be vacated. Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Applied in In re J.F.M., 168 N.C. App. 143, 607 S.E.2d 304, 2005 N.C. App. LEXIS 166 (2005).

§ 14-234. Public officers or employees benefiting from public contracts; exceptions.

(a)(1) No public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

(2) A public officer or employee who will derive a direct benefit from a contract with the public agency he or she serves, but who is not involved in making or administering the contract, shall not attempt to influence any other person who is involved in making or administering the contract.

(3) No public officer or employee may solicit or receive any gift, reward, or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.

(a1) For purposes of this section:

(1) As used in this section, the term "public officer" means an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor of a public agency.

(2) A public officer or employee is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract.

(3) A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms or in the preparation or award of the contract. A public officer is also involved in making a contract if the board, commission, or other body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action, unless the contract is approved under an exception to this section under which the public officer is allowed to benefit and is prohibited from voting.

(4) A public officer or employee derives a direct benefit from a contract if the person or his or her spouse: (i) has more than a ten percent (10%) ownership or other interest in an entity that is a party to the contract; (ii) derives any income or commission directly from the contract; or (iii) acquires property under the contract.

(5) A public officer or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract.

(b) Subdivision (a)(1) of this section does not apply to any of the following:

(1) Any contract between a public agency and a bank, banking institution, savings and loan association, or with a public utility regulated under the provisions of Chapter 62 of the General Statutes.

(2) An interest in property conveyed by an officer or employee of a public agency under a judgment, including a consent judgment, entered by a superior court judge in a condemnation proceeding initiated by the public agency.

(3) Any employment relationship between a public agency and the spouse of a public officer of the agency.

(4) Remuneration from a public agency for services, facilities, or supplies furnished directly to needy individuals by a public officer or employee of the agency under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by the agency if: (i) the programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; (ii) neither the agency nor any of its employees or agents, have control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance; (iii) the remuneration for the services, facilities or supplies are in the same amount as would be paid to any other provider; and (iv) although the public officer or employee may participate in making determinations of eligibility of needy persons to receive the assistance, he or she takes no part in approving his or her own bill or claim for remuneration.

(b1) No public officer who will derive a direct benefit from a contract entered into under subsection (b) of this section may deliberate or vote on the contract or attempt to influence any other person who is involved in making or administering the contract.

(c) through (d) Repealed by Session Laws 2001-409, s. 1, effective July 1, 2002.

(d1) Subdivision (a)(1) of this section does not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 15,000 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 15,000 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 15,000 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if all of the following apply:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and

recorded in its minutes and the amount does not exceed twenty thousand dollars ($20,000) for medically related services and forty thousand dollars ($40,000) for other goods or services within a 12-month period.

(2) The official entering into the contract with the unit or agency does not participate in any way or vote.

(3) The total annual amount of contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county.

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse board, or public hospital which contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) Subsection (d1) of this section does not apply to contracts that are subject to Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to Part 9 of Article 21 of Chapter 143 of the General Statutes or the Community Conservation Assistance Program created pursuant to Part 11 of Article 21 of Chapter 143 of the General Statutes by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(d4) Subsection (a) of this section does not apply to an application for, or the receipt of a grant or other financial assistance from, the Tobacco Trust Fund created under Article 75 of Chapter 143 of the General Statutes by a member of the Tobacco Trust Fund Commission or an entity in which a member of the Commission has an interest provided that the requirements of G.S. 143-717(h) are met.

(d5) This section does not apply to a public hospital subject to G.S. 131E-14.2 or a public hospital authority subject to G.S. 131E-21.

(d6) This section does not apply to employment contracts between the State Board of Education and its chief executive officer.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved as provided in this subsection. A public agency that is a party to the contract may request approval to continue contracts under this subsection as follows:

(1) Local governments, as defined in G.S. 159-7(15), public authorities, as defined in G.S. 159-7(10), local school administrative units, and community colleges may request approval from the chair of the Local Government Commission.

(2) All other public agencies may request approval from the State Director of the Budget.

Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (1825,

c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4; 2000-147, s. 6; 2001-409, s. 1; 2001-487, ss. 44(a), 44(b), 45; 2002-159, s. 28; 2006-78, s. 2; 2009-2, s. 2; 2009-226, s. 1.)

Local Modification. — Bladen: 1993 (Reg. Sess., 1994), c. 721, s. 3; Northhampton: 1973, c. 865; 1995, c. 260, s. 6; Pamlico: 1981 (Reg. Sess., 1982), c. 1198; 1977, 2nd Sess., c. 1152; city of Greensboro: 1951, c. 707, s. 3; city of New Bern: 1983, c. 364; city of Reidsville: 1983, c. 893; town of Elon College: 1985, c. 78; town of Roseboro: 2009-432 (expires July 31, 2010); town of Salemburg: 2007-20, s. 1; town of Tarboro: 1997-96. Yadkin: 2001-31.

Cross References. — As to liability of board of education members, see G.S. 115C-48. As to conflicts of interest within the Department of Transportation, see G.S. 136-14.

Editor's Note. — Session Laws 2000-147, s. 8(a)-(c), provides:

"(a) Interpretation of Act. — The foregoing sections of this act provide an additional and alternative method for the doing of the things authorized by the act, are supplemental and additional to powers conferred by other laws, and do not derogate any powers now existing.

"(b) References in this act to specific sections or Chapters of the General Statutes are intended to be references to those sections or Chapters as amended and as they may be amended from time to time by the General Assembly.

"(c) This act, being necessary for the health and welfare of the people of the State, shall be liberally construed to effect its purposes."

Effect of Amendments. — Session Laws 2009-2, s. 2, effective March 4, 2009, added subsection (d6).

Session Laws 2009-226, s. 1, effective October 1, 2009, substituted "twenty thousand dollars ($20,000)" for "twelve thousand five hundred dollars ($12,500)" and "forty thousand dollars ($40,000)" for "twenty-five thousand dollars ($25,000)" in subdivision (d1)(1).

CASE NOTES

Public Policy of State. — The General Assembly in adopting this section made the condemnation of the transactions embraced within its terms a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to "feather their own nests" by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Effect of Special Validating Act. — Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. Starmount Co. v. Ohio Sav. Bank & Trust Co., 55 F.2d 649 (4th Cir. 1932).

Denial of Recovery on Quantum Meruit Basis. — The courts not only will declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a quantum meruit basis. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Officer of Both City and Corporation. — The prohibition of this section extends to an officer of a corporation in making contracts between the corporation and the city of which he is commissioner or alderman. State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910); Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Contracts with city when an alderman is an employee of the other contracting party are not covered by the section. State v. Weddell, 153 N.C. 587, 68 S.E. 897 (1910).

Sale to Corporation Organized by Advisor to Municipality. — Under this statute a contract of sale does not become void because the purchasing corporation was organized through the efforts of a person who had a merely advisory relationship to a municipal corporation. Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).

Contracts for Benefit of County. — A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. State v. Garland, 134 N.C. 749, 47 S.E. 426 (1904).

Service to Body of Which Officer Is a Member. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. Davidson v. Guilford County, 152 N.C. 436, 67 S.E. 918 (1910).

Purchase of Property from Company Owned by Wife. — A member of the board of education of a county was not guilty under former G.S. 14-236 for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. State v. Debnam, 196 N.C. 740, 146 S.E. 857 (1929).

Condemnation of County Commissioner's Land. — In a suit seeking to halt the construction of a landfill, the district court properly dismissed plaintiffs' state claim because G.S. 14-234 did not prohibit a county commissioner from profiting from the condemnation of his land. Franks v. Ross, 313 F.3d 184, 2002 U.S. App. LEXIS 24523 (4th Cir. 2002).

A county commissioner contracting with the county, through another, to repair county buildings, violated North Carolina's conflict of interest law, G.S. 14-234(a), and had to return all sums he was paid in connection with this contract; evidence regarding the reasonable value of the work he performed pursuant to these contracts was irrelevant. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

When a county commissioner violated North Carolina's conflict of interest law, G.S. 14-234(a), by contracting with the county, through another, to repair county buildings, the other commissioners were not liable for the judgment entered against this commissioner because they did not enter into any contract with the county or receive any benefit or financial gain from the other commissioner's improper contract. Gibbs v. Mayo, 162 N.C. App. 549, 591 S.E.2d 905, 2004 N.C. App. LEXIS 252 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 45 (2004).

Public Official Immunity Does Not Apply to Bar Claims. — Because G.S. 14-234 (deriving a personal benefit from a contract made or administered on behalf of a public agency) did not contemplate recovery of compensation by an individual citizen from a public official as an individual, to the extent that plaintiffs sought relief other than monetary compensation under G.S. 14-234(a)(1), public official immunity was not applicable to bar the claim. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

Public Official Immunity Did Not Bar Claim for Duress. — Airport authority member's threatening demand for a discount, viewed in the light most favorable to the plaintiffs and drawing all reasonable inferences in plaintiffs' favor, was intentional and wrongful, and therefore a malicious act. Because public official immunity (POI) did not apply to claims based on malicious acts, POI did not bar plaintiffs' G.S. 14-234 claim against the member for duress. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

OPINIONS OF ATTORNEY GENERAL

Deposit of Funds by County ABC Board in Bank Whose President Is Chairman of Such Board Not a Violation. — See opinion of Attorney General to Mr. Cameron S. Weeks, 40 N.C.A.G. 559 (1969).

Mayor May Not Be Hired as Town Superintendent with Separate Salary. — See opinion of Attorney General to Mr. Bobby F. Jones, Elm City Town Attorney, 40 N.C.A.G. 563 (1969).

Pembroke State University May Not Employ Member of Its Board of Trustees. — See opinion of Attorney General to Mr. Terry R. Hutchins, 40 N.C.A.G. 566 (1969).

Inapplicable When Company by Which Local School Board Member Is Employed Contracts with State Board of Education. — See opinion of Attorney General to Mr. Bobby R. Stott, 40 N.C.A.G. 217 (1970).

Officers and Employees of City Selling Property Not Prohibited from Buying at Sale. — See opinion of Attorney General to Mr. E. Murray Tate, Jr., 41 N.C.A.G. 276 (1971).

When County Commissioners Who Run Grocery Stores May Authorize Food Stamp Program. — County commissioners who run grocery stores may authorize food stamp program if the specifics from the exemption from this section for public assistance programs are complied with. Opinion of Attorney General to Mr. Clifford L. Moore, Jr., 41 N.C.A.G. 530 (1971).

Member of County Board of Elections May Not Serve as Executive Secretary of That Board. — See opinion of Attorney General to Honorable Ed McKnight, N.C. House of Representatives, 41 N.C.A.G. 577 (1971).

Services Donated as County Employee Do Not Create a Conflict of Interest Where the Same Person Is a County Commissioner. — See opinion of Attorney General to Honorable Charles H. Taylor, N.C. General Assembly, 41 N.C.A.G. 765 (1972).

When County Director of Social Services May Serve on Board of Nonprofit Corporation Administering CETA Funds. — A conflict of interest does not arise if a county director of social services serves as a member of the board of directors of a nonprofit corporation organized for the purpose of administering federal funds under the Comprehensive Employment and Training Act (29 USC, Ch. 17; Pub. L. 93-203 (1973); Pub. L. 95-524 (1978)), when: (a) The nonprofit corporation will administer federal funds through community programs to which the county department of social services may refer social services clients; (b) The county department of social services is a potential recipient, through the nonprofit corporation, of federal funds, of services by employees of the nonprofit corporation and of training of social service employees; (c) The director, as a member of the board of the nonprofit corporation, will approve, or establish policy for entering into, contracts, including contracts with the county department of social services; and (d) Neither the county director of social services nor any member of his immediate family will realize any direct or indirect benefits by reason of any contractual or other relationship between the county department of social services and the nonprofit corporation. See opinion of Attorney General to Robert H. Ward, Director, Division of Social Services, Dep't of Human Resources and William W. Ivey, County Att'y for Randolph County, 49 N.C.A.G. 102 (1980).

When Person May Be Member of Two Nonprofit Corporations. — A conflict of interest does not arise if an individual, who is not a public official, serves as a member of the board of directors of a nonprofit corporation organized for the purpose of administering federal funds under CETA and at the same time serves as a member of the board of directors of another nonprofit corporation organized for the purpose of administering programs for the aging (Ch. 143B, Art. 3, Part 14; 42 USC, Ch. 35; Pub. L. 89-73, as amended), when the circumstances and relationships between the corporations will be similar to those required for directors of social services serving on board of nonprofit corporation administering CETA funds. See opinion of Attorney General to Robert H. Ward, Director, Div. of Social Services, Dep't of Human Resources and William W. Ivey, County Att'y for Randolph County, 49 N.C.A.G. 102 (1980).

This section does prohibit a person from serving both on the Hyde County Board of Health and the Hyde Rural Health Corporation Board of Directors. See opinion of Attorney General to Cliff Swindell, County Manager, Hyde County, 50 N.C.A.G. 12 (1980).

A prohibited conflict of interest may occur when a funeral home in which the chairman of the county board of social services holds a pecuniary interest enters into a contract with the county department of social services to provide funeral and burial services for a ward or juvenile under the jurisdiction or custody of the county department of social services. See opinion of Attorney General to Timothy W. Howard, Attorney for Sampson County Department of Social Services, 49 N.C.A.G. 108 (1980).

Trustees of New Hanover Memorial Hospital, Inc., are subject to the provisions of this section. See opinion of Attorney General to Mr. A. Dumay Gorham, Jr., Attorney for New Hanover Memorial Hospital, Inc., 52 N.C.A.G. 49 (1982).

A trustee's ownership of stock in a company which does business with the hospital violates this section. See opinion of Attorney General to Mr. A. Dumay Gorham, Jr., Attorney for New Hanover Memorial Hospital, Inc., 52 N.C.A.G. 49 (1982).

Telephone Membership Corporation President. — A conflict of interest under this section would not arise from the President of the Board of Directors of a telephone membership corporation serving on the Board of the Rural Electrification Authority. See opinion of Attorney General to Mr. Aaron A. Hathcock, Administrator, Rural Electrification Authority, 52 N.C.A.G. 107 (1983).

Current Division of Mental Health, Mental Retardation (now Developmental Disabilities) and Substance Abuse Services employees can also serve as members of the Commission of Mental Health, Mental Retardation (now Developmental Disabilities) and Substance Abuse Services. See opinion of Attorney General to Ms. Sarah T. Morrow, M.D., M.P.H., Secretary, Department of Human Resources, 52 N.C.A.G. 102 (1983).

This section does not prohibit members of the Trend Community Mental Health Services from serving as members of the Board of Directors of Trend Foundation, Incorporated. See opinion of Attorney General to Mr. James F. Creekman, Attorney for Trend Community Mental Health Services, 53 N.C.A.G. 2 (1983).

A conflict of interest may exist, within the purview of subsection (a) of this section, when an Authority member, the president of a public relations firm, enters into a contract with another company providing public relations services to the airport. See opinion of Attorney General to Mr. Victor W. Buchanan, Attorney for the Asheville Regional Airport Authority, 57 N.C.A.G. 63 (1987).

Applicability of Exemption in Subsection (d1). — The exemption of subsection (d1) of this section, which was enacted in 1979 and exempts from the prohibition against self-dealing in subsection (a) certain contracts between public boards and their members in counties with no town with a population of more than 7,500 (now 15,000), only applies to an "elected official or person appointed to fill an elective office." It does not apply to persons appointed to an appointive office, such as technical college trustee. See opinion of Attorney General to Mr. Garrett Dixon Baily, Attorney for Mayland Technical College, 55 N.C.A.G. 28 (1985).

Board of trustees of a technical college may not employ one of its members as a part-time instructor. See opinion of Attorney General to Mr. Garrett Dixon Baily, Attorney for Mayland Technical College, 55 N.C.A.G. 28 (1985).

Regarding a possible conflict of interest which could arise between an airport authority and two members of its board of directors if the authority decides to refund some of its outstanding bonds, which would likely involve entering into a contract with a financial institution to underwrite the issuance of such bonds, see opinion of Attorney General to William Owen Cooke, Cooke & Cooke, Attorneys At Law, 1999 N.C.A.G. 20 (6/24/99).

Simultaneous Membership in County Partnership for Children and County Interagency Transportation Corporation Was Permitted. — Members of a county partnership for children, who were also members of the board of directors of the county interagency transportation corporation, did not violate G.S. 14-234 by remaining on the partnership board and participating in a vote to award a grant to the interagency transportation corporation, where one of the individuals who sat on both boards was the county administrator and the other was chairman of the interagency transportation corporation, as no personal benefits accrued to those individuals. See opinion of Attorney General to Kipling Godwin, Chairman, Columbus County Partnership for Children, 1999 N.C. AG LEXIS 36 (8/27/99).

Regional Medical Center May Make Grant to Nonprofit Corporation Where Trustees Are on Board of Corporation. — There is no violation of G.S. 14-234 where a regional medical center makes a grant to a nonprofit corporation, even if one member of the board of trustees of the regional medical center is a member of the board of directors of the nonprofit corporation and another is executive director of the nonprofit corporation, assuming that neither of the trustees will personally benefit, either directly or indirectly, from the grant to the nonprofit corporation. See opinion of Attorney General to A. Dumay Gorham, Jr., Marshall, Williams & Gorham, L.L.P., 1999 N.C. AG LEXIS 42 (9/1/99).

Member of General Assembly with Financial Interest in Company. — A member of the General Assembly likely would not violate G.S. 14-234 if a company in which he has a financial interest contracts with governmental agencies in another state, a private company, or a political subdivision of the state because in none of these instances is the power to contract joined with private economic interests. See opinion of Attorney General to Burley B. Mitchell, Jr., Womble Carlyle Sandridge & Rice, 2001 N.C. AG LEXIS 2 (2/16/2001).

§ 14-234.1. Misuse of confidential information.

(a) It is unlawful for any officer or employee of the State or an officer or an employee of any of its political subdivisions, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information which was made known to him in his official capacity and which has not been made public, to commit any of the following acts:

(1) Acquire a pecuniary interest in any property, transaction, or enterprise or gain any pecuniary benefit which may be affected by such information or official action; or

(2) Intentionally aid another to do any of the above acts.

(b) Violation of this section is a Class 1 misdemeanor. (1987, c. 616, s. 1; 1993, c. 539, s. 146; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Section Relevant in Constructive Fraud Claim. — Where plaintiff had to establish that the defendant had a fiduciary relationship with her and that he breached that duty, in order to sustain her burden as to a claim of constructive fraud, this section was relevant as evidence of the corrupt and possible criminal nature of the acts allegedly perpetrated. Leftwich v. Gaines, 134 N.C. App. 502, 521 S.E.2d 717 (1999).

§ 14-235: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(11).

§§ 14-236, 14-237: Repealed by Session Laws 2001-409, ss. 2, 3, effective July 1, 2002.

Cross References. — For present provisions pertaining to public officers or employees benefiting from public contracts, see G.S. 14-234.

Editor's Note. — Session Laws 2001-409, s. 10, provides that the repeal of this section is effective July 1, 2002, and applies to actions taken and offenses committed on or after that date. Prosecutions for offenses committed before the effective dates of the provisions of the act are not abated or affected by the act, and the statutes that would be applicable but for the act remain applicable to those prosecutions.

§ 14-238. Soliciting during school hours without permission of school head.

No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1933, c. 220; 1969, c. 1224, s. 8; 1993, c. 539, s. 149; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Eastern Carolina Tastee-Freez, Inc. v. Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

§ 14-239. Allowing prisoners to escape; punishment.

If any sheriff, deputy sheriff, jailer, or other custodial personnel shall willfully or wantonly allow the escape of any person committed to that person's custody who is (i) a person charged with a crime, (ii) a person sentenced by the court upon conviction of any offense, or (iii) committed to the Department of Juvenile Justice and Delinquency Prevention, that person shall be guilty of a Class 1 misdemeanor. No prosecution shall be brought against any such officer pursuant to this section by reason of a prisoner being allowed to participate pursuant to court order in any work release, work study, community service, or other lawful program, or by reason of any such prisoner failing to return from participation in any such program. (1791, c. 343, s. 1, P.R.; R.C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C.S., s. 4393; 1973, c. 108, s. 7; 1983, c. 694; 1993, c. 539, s. 150; 1994, Ex. Sess., c. 24, s. 14(c); 2003-297, s. 1.)

Cross References. — As to permitting escape of or maltreating hired convicts, see G.S. 14-257.

CASE NOTES

Editor's Note. *— The cases annotated below were decided under prior law.*

This is a common-law offense. State v. Ritchie, 107 N.C. 857, 12 S.E. 251 (1890).

The statute contemplates two offenses. — negligently permitting or willfully promoting the escape — but charging negligence alone will suffice. State v. McLain, 104 N.C. 894, 10 S.E. 518 (1889).

The section changes the ordinary rule of the burden of proof by shifting such burden to the defendant. State v. Hunter, 94 N.C. 829 (1886); State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893).

This section provides an example of specific language used by the legislature when it intended to shift the burden of proof to a defendant. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Jury Question. — The question of good faith and diligence of the officer is for the jury. State v. Blackley, 131 N.C. 726, 42 S.E. 569 (1902).

Right to Kill to Prevent Escape. — The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893).

Cited in Sutton v. Williams, 199 N.C. 546, 155 S.E. 160 (1930).

§ 14-240. District attorney to prosecute officer for escape.

It shall be the duty of district attorneys, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the State, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (1791, c. 343, s. 2, P.R.; R.C., c. 34, s. 36; Code, s. 1023; Rev., s. 2822; C.S., s. 4394; 1973, c. 47, s. 2; c. 108, s. 8.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.

It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the General Assembly, appellate division reports or other public documents are transmitted or deposited for the use of the county or the State, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a Class 1 misdemeanor. (1881, c. 151; Code, s. 1073; Rev., s. 3598; C.S., s. 4395; 1969, c. 44, s. 26; 1993, c. 539, s. 151; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-242. Failing to return process or making false return.

If any sheriff, deputy, or other officer, whether State or municipal, or any person who presumes to act as any such officer, not being by law authorized so to do, willfully refuses to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or willfully makes a false return thereon, the person who willfully refused to make the return or willfully made the false return shall be guilty of a Class 1 misdemeanor. (1818, c. 980, s. 3, P.R.; 1827, c. 20, s. 4; R.C., c. 34, s. 118; Code, s. 1112; Rev., s. 3604; C.S., s. 4396; 1989, c. 462; 1993, c. 539, s. 152; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to duty to execute process and penalty for false return, see G.S. 162-14.

Legal Periodicals. — For survey of 1977 law on torts, see 56 N.C.L. Rev. 1136 (1978).

CASE NOTES

Civil Process. — This section applies to failure to return civil as well as criminal process. State v. Berry, 169 N.C. 371, 85 S.E. 387 (1915); Piedmont Mfg. Co. v. Buxton, 105 N.C. 74, 11 S.E. 264 (1890).

Process That Could Not Be Served. — An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. Fentress v. Brown, 61 N.C. 373 (1867).

Cited in State v. Brown, 119 N.C. 825, 25 S.E. 820 (1896); Rollins v. Gibson, 293 N.C. 73, 235 S.E.2d 159 (1977).

§ 14-243. Failing to surrender tax list for inspection and correction.

If any tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a Class 1 misdemeanor. (1870-1, c. 177, s. 2; Code, s. 3823; Rev., s. 3788; C.S., s. 4397; 1983, c. 670, s. 23; 1993, c. 539, s. 153; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-244. Failing to file report of fines or penalties.

If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a Class 1 misdemeanor. (1901, c. 4, s. 62; Rev., s. 3579; C.S., s. 4398; 1993, c. 539, s. 154; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-245: Repealed by Session Laws 1973, c. 108, s. 9.

§ 14-246. Failure of ex-magistrate to turn over books, papers and money.

If any magistrate, on expiration of his term of office, or if any personal representative of a deceased magistrate shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, all money, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a Class 1 misdemeanor. (Code, ss. 828, 829; 1885, c. 402; Rev., s. 3578; C.S., s. 4399; 1973, c. 108, s. 10; 1993, c. 539, s. 155; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Bailey v. Hester, 101 N.C. 538, 8 S.E. 164 (1888); Whitehurst v. Merchants & Farmers' Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

§ 14-247. Private use of publicly owned vehicle.

(a) It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. It is not a private purpose to drive a permanently assigned state- owned motor vehicle between one's official work station and one's home as provided in G.S. 143-341(8)i7a.

It shall be unlawful for any person to violate a rule or regulation adopted by the Department of Administration and approved by the Governor concerning the control of all state-owned passenger motor vehicles as provided in G.S. 143-341(8)i with the intent to defraud the State of North Carolina.

(b) Notwithstanding the provisions of subsection (a) of this section, county employees may carpool with each other in county vehicles as lawfully permitted by the county. (1925, c. 239, s. 1; 1981, c. 859, ss. 52, 53; 1983, c. 717, s. 75.)

Local Modification. — Mecklenburg: 1971, c. 302; 2007-136, s. 1; city of Charlotte: 1971, c. 220; town of Matthews: 1995, c. 176, s. 1.

Cross References. — As to the use of State vehicles by North Carolina Amateur Sports and Special Olympics World Summer Games Organizing Committee, see G.S. 143-299.3.

CASE NOTES

Elements of Offense. — The elements of the offense created by this section and G.S. 14-252 are (1), the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2), by a public official or employer answering to the statutory description and (3), for a private purpose. A warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose is insufficient to charge the offense. Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

Statement of Charges Held Sufficient. — A misdemeanor statement of charges which, when all surplusage was excluded from consideration, asserted that the defendant was a state employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose would be accomplished through the use of a state-owned motor vehicle, was sufficient to support a conviction of unlawful private use of a publicly owned vehicle. State v. Lilly, 75 N.C. App. 173, 330 S.E.2d 30 (1985).

It was error to instruct the jury that defendant would be guilty if she allowed the use of a state-owned vehicle for a private purpose. Merely having knowledge of the commission of a criminal offense, and doing nothing to prevent its commission, does not render one guilty. State v. Lilly, 75 N.C. App. 173, 330 S.E.2d 30 (1985).

§ 14-248. Obtaining repairs and supplies for private vehicle at expense of State.

It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

CASE NOTES

Violation of this section does not require an intent to do something in violation of the law. State v. Anderson, 88 N.C. App. 545, 364 S.E.2d 163 (1988).

This section contains no language setting forth any specific level of intent as an element of the crime. State v. Anderson, 88 N.C. App. 545, 364 S.E.2d 163 (1988).

A lack of specific criminal intent is not a valid defense under this section. State v. Anderson, 88 N.C. App. 545, 364 S.E.2d 163 (1988).

Evidence Held Sufficient. — Uncontroverted evidence in the record that defendant, while an employee of Craven County, used tires and rims purchased by the county on his personal vehicle was sufficient to support a guilty verdict under this section. State v. Anderson, 88 N.C. App. 545, 364 S.E.2d 163 (1988).

§ 14-249: Repealed by Session Laws 1981, c. 268, s. 1.

Cross References. — As to authority of the Secretary of Administration to make rules and regulations prescribing the manner in which passenger vehicles shall be purchased, see G.S. 143-60, subdivision (6).

§ 14-250: Repealed by Session Laws 2001-424, s. 6.14(d), effective September 26, 2001.

Cross References. — For requirements regarding marking and issuance of license plates for publicly owned vehicles, see G.S. 20-39.1.

§ 14-251. Violation made misdemeanor.

Any person, firm or corporation violating any of the provisions of G.S. 14-247 to 14-250 shall be guilty of a Class 2 misdemeanor. Nothing in G.S. 14-247 through 14-251 shall apply to the purchase, use or upkeep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5; 1969, c. 1224, s. 16; 1993, c. 539, s. 156; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Section 14-250 referred to in the above G.S. 14-251 was repealed by Session Laws 2001-424, s. 6.14(d).

§ 14-252. Five preceding sections applicable to cities and towns.

General Statutes 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Local Modification. — City of Charlotte: 1971, c. 220.

CASE NOTES

Elements of Offense. — The elements of the offense created by G.S. 14-247 and this section are (1) the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2) by a public official or employer answering to the statutory description (3) for a private purpose. A warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose is insufficient to charge the offense. Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

Article 32.

Misconduct in Private Office.

§ 14-253. Failure of certain railroad officers to account with successors.

If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a Class I felony. The Governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (1870-1, c. 72, ss. 1-3; Code, ss. 2001, 2002; Rev., s. 3760; C.S., s. 4400; 1993 c. 539, ss. 157, 1215; 1993 (Reg. Sess., 1994), c. 767, s. 20.)

CASE NOTES

Not Applicable to Tax Bond. — As this section has reference only to money, books, choses, etc., an indictment cannot be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N.C. 210 (1872).

§ 14-254. Malfeasance of corporation officers and agents.

(a) If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any person, or if any person shall aid and abet in the doing of any of these things, he shall be punished as a Class H felon.

(b) For purposes of this section, "person" means a natural person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1903, c. 275, s. 15; Rev., s. 3325; C.S., s. 4401; 1977, c. 809, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1216; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq. As to misapplication of funds by bank officers, see G.S. 53-129.

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

CASE NOTES

This section applies only to agents and officers of a corporation. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Crime of Embezzlement Compared. — A defendant charged with embezzlement (see G.S. 14-90) must have intended to defraud his principal. By contrast, a defendant violates this section if he does any of the acts prohibited by the statute with an intent to defraud or deceive any person. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

A defendant charged with embezzlement must have received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal. Under this section it is sufficient to show that a defendant as an agent or officer of a corporation abstracted or misapplied corporate funds. It need not be shown that he received such funds in the course of his employment. State v. Kornegay, 313 N.C. 1, 326 S.E.2d 881 (1985).

Indictments Quashed. — Indictments charging the defendant with corporate malfeasance in violation of this section must be quashed where they allege an intent "to defraud or to deceive the said Housing Authority of the City of Lumberton, North Carolina," since this section requires that they allege an accompanying intent to injure, defraud, or deceive an officer of the corporation. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Evidence Held Sufficient. — Evidence was sufficient to find that defendant induced others to participate in the commission of obtaining property by false pretense and corporate malfeasance where defendant induced putative father to participate in a scheme to defraud mother of child support by suggesting to him that drawing his blood and a paternity test would subject him to years of paying child support and the possible loss of his family, and offered to prevent him from being found to be the father for $500. State v. Weary, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

Phlebotomist hired as independent contractor for corporation was acting as the corporation's agent when she falsified a blood test report where she had an employment contract with the corporation, a salary, a traveling allowance, and a description of her duties, and the corporation had a contract with county child support enforcement agency to perform phlebotomy services and sent defendant to the agency on its behalf. State v. Weary, 124 N.C. App. 754, 479 S.E.2d 28 (1996).

Applied in State v. Chapman, 26 N.C. App.

66, 214 S.E.2d 789 (1975); State v. Fletcher, 66 N.C. App. 36, 310 S.E.2d 787 (1984); State v. Cobb, 361 N.C. 414, 646 S.E.2d 365, 2007 N.C. LEXIS 586 (2007).

Cited in State v. Hardin, 38 N.C. App. 558, 248 S.E.2d 458 (1978).

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. Escape of working prisoners from custody.

If any prisoner removed from the local confinement facility or satellite jail/work release unit of a county pursuant to G.S. 162-58 shall escape from the person having him in custody or the person supervising him, he shall be guilty of a Class 1 misdemeanor. (1876-7, c. 196, s. 4; Code, s. 3455; Rev., s. 3658; C.S., s. 4403; 1991 (Reg. Sess., 1992), c. 841, s. 2.; 1993, c. 539, s. 158; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(r).)

CASE NOTES

Two Classes of Escape. — There are two classes of escape from the State prison system. One is a felonious escape and the other is a misdemeanor. A defendant who has committed an escape is entitled to have his case submitted to the jury on question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970) (decided under prior law).

No Evidence That Defendant Was Hired Out Under This Section. — A defendant's contention that he should have been tried for escape under this section rather than under G.S. 148-45 was without merit where the evidence showed that, when he escaped, defendant was in the custody of the State Department of Correction and was under the supervision of a foreman for the State Highway Department, and there was no evidence that defendant was being hired out by a county, city or town under the provisions of this section. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970) (decided under prior law).

Fair Sentencing Act. — Although the principal provisions of the Fair Sentencing Act are codified in Chapter 15A, Article 81A of the General Statutes, the act resulted in revisions to other portions of the general statutes. See e.g., Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

For case discussing the historical background, policies, purposes, and implementation of the new Fair Sentencing Act, see State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983).

§ 14-256. Prison breach and escape from county or municipal confinement facilities or officers.

If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a Class 1 misdemeanor, except that the person is guilty of a Class H felony if:

(1) He has been convicted of a felony and has been committed to the facility pending transfer to the State prison system; or

(2) He is serving a sentence imposed upon conviction of a felony. (1 Edw. II, st. 2d; R.C., c. 34, s. 19; Code, s. 1021; Rev., s. 3657; 1909, c. 872; C.S., s. 4404; 1955, c. 279, s. 1; 1983, c. 455, s. 1; 1993, c. 539, ss. 159, 1217; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(s).)

Cross References. — As to penalty for escaping or assisting in an escape from the state prison, see G.S. 148-45.

Editor's Note. — The 1955 amendatory act provided in s. 4: "The provisions of this act shall be construed to be mandatory rather than directive."

CASE NOTES

Common Law. — The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. State v. Brown, 82 N.C. 585 (1880) (decided under prior law).

This section applies only to the act of breaking out of jail or county prison and not from mere personal restraint or imprisonment under law. State v. Brame, 71 N.C. App. 270, 321 S.E.2d 449 (1984).

Escape From Officer Not Included. — This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. State v. Brown, 82 N.C. 585 (1880).

A juvenile detention home or center is not a "prison, jail, or lockup" within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Deputy of Officer of "Such Jail." — Deputy's testimony he placed defendant in the Alamance County jail before and after defendant's hearing led to the conclusion that the deputy was an officer of "such jail," within the meaning of G.S. 14-256, and thus there was sufficient evidence to support defendant's conviction for felonious escape from local jail. State v. Farrar, 178 N.C. App. 231, 631 S.E.2d 48, 2006 N.C. App. LEXIS 1345 (2006).

Cost of Recapture May Not Be Recovered from Prisoner. — The State may not recover of a prisoner moneys expended by it to recapture him after escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of a penal system. State Hwy. & Pub. Works Comm'n v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939).

Applied in State v. Abernathy, 1 N.C. App. 625, 162 S.E.2d 114 (1968); State v. Whitt, 2 N.C. App. 601, 163 S.E.2d 531 (1968); State v. Netcliff, 116 N.C. App. 396, 448 S.E.2d 311 (1994).

Cited in Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927); State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1957).

§ 14-256.1. Escape from private correctional facility.

It is unlawful for any person convicted in a jurisdiction other than North Carolina but housed in a private correctional facility located in North Carolina to escape from that facility. Violation of this section is a Class H felony. (1998-212, s. 17.23(a).)

OPINIONS OF ATTORNEY GENERAL

Federal inmates who escape from private prisons are subject to North Carolina criminal penalties. See opinion of Attorney General to Senator Frank W. Ballance, Jr. and Representative E. David Redwine, 2001 N.C. AG LEXIS 5 (3/28/2001).

§ 14-257: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(12).

§ 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.

If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a Class H felony: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be punished as a Class F felon. (1873-4, c. 158; s. 12; Code, s. 3441; Rev., s. 3662; 1911, c. 11; C.S., s. 4406; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1218; 1994, Ex. Sess., c. 24, s. 14(c).)

G.S. 14-258.1 is set out twice. See notes.

Cross References. — For structured sentencing provisions effective October 1, 1994, see G.S. 15A-1340.10 et seq.

§ 14-258.1. (Effective until March 1, 2010) Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.

(a) If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, poison or poisonous substance, except upon the prescription of a physician, he shall be punished as a Class H felon; and if he be an officer or employee of any institution of the State, or of any local confinement facility, he shall be dismissed from his position or office.

(b) Any person who shall knowingly give or sell any alcoholic beverages to any inmate of any State mental or penal institution, or to any inmate of any local confinement facility, except for medical purposes as prescribed by a duly licensed physician and except for an ordained minister or rabbi who gives sacramental wine to an inmate as part of a religious service; or any person who shall combine, confederate, conspire, procure, or procure another or others to give or sell any alcoholic beverages to any inmate of any such State institution or local confinement facility, except for medical purposes as prescribed by a duly licensed physician and except for an ordained minister or rabbi who gives sacramental wine to an inmate as part of a religious service; or any person who shall bring into the buildings, grounds or other facilities of such institution any alcoholic beverages, except for medical purposes as prescribed by a duly licensed physician or sacramental wine brought by an ordained minister or rabbi for use as part of a religious service, shall be guilty of a Class 1 misdemeanor. If such person is an officer or employee of any institution of the State, such person shall be dismissed from office. (1961, c. 394, s. 2; 1969, c. 970, s. 6; 1971, c. 929; 1973, c. 1093; 1975, c. 804, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 412, s. 4; c. 747, s. 66; 1989, c. 106; 1993, c. 539, s. 160; 1994, Ex. Sess., c. 24, s. 14(c).)

Section Set Out Twice. — The section above is effective until March 1, 2010. For the section as amended March 1, 2010, see the following section, also numbered G.S. 14-258.1.

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

This section delineates two categories of offenses for which an individual might be found guilty: (1) The substantive offense of giving or selling or (2) a group of 13 related acts that depict involvement with, but fall short of the commission of, the substantive offense, namely, combining, confederating, conspiring, aiding, abetting, soliciting, urging, investigating (instigating?), counseling, advising, encouraging, attempting to procure, or procuring an

G.S. 14-258.1 is set out twice. See notes.

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other to commit the offense of giving or selling. State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

The second category of proscribed acts in this section does not create 13 separate criminal offenses, each punishable as a Class H felony. State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

Defendant's convictions of conspiring to provide drugs to an inmate in violation of subsection (a) of this section and of procuring drugs for an inmate in violation of the same statute constituted double jeopardy, and his conviction on the second count would be vacated. State v. Seagroves, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

Indictment Held Sufficient. — Indictment charging defendant with the completed offense of giving a controlled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense, so as to support his conviction of an attempt to give a controlled substance to an inmate. State v. Slade, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Evidence Held Sufficient in Controlled Substance Case. — The State's evidence showing that the defendant's boyfriend was an inmate at a local confinement facility, that defendant gave him a controlled substance while he was an inmate, and that defendant acted knowingly and intentionally was sufficient to sustain a conviction under this section. State v. Mitchell, 135 N.C. App. 617, 522 S.E.2d 94, 1999 N.C. App. LEXIS 1178 (1999).

Number of Conspiracy Counts Allowed. — Defendant could only be convicted of one count of conspiracy to provide an inmate with a controlled substance, even though four incidents occurred, where the offenses transpired over a short period of time, the participants in the conspiracies for which defendant was indicted remained the same, the indictments all averred the same objective, delivering controlled substances to the inmate coconspirator, and the state presented no evidence concerning the number of meetings which took place between defendant and the other participants. State v. Griffin, 112 N.C. App. 838, 437 S.E.2d 390 (1993).

Cited in State v. Hanson, 57 N.C. App. 595, 291 S.E.2d 912 (1982); State v. Kimbrell, 84 N.C. App. 59, 351 S.E.2d 801 (1987).

§ 14-258.1. (Effective March 1, 2010) Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities; furnishing tobacco products or mobile phones to inmates.

(a) If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, poison or poisonous substance, except upon the prescription of a physician, he shall be punished as a Class H felon; and if he be an officer or employee of any institution of the State, or of any local confinement facility, he shall be dismissed from his position or office.

(b) Any person who shall knowingly give or sell any alcoholic beverages to any inmate of any State mental or penal institution, or to any inmate of any local confinement facility, except for medical purposes as prescribed by a duly licensed physician and except for an ordained minister or rabbi who gives sacramental wine to an inmate as part of a religious service; or any person who shall combine, confederate, conspire, procure, or procure another or others to give or sell any alcoholic beverages to any inmate of any such State institution or local confinement facility, except for medical purposes as prescribed by a duly licensed physician and except for an ordained minister or rabbi who gives sacramental wine to an inmate as part of a religious service; or any person who shall bring into the buildings, grounds or other facilities of such institution any alcoholic beverages, except for medical purposes as prescribed by a duly licensed physician or sacramental wine brought by an ordained minister or rabbi for use as part of a religious service, shall be guilty of a Class 1 misdemeanor. If such person is an officer or employee of any institution of the State, such person shall be dismissed from office.

(c) Any person who knowingly gives or sells any tobacco product, as defined in G.S. 148-23.1, to an inmate in the custody of the Department of Correction and on the premises of a correctional facility or to an inmate in the custody of a local confinement facility, or any person who knowingly gives or sells any tobacco product to a person who is not an inmate for delivery to an inmate in the custody of the Department of Correction and on the premises of a correctional facility or to an inmate in the custody of a local confinement facility, other than for authorized religious purposes, is guilty of a Class 1 misdemeanor.

(d) Any person who knowingly gives or sells a mobile telephone or other wireless communications device, or a component of one of those devices, to an inmate in the custody of the Department of Correction or to an inmate in the custody of a local confinement facility, or any person who knowingly gives or sells any such device or component to a person who is not an inmate for delivery to an inmate, is guilty of a Class 1 misdemeanor.

(e) Any inmate of a local confinement facility who possesses any tobacco product, as defined in G.S. 148-23.1, other than for authorized religious purposes, or who possesses a mobile telephone or other wireless communications device or a component of one of those devices, is guilty of a Class 1 misdemeanor. (1961, c. 394, s. 2; 1969, c. 970, s. 6; 1971, c. 929; 1973, c. 1093; 1975, c. 804, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; c. 412, s. 4; c. 747, s. 66; 1989, c. 106; 1993, c. 539, s. 160; 1994, Ex. Sess., c. 24, s. 14(c); 2009-560, s. 3.)

Section Set Out Twice. — The section above is effective March 1, 2010. For the section as in effect until March 1, 2010, see the preceding section, also numbered G.S. 14-258.1.

Editor's Note. — Session Laws 2009-560, s. 4, provides: "The Department of Correction and local confinement facilities shall ensure that sufficient notice is provided to inmates, staff, and the public of the prohibitions and penalties established in this act through the posting of signs in prominent places at all State correctional facilities and local confinement facilities and any other measures the Department and local confinement facilities deem necessary to sufficiently publicize those prohibitions and penalties."

Effect of Amendments. — Session Laws 2009-560, s. 3, effective March 1, 2010, and applicable to acts committed on or after that date, added "furnishing tobacco products or mobile phones to inmates" at the end of the section heading; and added subsections (c) through (e).

§ 14-258.2. Possession of dangerous weapon in prison.

(a) Any person while in the custody of the Division of Prisons, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death, or who shall fabricate or create such a weapon from any source, shall be guilty of a Class H felony; and any person who commits any assault with such weapon and thereby inflicts bodily injury or by the use of said weapon effects an escape or rescue from imprisonment shall be punished as a Class F felon.

(b) A person is guilty of a Class H felony if he assists a prisoner in the custody of the Division of Prisons or of any local confinement facility as defined in G.S. 153A-217 in escaping or attempting to escape and:

(1) In the perpetration of the escape or attempted escape he commits an assault with a deadly weapon and inflicts bodily injury; or

(2) By the use of a deadly weapon he effects the escape of the prisoner. (1975, c. 316, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 455, s. 2; 1993, c. 539, s. 1219; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Phillips, 67 N.C. App. 757, 314 S.E.2d 6 (1984); State v. Bishop, 119 N.C. App. 695, 459 S.E.2d 830; State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

§ 14-258.3. Taking of hostage, etc., by prisoner.

Any prisoner in the custody of the Department of Correction, including persons in the custody of the Department of Correction pending trial or appellate review or for presentence diagnostic evaluation, or any prisoner in the custody of any local confinement facility (as defined in G.S. 153A-217), or any person in the custody of any local confinement facility (as defined in G.S. 153A-217) pending trial or appellate review or for any lawful purpose, who by threats, coercion, intimidation or physical force takes, holds, or carries away any person, as hostage or otherwise, shall be punished as a Class F felon. The provisions of this section apply to: (i) violations committed by any prisoner in the custody of the Department of Correction, whether inside or outside of the facilities of the North Carolina Department of Correction; (ii) violations committed by any prisoner or by any other person lawfully under the custody of any local confinement facility (as defined in G.S. 153A-217), whether inside or outside the local confinement facilities (as defined in G.S. 153A-217). (1975, c. 315; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1220; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

§ 14-258.4. Malicious conduct by prisoner.

(a) Any person in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1), including persons pending trial, appellate review, or presentence diagnostic evaluation, who knowingly and willfully throws, emits, or causes to be used as a projectile, bodily fluids or excrement at a person who is an employee of the State or a local government while the employee is in the performance of the employee's duties is guilty of a Class F felony. The provisions of this section apply to violations committed inside or outside of the prison, jail, detention center, or other confinement facility.

(b) Reserved. (2001-360, s. 1.)

Editor's Note. — As enacted, this section contained a subsection (a) but no (b). This section has been set out in the form above at the direction of the Revisor of Statutes.

CASE NOTES

"Free to leave test" is to be applied to determine whether an individual was "in custody" under G.S. 14-258.4 at the time of any alleged unlawful conduct. State v. Ellis, 168 N.C. App. 651, 608 S.E.2d 803, 2005 N.C. App. LEXIS 449 (2005).

In Custody. — Since no conclusion could be reached by reading the indictment other than that defendant was in custody at the time he allegedly committed malicious conduct by a prisoner, the trial court had jurisdiction over his case, as the State adequately alleged the offense such that defendant was notified of the offense against which he was called to defend. State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204, 2005 N.C. App. LEXIS 2610 (2005), cert. denied, — N.C. —, 630 S.E.2d 188 (2006).

Evidence. — In a case involving felony malicious conduct by a prisoner, evidence regarding the treatment required for spitting when it went into an open wound, eyes, or mouth, even if erroneously admitted, did not constitute a prejudicial error. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Even if defendant had not waived his claim of error based on the trial court's admission of officers' testimony concerning his intent to spit on an officer in his trial for malicious conduct by prisoner, G.S. 14-258.4, defendant failed to prove that, had the alleged error by the trial court not been committed, a reasonable possibility existed that a different result would have been reached at trial; the state's evidence at trial was sufficiently strong to preclude any reasonable possibility that the jury would have found differently if the trial court excluded the challenged testimony. State v. Gutierrez, 185 N.C. App. 297, 648 S.E.2d 239, 2007 N.C. App. LEXIS 1693 (2007).

Aggravating Sentencing Factor. — Trial court did not violate G.S. 15A-1340.16(d) when it found as an aggravating sentencing factor that defendant intended to hinder the lawful exercise of a governmental function when he committed the crime of malicious conduct by a prisoner, G.S. 14-258.4. State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902, 2003 N.C. App. LEXIS 2049 (2003).

Lesser Included Offense. — Where the State offered evidence at trial establishing that defendant, a prisoner at a facility operated by the North Carolina Department of Correction, deliberately spat on a correctional officer, an employee of the State, and that at the time of the incident, the officer was performing her duties as a correctional officer, the State presented evidence as to each essential element of the offense of malicious conduct by a prisoner; since defendant presented no evidence to negate the State's evidence, the trial court was under no obligation to instruct the jury on any alleged lesser-included offense, as requested by defendant. State v. Smith, 163 N.C. App. 771, 594 S.E.2d 430, 2004 N.C. App. LEXIS 582 (2004).

Misdemeanor assault on a government official is not a lesser included offense of felony malicious conduct by a prisoner; therefore, defendant was not entitled to such a jury instruction in a case where defendant spat in an officer's face. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Substantial Evidence Existed to Overcome Motion to Dismiss. — Trial court properly denied defendant's motion to dismiss the charge of malicious conduct by a prisoner because (1) substantial evidence existed to show that defendant was in custody of a law enforcement officer when he smeared his feces on the officer, and (2) the officer had chased defendant for 40 minutes, had cornered him in a canal, and approached him with the handcuffs in full view. State v. Ellis, 168 N.C. App. 651, 608 S.E.2d 803, 2005 N.C. App. LEXIS 449 (2005).

Willful and Knowing Conduct. — In a case involving felony malicious conduct by a prisoner, a motion to dismiss was properly denied because a jury could have inferred that defendant's act of spitting in an officer's face was knowing and willful; despite evidence that defendant was in a stupor, there was ample evidence that defendant had motor skill control because defendant expressed dissatisfaction with the officer, ran down the street, and collected saliva in her mouth prior to spitting. State v. Crouse, 169 N.C. App. 382, 610 S.E.2d 454, 2005 N.C. App. LEXIS 691 (2005).

Cited in State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274, 2005 N.C. App. LEXIS 2491 (2005).

§ 14-259. Harboring or aiding certain persons.

It shall be unlawful for any person knowing or having reasonable cause to believe, that any person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, or that such person is a fugitive from justice or is otherwise the subject of an outstanding warrant for arrest or order of arrest, to conceal, hide, harbor, feed, clothe or otherwise aid and comfort in any manner to any such person. Fugitive from justice shall, for the purpose of this provision, mean any person who has fled from any other jurisdiction to avoid prosecution for a crime.

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished as a Class I felon; and shall be guilty of a Class 1 misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such person. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said person. (1939, c. 72; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 564, ss. 1-3; 1993, c. 539, s. 161; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For comment on this enactment, see 17 N.C.L. Rev. 348 (1939).

CASE NOTES

Indictment Fatally Defective. — An indictment charging that the defendant unlawfully, willfully, and feloniously harbored an escapee who was serving a sentence of imprisonment when he escaped, is fatally defective in omitting the words "knowing or having reasonable cause to believe that said person was an escapee." State v. Kirkman, 272 N.C. 143, 157 S.E.2d 716 (1976).

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

§ 14-260: Recodified as § 162-55 by Session Laws 1983, c. 631, s. 1.

§ 14-261: Recodified as § 162-56 by Session Laws 1983, c. 631, s. 2.

§ 14-262: Repealed by Session Laws 1975, c. 402.

§ 14-263: Repealed by Session Laws 1979, c. 760, s. 4.

§ 14-264: Recodified as § 162-57 by Session Laws 1983, c. 631, s. 3.

§ 14-265: Repealed by Session Laws 1977, c. 711, s. 33.

Article 34.

Custodial Institutions.

§ 14-266. Persuading inmates to escape.

It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any State institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally committed or admitted under suspended sentence to said institution by juvenile, recorder's, superior or any other court of competent jurisdiction. (1935, c. 307, s. 1; 1937, c. 189, s. 1.)

§ 14-267. Harboring fugitives.

It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court or are admitted under suspended sentence. (1935, c. 307, s. 2; 1937, c. 189, s. 2.)

§ 14-268. Violation made misdemeanor.

Any person violating the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1935, c. 307, s. 3; 1993, c. 539, s. 162; 1994, Ex. Sess., c. 24, s. 14(c).)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

Article 35.

Offenses Against the Public Peace.

§ 14-269. Carrying concealed weapons.

(a) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises.

(a1) It shall be unlawful for any person willfully and intentionally to carry concealed about his person any pistol or gun except in the following circumstances:

(1) The person is on the person's own premises.

(2) The deadly weapon is a handgun, and the person has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24.

(3) The deadly weapon is a handgun and the person is a military permittee as defined under G.S. 14-415.10(2a) who provides to the law enforcement officer proof of deployment as required under G.S. 14-415.11(a).

(b) This prohibition shall not apply to the following persons:

(1) Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms and weapons;

(2) Civil and law enforcement officers of the United States;
(3) Officers and soldiers of the militia and the National Guard when called into actual service;
(4) Officers of the State, or of any county, city, town, or company police agency charged with the execution of the laws of the State, when acting in the discharge of their official duties;
(5) Sworn law-enforcement officers, when off-duty, provided that an officer does not carry a concealed weapon while consuming alcohol or an unlawful controlled substance or while alcohol or an unlawful controlled substance remains in the officer's body.

(b1) It is a defense to a prosecution under this section that:
(1) The weapon was not a firearm;
(2) The defendant was engaged in, or on the way to or from, an activity in which he legitimately used the weapon;
(3) The defendant possessed the weapon for that legitimate use; and
(4) The defendant did not use or attempt to use the weapon for an illegal purpose.

The burden of proving this defense is on the defendant.

(b2) It is a defense to a prosecution under this section that:
(1) The deadly weapon is a handgun;
(2) The defendant is a military permittee as defined under G.S. 14-415.10(2a); and
(3) The defendant provides to the court proof of deployment as defined under G.S. 14-415.10(3a).

(c) Any person violating the provisions of subsection (a) of this section shall be guilty of a Class 2 misdemeanor. Any person violating the provisions of subsection (a1) of this section shall be guilty of a Class 2 misdemeanor for the first offense. A second or subsequent offense is punishable as a Class I felony.

(d) This section does not apply to an ordinary pocket knife carried in a closed position. As used in this section, "ordinary pocket knife" means a small knife, designed for carrying in a pocket or purse, that has its cutting edge and point entirely enclosed by its handle, and that may not be opened by a throwing, explosive, or spring action. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C.S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616; 1981, c. 412, s. 4; c. 747, s. 66; 1983, c. 86; 1985, c. 432, ss. 1-3; 1993, c. 539, s. 163; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 398, s. 2; 1997-238, s. 1; 2003-199, s. 2; 2005-232, ss. 4, 5; 2005-337, s. 1; 2006-259, s. 5(a); 2009-281, s. 1.)

Local Modification. — Caswell: 1941, c. 90; Halifax: 1943, c. 34.

Cross References. — As to counties still governed by a former subdivision (b) of this section, which was eliminated by the 1965 amendment, see note to G.S. 14-269.1. As to going armed on Sunday, see G.S. 103-2.

Effect of Amendments. — Session Laws 2009-281, s. 1, effective July 10, 2009, substituted "National Guard" for "national guard" in subdivision (b)(3).

Legal Periodicals. — For note on control of firearms, see 35 N.C.L. Rev. 149 (1956).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Persons Excepted.
IV. Illustrative Cases.
V. Practice and Procedure.

I. GENERAL CONSIDERATION.

Purpose. — The purpose of this section is to reduce the likelihood that a concealed weapon may be resorted to in a fit of anger. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Applied in State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); United States v. General, 435 F. Supp. 2d 502, 2006 U.S. Dist. LEXIS 44918 (E.D.N.C. 2006).

Cited in State v. Divine, 98 N.C. 778, 4 S.E. 477 (1887); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905); State v. Sauls, 199 N.C. 193, 154 S.E. 28 (1930); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Burgess, 2 N.C. App. 677, 163 S.E.2d 662 (1968); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973); State v. Grainger, 60 N.C. App. 188, 298 S.E.2d 203 (1982); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Hudson, 103 N.C. App. 708, 407 S.E.2d 583 (1991); State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992); State v. McGirt, 122 N.C. App. 237, 468 S.E.2d 833 (1996); In re B.N.S., 182 N.C. App. 155, 641 S.E.2d 411, 2007 N.C. App. LEXIS 471 (2007); State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

II. ELEMENTS OF THE OFFENSE.

Elements Generally. — In order to be guilty of violating this section the accused must be off his own premises, carrying a deadly weapon, and the weapon must be concealed about his person. State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953).

In defendant's prosecution for carrying a concealed weapon, the admission of testimony about the effect of hollow point bullets, which were found in the weapons seized from defendant and defendant's associate, was erroneous because such testimony was irrelevant under G.S. 8C-1-401 as to whether defendant possessed a concealed weapon under G.S. 14-269(a1), but the error was harmless because the evidence of defendant's guilt was overwhelming, so defendant could not show that defendant was prejudiced. State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275, 2007 N.C. App. LEXIS 1739 (2007).

Concealment Is Gist of Offense. — The mischief provided against is the practice of wearing weapons concealed about the person to be used upon any emergency. State v. Broadnax, 91 N.C. 543 (1884).

Concealment of the weapon must be shown. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

If the weapon was carried openly, the defendant could not be guilty under this section. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

And Is Question for Jury. — Whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897). See State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895).

Prima Facie Evidence of Concealment. — The fact that defendant had a pistol about his person, off of his own premises, was prima facie evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. State v. McManus, 89 N.C. 555 (1883); State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895); State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897); State v. Hamby, 126 N.C. 1066, 35 S.E. 614 (1900).

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession prima facie evidence of the concealment thereof. State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Affirmative Showing Required in Rebuttal. — To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. State v. Gilbert, 87 N.C. 527 (1882); State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

Intent Required. — The intent to carry, not the intent to use, determines the guilt. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897).

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that it may not be seen. State v. Gilbert, 87 N.C. 527 (1882).

Defense of No Intent to Conceal. — The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

When Intent Is Immaterial. — But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed, intent is immaterial. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

"About His Person". — The language is not "concealed on his person," but "concealed about his person"; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. State v. McManus, 89 N.C. 555 (1883).

To be criminal, the weapon must be concealed, not necessarily on the person of the accused, but in such position as gives him ready access to it. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Evidence was insufficient to support defendant's conviction for carrying a concealed weapon in violation of G.S. 14-269(a) as the State failed to present evidence that the backpack in which the weapon was concealed was within arms reach of the driver's seat, where defendant was located, and thus did not prove that the weapon was "about his person." State v. Soles, 191 N.C. App. 241, 662 S.E.2d 564, 2008 N.C. App. LEXIS 1194 (2008).

Carrying on Own Premises. — That defendant was not on his own premises when discovered carrying a concealed weapon is an element of this section. State v. Stanfield, 19 N.C. App. 622, 199 S.E.2d 741 (1973), appeal dismissed, 284 N.C. 622, 201 S.E.2d 692 (1974).

The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. State v. Perry, 120 N.C. 580, 26 S.E. 915, 26 S.E. 1008 (1897).

Time Not Essence of Offense. — Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N.C. 765, 117 S.E. 803 (1923).

Apprehension of Assault No Defense. — Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. State v. Woodlief, 172 N.C. 885, 90 S.E. 137 (1916).

Nor Is Acting upon Advice of Attorney. — A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

Mens Rea. — Lack of a mens rea element in G.S. 14-269.2 did not offend the equal protection requirements of N.C. Const. art. I, § 19, or U.S. Const. amend. XIV, § 1, because the distinction between those exempt from prosecution under G.S. 14-269.2(g) and G.S. 14-269(b) and those subject to prosecution, despite having no criminal intent, did not violate equal protection requirements as the statutory exemptions bore a rational relationship to a legitimate governmental interest, as they struck an appropriate balance between the safety of children and the furtherance of education. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

III. PERSONS EXCEPTED.

Night Watchman. — A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. State v. Anderson, 129 N.C. 521, 39 S.E. 824 (1901).

Officials of Transportation Companies. — The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. State v. Perry, 120 N.C. 580, 26 S.E. 915, 26 S.E. 1008 (1897).

United States Mail Carrier. — A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. State v. Boone, 132 N.C. 1107, 44 S.E. 595 (1903).

Bail Bondsman. — When defendant was prosecuted under G.S. 14-269.2, he was not exempt from felony liability under G.S. 14-269.2(g)(1a) or G.S. 14-269(b)(2), which exempted United States civil and law enforcement officers and state, county, city or town officers, because, as a bail bondsman, he was not an officer of the state, but was a surety regulated by the Commissioner of Insurance, under G.S. 58-71-5, and his statutory right of arrest, under G.S. 58-71-30, did not create law enforcement officer status but codified the common law governing the surety-principal relationship between bondsmen and the criminally accused. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

IV. ILLUSTRATIVE CASES.

"Ordinary Pocket Knife." — Knife about four and one-half inches in overall length which, when folded, was clearly designed for carrying in a pocket or purse, was an "ordinary pocketknife" as defined by this section. In re Dale B., 96 N.C. App. 375, 385 S.E.2d 521 (1989).

Butcher Knife. — This section making it indictable for one to carry concealed about his person any pistol, bowie knife, razor or other deadly weapon of like kind, embraces a butcher's knife. State v. Erwin, 91 N.C. 545 (1884).

Revolver in Bag in Back Seat. — Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the backseat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor — carrying a concealed weapon in violation of this section — in their presence. State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973), appeal dismissed, 283 N.C. 587, 196 S.E.2d 811 (1973).

Gun Under Driver's Seat. — Evidence of defendant's guilty knowledge and intent was quite plain, where he was the driver of a car involved in a collision, witnesses to accident, who prevented his escape, saw him reach under the driver's seat as though placing something there, and that is where the patrolman found a gun. State v. Jordan, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Pistol in Hip Pocket with Coat on Shoulder. — Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. State v. Mangum, 187 N.C. 477, 121 S.E. 765 (1924).

Carrying Pistol to Deliver to Another. — One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. State v. Broadnax, 91 N.C. 543 (1884).

Sitting on Firearm. — Where officer approached the defendant's car and, using his flashlight, looked into the interior, viewed the empty holster next to the defendant, asked the defendant where his gun was and was told by the defendant that the defendant was sitting on the gun, the officer then had probable cause to arrest the defendant for carrying a concealed weapon. State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994).

Persons Not "On Premises". — A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. State v. Bridgers, 169 N.C. 309, 84 S.E. 689 (1915).

A person in his own automobile on a public highway is not on his own premises within the meaning of this section. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

A mere servant or hireling who carries concealed weapons on the premises of his employer is indictable. State v. Deyton, 119 N.C. 880, 26 S.E. 159 (1896).

V. PRACTICE AND PROCEDURE.

Warrant Must State That Defendant Carried Weapon Off His Own Premises. — In prosecution for carrying a concealed weapon, the warrant is held fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried concealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. State v. Bradley, 210 N.C. 290, 186 S.E. 240 (1936).

Information Held Sufficient. — An information charging that defendant, on a specified date, unlawfully and willfully carried a concealed weapon, to wit, a pistol, about his person, the defendant not being at the time on his own premises, is an accurate and sufficient charge of violating this section. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

Indictment Facially Valid. — Trial court did not commit jurisdictional error by entering judgment against defendant for the offense of carrying a concealed weapon after the jury was instructed that it could find defendant guilty only upon a finding that he intentionally carried and concealed about his person one or more knives, while the indictment alleged only that defendant unlawfully carried a concealed weapon, a metallic set of knuckles, because the mention of knives was inadvertent and did not affect the State's burden of proof or constitute a substantial change or variance from the indictment; the indictment charging carrying a concealed weapon pursuant to G.S. 14-269(a) was valid on its face, and the additional language regarding metallic knuckles was mere surplusage and not an essential element of the crime. State v. Bollinger, — N.C. App. —, 665 S.E.2d 136, 2008 N.C. App. LEXIS 1518 (2008).

Former Conviction of Assault. — A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. State v. Robinson, 116 N.C. 1046, 21 S.E. 701 (1895).

Punishment. — When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

OPINIONS OF ATTORNEY GENERAL

Possession of an Unconcealed Pistol in an Automobile Not Violation of Statute. — See opinion of Attorney General to Honorable Albert Jackson, Sheriff of Henderson County, 41 N.C.A.G. 207 (1971).

§ 14-269.1. Confiscation and disposition of deadly weapons.

Upon conviction of any person for violation of G.S. 14-269, G.S. 14-269.7, or any other offense involving the use of a deadly weapon of a type referred to in G.S. 14-269, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered confiscated and disposed of by the presiding judge at the trial in one of the following ways in the discretion of the presiding judge.

(1) By ordering the weapon returned to its rightful owner, but only when such owner is a person other than the defendant and has filed a petition for the recovery of such weapon with the presiding judge at the time of the defendant's conviction, and upon a finding by the presiding judge that petitioner is entitled to possession of same and that he was unlawfully deprived of the same without his consent.

(2), (3) Repealed by Session Laws 1994, Ex. Sess., c. 16, s. 2.

(4) By ordering such weapon turned over to the sheriff of the county in which the trial is held or his duly authorized agent to be destroyed. The sheriff shall maintain a record of the destruction thereof.

(4a) Repealed by Session Laws 2005-287, s. 3, effective August 22, 2005.

(4b) By ordering the weapon turned over to a law enforcement agency in the county of trial for (i) the official use of the agency or (ii) sale, trade, or exchange by the agency to a federally licensed firearm dealer in accordance with all applicable State and federal firearm laws. The court may order a disposition of the firearm pursuant to this subdivision only upon the written request of the head or chief of the law enforcement agency and only if the firearm has a legible, unique identification number. If the law enforcement agency sells the firearm, then the proceeds of the sale shall be remitted to the appropriate county finance officer as provided by G.S. 115C-452 to be used to maintain free public schools. The receiving law enforcement agency shall maintain a record and inventory of all firearms received pursuant to this subdivision.

(5) By ordering such weapon turned over to the North Carolina State Bureau of Investigation's Crime Laboratory Weapons Reference Library for official use by that agency. The State Bureau of Investigation shall maintain a record and inventory of all such weapons received.

(6) By ordering such weapons turned over to the North Carolina Justice Academy for official use by that agency. The North Carolina Justice Academy shall maintain a record and inventory of all such weapons received. (1965, c. 954, s. 2; 1967, c. 24, s. 3; 1983, c. 517; 1989, c. 216; 1993, c. 259, s. 2; 1994, Ex. Sess., c. 16, s. 2; c. 22, s. 23; 1997-356, s. 1; 2003-378, s. 5; 2005-287, s. 3.)

Certain Counties Governed by Former § 14-269(b). — Harnett, Pamlico, Perquimans, Scotland and Warren Counties were excepted from the provisions of this section by Session Laws 1965, c. 954, s. 2 1/2, as amended by Session Laws 1969, c. 301, Session Laws 1973, c. 1399, Session Laws 1981, c. 279, and Session Laws 1987 (Reg. Sess., 1988), c. 895, s. 1. Session Laws 1969, c. 1117, amended the 1965 act by adding to s. 2 1/2 the following sentence: "The provisions of G.S. 14-269(b) prior to amendment by this Act shall be effective as to these counties." Former G.S. 14-269(b) provided:

"(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the sheriff of the county in which the trial is held by the judge presiding at the trial. Under the direction of said sheriff the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go the general fund of the county in which the weapon or weapons were confiscated and sold. The sheriff shall keep a record and inventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant."

In former G.S. 14-269(b) as set out above, the word "sheriff" was substituted for the words "clerk of the superior court" in three places by Session Laws 1959, c. 1073, the intent of the amendatory act being to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in disposing of confiscated weapons. Of the counties presently governed by former G.S. 14-269(b), the following are excepted from the application of the 1959 amendment: Perquimans, and Warren. (Harnett and Pamlico, originally among those excepted, were brought under the 1959 act by Session Laws 1967, cc. 470 and 6, respectively.) As to the counties excepted from the 1959 act, the word "sheriff" in former G.S. 14-469(b) as set out above should be read "clerk of the superior court."

Former G.S. 14-269(b) was also modified, as to one of the counties in which it remains applicable, as follows: Scotland: 1955, c. 569.

Session Laws 1987 (Reg. Sess., 1988), c. 895 deleted Rockingham from the list of counties in Session Laws 1965, c. 954, s. 2 1/2 governed by former G.S. 14-269(b), and repealed Session Laws 1957, c. 939, which had modified G.S. 14-269(b) as to Rockingham County.

CASE NOTES

Applied in In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982).

Cited in State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913 (1984).

§ 14-269.2. Weapons on campus or other educational property.

(a) The following definitions apply to this section:

(1) Educational property. — Any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any board of education or school board of trustees, or directors for the administration of any school.

(1a) Employee. — A person employed by a local board of education or school whether the person is an adult or a minor.

(1b) School. — A public or private school, community college, college, or university.

(2) Student. — A person enrolled in a school or a person who has been suspended or expelled within the last five years from a school, whether the person is an adult or a minor.

(3) Switchblade knife. — A knife containing a blade that opens automatically by the release of a spring or a similar contrivance.

(4) Weapon. — Any device enumerated in subsection (b), (b1), or (d) of this section.

(b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. Unless the conduct is covered under some other provision of law providing greater punishment, any person who willfully discharges a firearm of any kind on educational property is guilty of a Class F felony. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(b1) It shall be a Class G felony for any person to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1, on educational property or to a curricular or extracurricular activity sponsored by a school. This subsection shall not apply to fireworks.

(c) It shall be a Class I felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

(c1) It shall be a Class G felony for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any dynamite cartridge, bomb, grenade, mine, or powerful explosive as defined in G.S. 14-284.1 on educational property. This subsection shall not apply to fireworks.

(d) It shall be a Class 1 misdemeanor for any person to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(e) It shall be a Class 1 misdemeanor for any person to cause, encourage, or aid a minor who is less than 18 years old to possess or carry, whether openly or concealed, any BB gun, stun gun, air rifle, air pistol, bowie knife, dirk, dagger, slungshot, leaded cane, switchblade knife, blackjack, metallic knuckles, razors and razor blades (except solely for personal shaving), firework, or any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for preparation of food, instruction, and maintenance, on educational property.

(f) Notwithstanding subsection (b) of this section it shall be a Class 1 misdemeanor rather than a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind, on educational property or to a curricular or extracurricular activity sponsored by a school if:

(1) The person is not a student attending school on the educational property or an employee employed by the school working on the educational property; and

(1a) The person is not a student attending a curricular or extracurricular activity sponsored by the school at which the student is enrolled or an employee attending a curricular or extracurricular activity sponsored by the school at which the employee is employed; and

(2) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.

(3) The firearm is not loaded, is in a motor vehicle, and is in a locked container or a locked firearm rack.

(4) Repealed by Session Laws 1999-211, s. 1, effective December 1, 1999, and applicable to offenses committed on or after that date.

(g) This section shall not apply to any of the following:

(1) A weapon used solely for educational or school-sanctioned ceremonial purposes, or used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority.

(1a) A person exempted by the provisions of G.S. 14-269(b).

(2) Firefighters, emergency service personnel, and North Carolina Forest Service personnel, and any private police employed by a school, when acting in the discharge of their official duties.

(3) Home schools as defined in G.S. 115C-563(a).

(4) Weapons used for hunting purposes on the Howell Woods Nature Center property in Johnston County owned by Johnston Community College when used with the written permission of Johnston Community College or for hunting purposes on other educational property when used with the written permission of the governing body of the school that controls the educational property.

(5) A person registered under Chapter 74C of the General Statutes as an armed armored car service guard or an armed courier service guard when acting in the discharge of the guard's duties and with the permission of the college or university.

(6) A person registered under Chapter 74C of the General Statutes as an armed security guard while on the premises of a hospital or health care facility located on educational property when acting in the discharge of the guard's duties with the permission of the college or university.

(h) No person shall be guilty of a criminal violation of this section with regard to the possession or carrying of a weapon so long as both of the following apply:

(1) The person comes into possession of a weapon by taking or receiving the weapon from another person or by finding the weapon.

(2) The person delivers the weapon, directly or indirectly, as soon as practical to law enforcement authorities. (1971, c. 241, ss. 1, 2; c. 1224; 1991, c. 622, s. 1; 1993, c. 539, s. 164; c. 558, s. 1; 1994, Ex. Sess., c. 14, s. 4(a), (b); 1995, c. 49, s. 1; 1997-238, s. 2; 1999-211, s. 1; 1999-257, s. 3, 3.1; 2003-217, s. 1; 2004-198, ss. 1, 2, 3; 2006-264, s. 31; 2007-427, s. 6; 2007-511, s. 12.)

Legal Periodicals. — For note, "Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection From Peer Abuse in Public Schools," see 1993 Duke L.J. 588.

For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Purpose. — The purpose of subsection (b) is to deter students and others from bringing any type of gun onto school grounds. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Mens rea was not an element of G.S. 14-269.2, prohibiting the possession of a weapon on educational property, nor was the insertion of such an element required, because the statute was enacted for the purpose of deterring students and others from bringing any type of gun onto school grounds because of the increased necessity for safety in the schools. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Public policy favors that subsection (b) be treated differently from the other firearm statutes. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Construction with Other Sections. — Section 14-87(a) is distinguishable because the only way a person's life would be threatened is with the use of an operable gun; the armed robbery statute necessarily implies that the gun be operable. To the contrary, subsection (b) states it is illegal to carry any gun on school property. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

The focus of G.S. 14-288.8 is weapons of mass death and destruction which is considerably different from the concept of any gun used in subsection (b). In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Section 14-415.1(a) encompasses a narrow range of guns, while subsection (b) of this section prohibits any gun, excluding only a BB gun, stun gun, air rifle, or air pistol. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

When defendant was prosecuted under G.S. 14-269.2, he was not exempt from felony liability under G.S. 14-269.2(g)(1a) or G.S. 14-269(b)(2), which exempted United States civil and law enforcement officers and state, county, city or town officers, because, as a bail bondsman, he was not an officer of the state, but was a surety regulated by the Commissioner of Insurance, under G.S. 58-71-5, and his statutory right of arrest, under G.S. 58-71-30, did not create a law enforcement officer but codified the common law governing the surety-principal relationship between bondsmen and the criminally accused. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Evidence Was Sufficient. — The State presented sufficient evidence for a reasonable mind to conclude that the juvenile knowingly possessed a pellet gun on educational property. In re Murray, 136 N.C. App. 648, 525 S.E.2d

496, 2000 N.C. App. LEXIS 113 (2000).

Statement by Defendant During Custodial Restraint Held Inadmissible. — Adjudication of delinquency based on the alleged possession of a weapon on school property was vacated after the trial court erred in admitting defendant's statement that defendant possessed a knife on school property; a reasonable person in defendant's place would have believed that he or she was restrained to a degree associated with a formal arrest and the statement was the only evidence introduced supporting the charge against defendant. In re W.R., 179 N.C. App. 642, 634 S.E.2d 923, 2006 N.C. App. LEXIS 2028 (2006).

A gun does not have to be operable in order for a student to be adjudicated delinquent under the statute prohibiting the possession of "any gun" on educational property. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

The juvenile's motion to suppress the search was properly denied where the school principal had reasonable grounds for suspicion about the contents of the book bag, and the search was conducted in a reasonable manner under the circumstances. In re Murray, 136 N.C. App. 648, 525 S.E.2d 496, 2000 N.C. App. LEXIS 113 (2000).

Educational Property. — Where a school principal testified that a parking lot in which the principal located defendant juvenile and her cohorts was school property, the evidence was sufficient to convict defendant of possession of a weapon, a knife, on educational property in violation of G.S. 14-269.2(d), regardless of the fact that a city bus made stops in that parking lot. In re D.D., 146 N.C. App. 309, 554 S.E.2d 346, 2001 N.C. App. LEXIS 942 (2001), cert. denied, 354 N.C. 572, 558 S.E.2d 867 (2001).

Juvenile's motion to dismiss a charge of possessing a weapon on school property, in violation of G.S. 14-269.2(d), was properly denied where he had possessed a 2.5 inch pocketknife while on school property and although the blade was closed, the operability of the weapon was irrelevant given the statute's purpose. In re B.N.S., 182 N.C. App. 155, 641 S.E.2d 411, 2007 N.C. App. LEXIS 471 (2007).

Mens Rea. — Lack of a mens rea element in G.S. 14-269.2 did not offend the equal protection requirements of N.C. Const. art. I, § 19, or U.S. Const. amend. XIV, § 1, because the distinction between those exempt from prosecution under G.S. 14-269.2(g) and those subject to prosecution, despite having no criminal intent, did not violate equal protection requirements as the statutory exemptions bore a rational relationship to a legitimate governmental interest, as they struck an appropriate balance between the safety of children and the furtherance of education. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Jury Instructions. — When defendant was prosecuted under G.S. 14-269.2, it was not error for the trial court to decline to instruct the jury on willfulness, despite the fact that defendant was indicted for willfully, feloniously, and unlawfully possessing a weapon on educational property, because the use of the word "willfully" in the indictment did not indicate the level of mens rea to be proven but was used to characterize the offense as a felony and to put defendant on notice to defend against a felony charge. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Defenses. — When defendant was prosecuted under G.S. 14-269.2, the trial court was not required, under G.S. 1-181 and G.S. 1A-1, N.C. R. Civ. P. 51(b), to give defendant's proffered special instruction on the defense of necessity, and did not err in instructing the jury that necessity was not a defense, as several alternatives were available to defendant, who was pursuing an armed fugitive into an elementary school, which did not require him to violate G.S. 14-269.2. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

Applied in In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977); In re Greene, 306 N.C. 376, 297 S.E.2d 379 (1982).

Cited in State v. Jackson, 353 N.C. 495, 546 S.E.2d 570, 2001 N.C. LEXIS 529 (2001); In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913, 2007 N.C. App. LEXIS 1969 (2007); State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

OPINIONS OF ATTORNEY GENERAL

Faculty Member May Have Gun in Own Home Located on Campus. — See opinion of Attorney General to Mr. Pritchard C. Smith, 41 N.C.A.G. 466 (1971).

§ 14-269.3. Carrying weapons into assemblies and establishments where alcoholic beverages are sold and consumed.

(a) It shall be unlawful for any person to carry any gun, rifle, or pistol into any assembly where a fee has been charged for admission thereto, or into any establishment in which alcoholic beverages are sold and consumed. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor.

(b) This section shall not apply to the following:

(1) A person exempted from the provisions of G.S. 14-269;

(2) The owner or lessee of the premises or business establishment;

(3) A person participating in the event, if he is carrying a gun, rifle, or pistol with the permission of the owner, lessee, or person or organization sponsoring the event; and

(4) A person registered or hired as a security guard by the owner, lessee, or person or organization sponsoring the event. (1977, c. 1016, s. 1; 1981, c. 412, s. 4; c. 747, s. 66; 1993, c. 539, s. 165; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-269.4. Weapons on State property and in courthouses.

It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings, and in any building housing any court of the General Court of Justice. If a court is housed in a building containing nonpublic uses in addition to the court, then this prohibition shall apply only to that portion of the building used for court purposes while the building is being used for court purposes.

This section shall not apply to:

(1) Repealed by S.L. 1997-238, s. 3, effective June 27, 1997,

(1a) A person exempted by the provisions of G.S. 14-269(b),

(2) through (4) Repealed by S.L. 1997-238, s. 3, effective June 27, 1997,

(4a) Any person in a building housing a court of the General Court of Justice in possession of a weapon for evidentiary purposes, to deliver it to a law-enforcement agency, or for purposes of registration,

(4b) Any district court judge or superior court judge who carries or possesses a concealed handgun in a building housing a court of the General Court of Justice if the judge is in the building to discharge his or her official duties and the judge has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24,

(4c) Firearms in a courthouse, carried by detention officers employed by and authorized by the sheriff to carry firearms,

(4d) Any magistrate who carries or possesses a concealed handgun in any portion of a building housing a court of the General Court of Justice other than a courtroom itself unless the magistrate is presiding in that courtroom, if the magistrate (i) is in the building to discharge the magistrate's official duties, (ii) has a concealed handgun permit issued in accordance with Article 54B of this Chapter or considered valid under G.S. 14-415.24, (iii) has successfully completed a one-time weapons retention training substantially similar to that provided to certified law enforcement officers in North Carolina, and (iv) secures the weapon in a locked compartment when the weapon is not on the magistrate's person,

(5) State-owned rest areas, rest stops along the highways, and State-owned hunting and fishing reservations.

Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1981, c. 646; 1987, c. 820, s. 1; 1993, c. 539, s. 166; 1994, Ex. Sess., c. 24, s. 14(c); 1997-238, s. 3; 2007-412, s. 1; 2007-474, s. 1; 2009-513, s. 1.)

Editor's Note. — Session Laws 2007-412, s. 1, and Session Laws 2007-474, s. 1, each added new subdivisions designated as (4b). The subdivision added by Session Laws 2007-474, s. 1, has been designated herein as subdivision (4c) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2009-513, s. 1, effective August 26, 2009, added subdivision (4d).

§ 14-269.5: Reserved for future codification purposes.

§ 14-269.6. Possession and sale of spring-loaded projectile knives prohibited.

(a) On and after October 1, 1986, it shall be unlawful for any person including law-enforcement officers of the State, or of any county, city, or town to possess, offer for sale, hold for sale, sell, give, loan, deliver, transport, manufacture or go armed with any spring-loaded projectile knife, a ballistic knife, or any weapon of similar character. Except that it shall be lawful for a law-enforcement agency to possess such weapons solely for evidentiary, education or training purposes.

(b) Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1985 (Reg. Sess., 1986), c. 810, s. 1; 1993, c. 539, s. 167; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-269.7. Prohibitions on handguns for minors.

(a) Any minor who possesses or carries a handgun is guilty of a Class 2 misdemeanor.

(b) This section does not apply:

(1) To officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties or acting under orders requiring them to carry handguns.

(2) To a minor who possesses a handgun for educational or recreational purposes while the minor is supervised by an adult who is present.

(3) To an emancipated minor who possesses such handgun inside his or her residence.

(4) To a minor who possesses a handgun while hunting or trapping outside the limits of an incorporated municipality if he has on his person written permission from a parent, guardian, or other person standing in loco parentis.

(c) The following definitions apply in this section:

(1) Handgun. — A firearm that has a short stock and is designed to be fired by the use of a single hand, or any combination of parts from which such a firearm can be assembled.

(2) Minor. — Any person under 18 years of age. (1993, c. 259, s. 1; 1994, Ex. Sess., c. 14, s. 5; 1993 (Reg. Sess., 1994), c. 597, s. 1.)

§ 14-269.8. Purchase or possession of firearms by person subject to domestic violence order prohibited.

(a) In accordance with G.S. 50B-3.1, it is unlawful for any person to own, possess, purchase, or receive or attempt to own, possess, purchase, or receive a firearm, as defined in G.S. 14-409.39(2), machine gun, ammunition, or permits to purchase or carry concealed firearms if ordered by the court for so long as that protective order or any successive protective order entered against that person pursuant to Chapter 50B of the General Statutes is in effect.

(b) Any person violating the provisions of this section shall be guilty of a Class H felony. (1995, c. 527, s. 2; 2003-410, s. 2.)

Cross References. — As to surrender and disposal of firearms in domestic violence cases, see G.S. 50B-3.1.

§§ 14-270, 14-271: Repealed by Session Laws 1994, Extra Session, c. 14, ss. 72, 73.

§§ 14-272 through 14-275: Repealed by Session Laws 1983, c. 39, ss. 1-4.

Cross References. — As to disrupting, disturbing or interfering with a religious service or assembly, see now G.S. 14-288.4(a)(7).

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.

Any person shall be guilty of a Class 3 misdemeanor, if such person while at, or upon the premises of,

(1) Any bus station, depot or terminal, or
(2) Any railroad passenger station, depot or terminal, or
(3) Any airport or air terminal used by any common carrier, or
(4) Any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the State, or privately owned airport

shall

(1) Engage in disorderly conduct, or
(2) Use vulgar, obscene or profane language, or
(3) On any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310; 1993, c. 539, s. 168; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-276: Repealed by Session Laws 1971, c. 357.

§ 14-276.1. Impersonation of firemen or emergency medical services personnel.

It is a Class 3 misdemeanor, for any person, with intent to deceive, to impersonate a fireman or any emergency medical services personnel, whether paid or voluntary, by a false statement, display of insignia, emblem, or other identification on his person or property, or any other act, which indicates a false status of affiliation, membership, or level of training or proficiency, if:

(1) The impersonation is made with intent to impede the performance of the duties of a fireman or any emergency medical services personnel, or
(2) Any person reasonably relies on the impersonation and as a result suffers injury to person or property.

For purposes of this section, emergency medical services personnel means a medical responder, emergency medical technician, emergency medical technician intermediates, emergency medical technician paramedics, or other member of a rescue squad or other emergency medical organization. (1981, c. 432, s. 1; 1993, c. 539, s. 169; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.129B.)

§ 14-277. Impersonation of a law-enforcement or other public officer.

(a) No person shall falsely represent to another that he is a sworn law-enforcement officer. As used in this section, a person represents that he is a sworn law-enforcement officer if he:

(1) Verbally informs another that he is a sworn law-enforcement officer, whether or not the representation refers to a particular agency;

(2) Displays any badge or identification signifying to a reasonable individual that the person is a sworn law-enforcement officer, whether or not the badge or other identification refers to a particular law-enforcement agency;

(3) Unlawfully operates a vehicle on a public street, highway or public vehicular area with an operating red light as defined in G.S. 20-130.1(a); or

(4) Unlawfully operates a vehicle on a public street, highway, or public vehicular area with an operating blue light as defined in G.S. 20-130.1(c).

(b) No person shall, while falsely representing to another that he is a sworn law-enforcement officer, carry out any act in accordance with the authority granted to a law-enforcement officer. For purposes of this section, an act in accordance with the authority granted to a law-enforcement officer includes:

(1) Ordering any person to remain at or leave from a particular place or area;

(2) Detaining or arresting any person;

(3) Searching any vehicle, building, or premises, whether public or private, with or without a search warrant or administrative inspection warrant;

(4) Unlawfully operating a vehicle on a public street or highway or public vehicular area equipped with an operating red light or siren in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such red light or siren;

(5) Unlawfully operating a vehicle on a public street or highway or public vehicular area equipped with an operating blue light in such a manner as to cause a reasonable person to yield the right-of-way or to stop his vehicle in obedience to such blue light.

(c) Nothing in this section shall prohibit any person from detaining another as provided by G.S. 15A-404 or assisting a law-enforcement officer as provided by G.S. 15A-405.

(d) Repealed by Session Laws 1995 (Reg. Sess., 1996), c. 712, s. 1.

(d1) Violations under this section are punishable as follows:

(1) A violation of subdivision (a)(1), (2), or (3) is a Class 1 misdemeanor.

(2) A violation of subdivision (b)(1), (2), (3), or (4) is a Class 1 misdemeanor. Notwithstanding the disposition in G.S. 15A-1340.23, the court may impose an intermediate punishment on a person sentenced under this subdivision.

(3) A violation of subdivision (a)(4) is a Class I felony.

(4) A violation of subdivision (b)(5) is a Class H felony.

(e) It shall be unlawful for any person other than duly authorized employees of a county, a municipality or the State of North Carolina, including but not limited to, the Department of Social Services, Health, Area Mental Health, Developmental Disabilities, and Substance Abuse Authority or Building Inspector to represent to any person that they are duly authorized employees of a county, a municipality or the State of North Carolina or one of the above-enumerated departments and acting upon such representation to perform any act, make any investigation, seek access to otherwise confidential information, perform any duty of said office, gain access to any place not otherwise open to the public, or seek to be afforded any privilege which would otherwise not be afforded to such person except for such false representation or make any attempt to do any of said enumerated acts. Any person, corporation, or business association violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1927, c. 229; 1985, c. 477; 1985, c. 761, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 3; 1991 (Reg. Sess., 1992), c. 1030, s. 7; 1993, c. 539, ss. 170, 171; 1994, Ex. Sess., c. 24, s. 14(c); 1995 (Reg. Sess., 1996), c. 712, s. 1; 1997-456, s. 2.)

CASE NOTES

Elements of the Offense. — The offense defined by this section consists of two material elements, both of which must be made to appear before the person charged can be convicted. He must have made a false representation that he is a duly authorized peace officer, and acting upon such representation he must have arrested some person, searched a building, or done some act in accordance with the authority delegated to duly authorized officers. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

Because the trial court used evidence that was also used to prove an element of the offense of impersonating a law enforcement officer to support an aggravating factor under G.S. 14-277, the error was not harmless; accordingly, the case was remanded for resentencing. State v. Jacobs, — N.C. App. —, 668 S.E.2d 346, 2008 N.C. App. LEXIS 2006 (2008).

Punishment Provisions Under § 14-3(a) and Subsection (d) of This Section. — While subsection (d) of this section provides in pertinent part that a violation of both subsections (a) and (b) is a misdemeanor, it also provides that a violation of subsection (a) is punishable under G.S. 14-3(a) and a violation of subsection (b) is punishable under subsection (d) of this section. The punishment provisions of G.S. 14-3(a) and subsection (d) vary. State v. Chisholm, 90 N.C. App. 526, 369 S.E.2d 375 (1988).

Error in Instruction Held Not Plain Error. — The trial judge's instruction to the jury of elements under subsection (b) of this section instead of subsection (a) of this section did not create an error that rose to the level of "plain error" when defendant was only charged with a violation of subsection (a), since to have convicted defendant under this section the jury would have to have found that he represented himself as a sworn law-enforcement officer to another. State v. Chisholm, 90 N.C. App. 526, 369 S.E.2d 375 (1988).

When Nonsuit Proper. — Where the defendant made no oral representation that he was a peace officer, but merely exhibited a courtesy card, which the witness examined, but was not misled by, and the defendant used no words or action which would indicate that he intended or attempted to arrest the witness, a motion for judgment as of nonsuit should have been allowed. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

§ 14-277.1. Communicating threats.

(a) A person is guilty of a Class 1 misdemeanor if without lawful authority:
- (1) He willfully threatens to physically injure the person or that person's child, sibling, spouse, or dependent or willfully threatens to damage the property of another;
- (2) The threat is communicated to the other person, orally, in writing, or by any other means;
- (3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and
- (4) The person threatened believes that the threat will be carried out.

(b) A violation of this section is a Class 1 misdemeanor. (1973, c. 1286, s. 11; 1993, c. 539, s. 172; 1994, Ex. Sess., c. 24, s. 14(c); 1999-262, s. 2.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

CASE NOTES

Construction with Federal Law. — Defendants were entitled to summary judgment as to the plaintiff's 42 U.S.C. § 1983 claim for unlawful arrest, where officers had probable cause to believe that the plaintiff had committed, at least, three offenses, that is, discharging a firearm in violation of a county ordinance, resisting, obstructing, and delaying an officer in carrying out his duties, and threatening bodily harm to an officer. Bell v. Dawson, 144 F. Supp. 2d 454, 2001 U.S. Dist. LEXIS 5629 (W.D.N.C. 2001).

Conditional Threats. — A defendant may be held liable under this section for conditional threats where the condition is one which she had no right to impose. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Defendant's threat to hit the victim with a rock did not become lawful merely because defendant indicated she had no intention to strike if the victim did not "come any closer." While the threat gave the victim the power to avoid the threatened consequences by simply complying with the condition imposed by defendant, the condition was one which defendant had no right to impose. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Threatening language can amount to an offer to injure a person even though it is a conditional offer. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Communication Through Third Party. — Evidence defendant communicated threats against the victim to a third person who relayed the threats to the victim was sufficient to convict defendant of communicating threats since the utilization of a third person to communicate the threats did not negate the criminality of defendant's behavior. State v. Thompson, 157 N.C. App. 638, 580 S.E.2d 9, 2003 N.C. App. LEXIS 952 (2003), cert. denied, 357 N.C. 469, 587 S.E.2d 72 (2003).

No Requirement That Threat Be Carried Out. — The conduct proscribed by this section is the making and communicating of the threat in the manner described in the statute, with no requirement that the threat be carried out. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Belief That Threat Will Be Carried Out. — The crime of communicating threats under this section involves more than making a threat to injure one's person or property and communicating it to the other person; it is also necessary, as the statute expressly provides, that the threat was made in a manner and under circumstances which could cause a reasonable person to believe that the threat is likely to be carried out and that the person threatened believes that the threat will be carried out. State v. Elledge, 80 N.C. App. 714, 343 S.E.2d 549 (1986).

Trial court properly refused respondent juvenile's motion to dismiss the juvenile petition, which alleged that he had communicated threats by telling a teacher he was going to kill her daughter; based upon the teacher's testimony that she had known respondent for several years and that he had once knocked her daughter into a wall, there was sufficient evidence that a reasonable person would believe that the threat was likely to be carried out, and that the teacher actually believed the threat was likely to be carried out. In re S.R.S., 180 N.C. App. 151, 636 S.E.2d 277, 2006 N.C. App. LEXIS 2233 (2006).

Victim's Statement Introduced as Recorded Recollection. — Appellate court upheld the trial court's ruling admitting a statement which defendant's wife made to police shortly after defendant allegedly threatened to punch the wife, as a recorded recollection, and affirmed the trial court's judgment convicting defendant of communicating threats, in violation of G.S. 14-277.1, but vacated the trial court's judgment sentencing defendant to 24 months' supervised probation because the trial court imposed that sentence without making a specific finding that a period of probation longer than 18 months was necessary, as required by G.S. 15A-1343.2(d). State v. Love, 156 N.C. App. 309, 576 S.E.2d 709, 2003 N.C. App. LEXIS 114 (2003).

Evidence that on earlier occasions defendant had broken into wife's house and assaulted her tended to prove the two elements of the offense under this section and its receipt did not violate G.S. 8C-1, Rule 404(b). State v. Elledge, 80 N.C. App. 714, 343 S.E.2d 549 (1986).

Insufficient Evidence of a Willful Threat to Physically Injure Person or Property. — The State failed to present substantial evidence of the first element of the crime of communicating threats—that defendant willfully threatened to physically injure the person or damage the property of another—where the defendant created a screen saver which ambiguously stated, "The end is near;" the defendant was never connected with any of the alleged bomb threats at the school; there was no evidence defendant had any plans to physically injure anyone or damage school property; he had exhibited good behavior at the school prior to this incident, and the arresting officer testified he determined the message written on the computer was "a prank." State v. Mortimer, 142 N.C. App. 321, 542 S.E.2d 330, 2001 N.C. App. LEXIS 81 (2001).

Refusal to Allow Testimony as to Defendant's Peacefulness as Error. — Where at abortion clinic defendant yelled, "If you will hold that door open, I'm going to throw a bomb in there and get you out," trial court erred in its refusal to allow defendant to present character witnesses to testify as to his character for peacefulness; evidence of defendant's peacefulness was relevant to the issues of defendant's willfulness in making the statement, whether the statement would have been believed by a reasonable person as well as the reasonableness of business manager's perception that the statement was not a joke. State v. Shreve, 94 N.C. App. 383, 380 S.E.2d 158 (1989).

Testimony Collateral to Issue Charged. — Where at an abortion clinic defendant yelled at business manager, "If you will hold that door open, I'm going to throw a bomb in there," trial court did not err in refusing to allow defendant to cross-examine business manager about her experiences in Cyprus just a few months earlier; defendant's argument that evidence was relevant in determining whether business manager believed that defendant would actually throw a bomb was without merit and testimony defendant attempted to elicit was collateral to the charges tried. State v. Shreve, 94 N.C. App. 383, 380 S.E.2d 158 (1989).

Defendant Not Subjected to Double Jeopardy. — Where the defendant was charged with communicating threats and assault by pointing a gun, he was not subjected to double jeopardy, even though the charges arose out of the same incident, since the elements of the two offenses differed. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Instructions. — In a prosecution for communicating a threat, the trial court did not err in instructing that the threat must be proven to have been communicated orally and in failing to instruct the jury that the threat could be communicated by any other means. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Applied in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

Cited in In re Williamson, 36 N.C. App. 362, 244 S.E.2d 189 (1978); Town of Winterville v. King, 60 N.C. App. 730, 299 S.E.2d 838 (1983); State v. Dixon, 77 N.C. App. 27, 334 S.E.2d 433 (1985); State v. Baker, 77 N.C. App. 465, 335 S.E.2d 56 (1985); Shreve v. Duke Power Co., 97 N.C. App. 648, 389 S.E.2d 444 (1990); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); State v. Faison, 128 N.C. App. 745, 497 S.E.2d 111 (1998); State v. Adams, 187 N.C. App. 676, 654 S.E.2d 711, 2007 N.C. App. LEXIS 2572 (2007).

§ 14-277.2. Weapons at parades, etc., prohibited.

(a) It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any private health care facility or upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon. Violation of this subsection shall be a Class 1 misdemeanor. It shall be presumed that any rifle or gun carried on a rack in a pickup truck at a holiday parade or in a funeral procession does not violate the terms of this act.

(b) For the purposes of this section the term "dangerous weapon" shall include those weapons specified in G.S. 14-269, 14-269.2, 14-284.1, or 14-288.8 or any other object capable of inflicting serious bodily injury or death when used as a weapon.

(c) The provisions of this section shall not apply to a person exempted by the provisions of G.S. 14-269(b) or to persons authorized by State or federal law to carry dangerous weapons in the performance of their duties or to any person who obtains a permit to carry a dangerous weapon at a parade, funeral procession, picket line, or demonstration from the sheriff or police chief, whichever is appropriate, of the locality where such parade, funeral procession, picket line, or demonstration is to take place. (1981, c. 684, s. 1; 1983, c.

633; 1993, c. 412, s. 2; c. 539, s. 174; 1994, Ex. Sess., c. 24, s. 14(c); 1997-238, s. 4.)

§ 14-277.3: Repealed by Session Laws 2008-167, s. 1, effective December 1, 2008.

Cross References. — For current provisions as to stalking, see G.S. 14-277.3A.

Editor's Note. — Session Laws 2008-167, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 14-277.3A. Stalking.

(a) Legislative Intent. — The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.

The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

(b) Definitions. — The following definitions apply in this section:

(1) Course of conduct. — Two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, is in the presence of, or follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

(2) Harasses or harassment. — Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

(3) Reasonable person. — A reasonable person in the victim's circumstances.

(4) Substantial emotional distress. — Significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) Offense. — A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:

(1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

(d) Classification. — A violation of this section is a Class A1 misdemeanor. A defendant convicted of a Class A1 misdemeanor under this section, who is sentenced to a community punishment, shall be placed on supervised probation in addition to any other punishment imposed by the court. A defendant who commits the offense of stalking after having been previously convicted of a stalking offense is guilty of a Class F felony. A defendant who commits the offense of stalking when there is a court order in effect prohibiting the conduct described under this section by the defendant against the victim is guilty of a Class H felony.

(e) Jurisdiction. — Pursuant to G.S. 15A-134, if any part of the offense occurred within North Carolina, including the defendant's course of conduct or the effect on the victim, then the defendant may be prosecuted in this State. (2008-167, s. 2.)

Cross References. — For the Address Confidentiality Program, see G.S. 15C-1 et seq.

Editor's Note. — Session Laws 2008-167, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Editor's Note. — *Many of the cases below were decided under former G.S. 14-277.3.*

Crime of Violence. — Defendant was properly sentenced, where his prior conviction for felony stalking under former G.S. 14-277.3, unlike stalking statutes from other jurisdictions, met the standard for a crime of violence under U.S. Sentencing Guidelines Manual § 4B1.2(a)(2), and justified the enhancement imposed under U.S. Sentencing Guidelines Manual § 2K2.1. United States v. Seay, 553 F.3d 732, 2009 U.S. App. LEXIS 1290 (4th Cir. 2009).

Amendment of Indictment. — In a case in which the defendant was prosecuted for stalking and for having previously been convicted of stalking, the State was properly allowed to amend the indictment to place the allegation of the prior offense in a count separate from that of the current offense because the amendment was not a substantial alteration of the charge, prohibited by G.S. 15A-923(e); the amendment merely placed the last two sentences of the single count in the original indictment into a separate count, to comply with G.S. 15A-928, and defendant had prior notice that the State alleged defendant's prior conviction and intended to prove that conviction, so defendant had the opportunity to prepare a defense. State v. Stephens, 188 N.C. App. 286, 655 S.E.2d 435, 2008 N.C. App. LEXIS 74 (2008).

The trial courts should instruct the jury as to the definition of "reasonable fear" when handling violations under this section to ensure that an objective standard, based on what frightens an ordinary, prudent person under the same or similar circumstances, is applied rather than a subjective standard which focuses on the individual victim's fears and apprehensions. State v. Ferebee, 137 N.C. App. 710, 529 S.E.2d 686, 2000 N.C. App. LEXIS 498 (2000).

Evidence. — Evidence which related to events occurring before defendant was warned to stay a away from the victim was not irrelevant and prejudicial. State v. Ferebee, 128 N.C. App. 710, 499 S.E.2d 459 (1998).

Acts Prior to Warning Relevant to Show Context But Not to Convict. — The trial court's charge, given in accordance with the pattern jury instructions, "incorrectly allowed the jury to consider acts prior to the alleged warning as constituting part of the basis of a stalking conviction." A conviction for the offense of stalking may not be based upon acts which occurred prior to the time a defendant was warned to desist, but rather upon acts committed after the warning. State v. Ferebee, 137 N.C. App. 710, 529 S.E.2d 686, 2000 N.C. App. LEXIS 498 (2000).

Fear of Continued Harassment Supported Protective Order for Domestic Vio-

lence. — Protective order against a husband for acts of domestic violence was supported by the evidence as, inter alia, the husband yelled at the wife "Would you like to hurt me? Would you like to kill and hit me? Would that make you feel better?," the husband banged a stapler on a counter, threw a water bottle in the wife's direction, and refused to leave their jointly-owned business during the late night hours, and the wife was afraid of the husband and thought he was "out of control." Wornstaff v. Wornstaff, 179 N.C. App. 516, 634 S.E.2d 567, 2006 N.C. App. LEXIS 1975 (2006).

Harassment Could Not Support Civil No-Contact Order. — Finding that a blogger had harassed the victims under G.S. 50C-1(6) and (7) by knowingly publishing electronic or computerized transmissions directed at the victims that tormented, terrorized, or terrified the victims and served no legitimate purpose could not support a civil no-contact order, even though the correct definition of harassment under G.S. 14-277.3(c) [now G.S. 14-277.3A] was used. Ramsey v. Harman, 191 N.C. App. 146, 661 S.E.2d 924, 2008 N.C. App. LEXIS 1146 (2008).

Sufficiency of Evidence That Defendant Was in Presence of Victim Without Legal Purpose. — Evidence that defendant hid in the woods outside the victim's home, had weapons in his vehicle when he was stopped by police a short distance from the victim's house, and admitted to another inmate that he was watching the victim and intended to kill her and her family was sufficient to support a stalking conviction under G.S. 14-277.3(a)(1) [now G.S. 14-277.3A]; that evidence was sufficient to support the element of stalking that the defendant was following the victim or was in the victim's presence without lawful purpose. State v. Borkar, 173 N.C. App. 162, 617 S.E.2d 341, 2005 N.C. App. LEXIS 1926 (2005), cert. dismissed, 360 N.C. 67, 623 S.E.2d 774 (2005), cert. denied, 360 N.C. 67, 623 S.E.2d 773 (2005).

Applied in State v. Thompson, 157 N.C. App. 638, 580 S.E.2d 9, 2003 N.C. App. LEXIS 952 (2003).

Cited in Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

§ 14-277.4. Obstruction of health care facilities.

(a) No person shall obstruct or block another person's access to or egress from a health care facility or from the common areas of the real property upon which the facility is located in a manner that deprives or delays the person from obtaining or providing health care services in the facility.

(b) No person shall injure or threaten to injure a person who is or has been:

(1) Obtaining health care services;

(2) Lawfully aiding another to obtain health care services; or

(3) Providing health care services.

(c) A violation of subsection (a) or (b) of this section is a Class 2 misdemeanor. A second conviction for a violation of either subsection (a) or (b) of this section within three years of the first shall be punishable as a Class 1 misdemeanor. A third or subsequent conviction for a violation of either subsection (a) or (b) of this section within three years of the second or most recent conviction shall be punishable as a Class I felony.

(d) Any person aggrieved under this section may seek injunctive relief in a court of competent jurisdiction to prevent threatened or further violations of this section. Any violation of an injunction obtained pursuant to this section constitutes criminal contempt and shall be punishable by a term of imprisonment of not less than 30 days and no more than 12 months.

(e) This section shall not prohibit any person from engaging in lawful speech or picketing which does not impede or deny another person's access to health care services or to a health care facility or interfere with the delivery of health care services within a health care facility.

(f) "Health care facility" as used in this section means any hospital, clinic, or other facility that is licensed to administer medical treatment or the primary function of which is to provide medical treatment in this State.

(g) "Health care services" as used in this section means services provided in a health care facility.

(h) Persons subject to the prohibitions in subsection (a) of this section do not include owners, officers, agents, or employees of the health care facility or law enforcement officers acting to protect real or personal property. (1993, c. 412, s. 1; 1994, Ex. Sess., c. 14, s. 6; 1993 (Reg. Sess., 1994), c. 767, s. 21.)

CASE NOTES

Constitutionality. — This section is neither vague nor overbroad; the terms "obstruct" and "block" do not require those persons subject to the statute to guess at their meaning, and the plain language of the section prohibits only conduct that imposes physical impediments to entering and exiting a health care facility. Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998).

Law enforcement officers exceeded their authority in threatening plaintiffs with arrest for attempting to distribute literature to persons entering clinics and for being present when patients were rescheduling appointments, activities that do no violate this section. Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 523 U.S. 1136, 118 S. Ct. 1838, 140 L. Ed. 2d 1089 (1998).

§ 14-277.4A. Targeted picketing of a residence.

(a) Definitions. — As used in this section:

(1) "Residence" means any single-family or multifamily dwelling unit that is not being used as a targeted occupant's sole place of business or as a place of public meeting.

(2) "Targeted picketing" means picketing, with or without signs, that is specifically directed toward a residence, or one or more occupants of the residence, and that takes place on that portion of a sidewalk or street in front of the residence, in front of an adjoining residence, or on either side of the residence.

(b) It shall be unlawful for a person to engage in targeted picketing when the person knows or should know that the manner in which they are picketing would cause in a reasonable person any of the following:

(1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.

(2) Substantial emotional distress. For the purposes of this subdivision, "substantial emotional distress" is defined as in G.S. 14-277.3A(b)(4).

(c) Any person who commits the offense defined in this section is guilty of a Class 2 misdemeanor.

(d) Any person aggrieved under this section may seek injunctive relief in a court of competent jurisdiction to prevent threatened or further violations of this section. Any violation of an injunction obtained pursuant to this section constitutes criminal contempt and shall be punishable by a term of imprisonment of not less than 30 days and no more than 12 months.

(e) Nothing in this section shall be construed to prohibit general picketing that proceeds through residential neighborhoods or that proceeds past residences. (2009-300, s. 1.)

Editor's Note. — Session Laws 2009-300, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-277.5. Making a false report concerning mass violence on educational property.

(a) The following definitions apply in this section:

(1) Educational property. — As defined in G.S. 14-269.2.

(2) Mass violence. — Physical injury that a reasonable person would conclude could lead to permanent injury (including mental or emotional injury) or death to two or more people.

(3) School. — As defined in G.S. 14-269.2.

(b) A person who, by any means of communication to any person or groups of persons, makes a report, knowing or having reason to know the report is false, that an act of mass violence is going to occur on educational property or at a curricular or extracurricular activity sponsored by a school, is guilty of a Class H felony.

(c) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from the disruption of the normal activity that would have otherwise occurred on the premises but for the false report, pursuant to Article 81C of Chapter 15A of the General Statutes. (2007-196, s. 1.)

Editor's Note. — Session Laws 2007-196, s. 2, made this section effective December 1, 2007, and applicable to offenses committed on or after date.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

Article 36.

Offenses Against the Public Safety.

§ 14-278. Willful injury to property of railroads.

It shall be unlawful for any person to willfully, with intent to cause injury to any person passing over the railroad or damage to the equipment traveling on such road, put or place any matter or thing upon, over or near any railroad track, or destroy, injure, tamper with, or remove the roadbed, or any part thereof, or any rail, sill or other part of the fixtures appurtenant to or constituting or supporting any portion of the track of such railroad, and the person so offending shall be punished as a Class I felon. (1838, c. 38; R.C., c. 34, ss. 99, 100; 1879, c. 255, s. 2; Code, s. 1098; Rev., s. 3754; 1911, c. 200; C.S., s. 4417; 1967, c. 1082, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1985, c. 577, s. 1; 1993, c. 539, s. 1221; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Freeman, 230 N.C. 725, 55 S.E.2d 500 (1949); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

§ 14-279. Unlawful injury to property of railroads.

Any person who, without intent to cause injury to any person or damage to equipment, commits any of the acts referred to in G.S. 14-278 shall be guilty of a Class 2 misdemeanor. (R.C., c. 34, s. 101; Code, s. 1099; Rev., s. 3755; C.S., s. 4418; 1967, c. 1082, s. 2; 1985, c. 577, s. 2; 1993, c. 539, s. 175; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-279.1. Unlawful impairment of operation of railroads.

Any person who, without authorization of the affected railroad company, shall willfully do or cause to be done any act to railroad engines, equipment, or rolling stock so as to impede or prevent movement of railroad trains or so as to impair the operation of railroad equipment shall be guilty of a Class 2 misdemeanor. (1979, c. 387, s. 1; 1993, c. 539, s. 176; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-280. Shooting or throwing at trains or passengers.

If any person shall willfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or train shall be stopped for any purpose, the person so offending shall be guilty of a Class I felony. (1876-7, c. 4; Code, s. 1100; 1887, c. 19; Rev., s. 3763; 1911, c. 179; C.S., s. 4419; 1985, c. 577, s. 3; 1993, c. 539, s. 1222; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Intent a Question for Jury. — Where a defendant was indicted for shooting at a train with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. State v. Barbee, 92 N.C. 820 (1885).

Proof That Gun Was Unloaded. — If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. State v. Hinson, 82 N.C. 597 (1880).

Proof of Conspiracy. — Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Indictment. — Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

But the indictment must charge that the train was in actual motion or stopped for a temporary purpose. State v. Boyd, 86 N.C. 634 (1882).

Cited in Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

§ 14-280.1. Trespassing on railroad right-of-way.

(a) Offense. — A person commits the offense of trespassing on railroad right-of-way if the person enters and remains on the railroad right-of-way without the consent of the railroad company or the person operating the railroad or without authority granted pursuant to State or federal law.

(b) Crossings. — Nothing in this section shall apply to a person crossing the railroad right-of-way at a public or private crossing.

(c) Legally Abandoned Rights-of-Way. — This section shall not apply to any right-of-way that has been legally abandoned pursuant to an order of a federal or State agency having jurisdiction over the right-of-way and is not being used for railroad services.

(d) Classification. — Trespassing on railroad right-of-way is a Class 3 misdemeanor. (2000-146, s. 10.)

§ 14-280.2. Use of a laser device towards an aircraft.

(a) Any person who, willfully points a laser device at an aircraft, while the device is emitting a laser beam, and while the aircraft is taking off, landing, in flight, or otherwise in motion, is guilty of a Class H felony.

(b) The following definitions apply to this section:

(1) "Aircraft" is as defined in G.S. 63-1.

(2) "Laser" is as defined in G.S. 14-34.8.

(c) This section shall not apply where the laser use had been approved by a State or federal agency. (2005-329, s. 1.)

§ 14-281. Operating trains and streetcars while intoxicated.

Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a Class 2 misdemeanor. (1871-2, c. 138, s. 38; Code, s. 1972; 1891, c. 114; Rev., s. 3758; 1907, c. 330; C.S., s. 4420; 1969, c. 1224, s. 3; 1993, c. 539, s. 177; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-281.1. Throwing, dropping, etc., objects at sporting events.

It shall be unlawful for any person to throw, drop, pour, release, discharge, expose or place in an area where an athletic contest or sporting event is taking place any substance or object that shall be likely to cause injury to persons participating in or attending such contests or events or to cause damage to animals, vehicles, equipment, devices, or other things used in connection with such contests or events. Any person violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (1977, c. 772, s. 1; 1993, c. 539, s. 178; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-282. Displaying false lights on seashore.

If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a Class I felony. (1831, c. 42; R.C., c. 34, s. 58; Code, s. 1024; Rev., s. 3430; C.S., s. 4421; 1979, 2nd Sess., c. 1316, s. 16; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1223; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-283. Exploding dynamite cartridges and bombs.

If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a Class 1 misdemeanor. (1887, c. 364, s. 53; Rev., s. 3794; C.S., s. 4423; 1993, c. 539, s. 179; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to willful injury with explosives, see G.S. 14-49. As to burglary with explosives, see G.S. 14-57.

CASE NOTES

Cited in State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985).

§ 14-284. Keeping for sale or selling explosives without a license.

If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a Class 1 misdemeanor. (1887, c. 364, ss. 1, 4; Rev., s. 3817; C.S., s. 4425; 1993, c. 539, s. 180; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Catawba: 1983, c. 116; Forsyth: 1983, c. 21; Mecklenburg: 1981, c. 117, s. 1; New Hanover: 1989, c. 178, s. 1; Union: 1983, c. 116.

§ 14-284.1. Regulation of sale of explosives; reports; storage.

(a) No person shall sell or deliver any dynamite or other powerful explosives as hereinafter defined without being satisfied as to the identity of the purchaser or the one to receive such explosives and then only upon the written application signed by the person or agent of the person purchasing or receiving such explosive, which application must contain a statement of the purpose for which such explosive is to be used.

(b) All persons delivering or selling such explosives shall keep a complete record of all sales or deliveries made, including the amounts sold and delivered, the names of the purchasers or the one to whom the deliveries were made, the dates of all such sales or such deliveries and the use to be made of such explosive, and shall preserve such record and make the same available to any law-enforcement officer during business hours for a period of 12 months thereafter.

(c) All persons having dynamite or other powerful explosives in their possession or under their control shall at all times keep such explosives in a safe and secure manner, and when such explosives are not in the course of being used they shall be stored and protected against theft or other unauthorized possession.

(d) As used in this section, the term "powerful explosives" includes, but shall not be limited to, nitroglycerin, trinitrotoluene, and blasting caps, detonators and fuses for the explosion thereof.

(e) Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(f) The provisions of this section are intended to apply only to sales to those who purchase for use. Nothing herein contained is intended to apply to a sale made by a manufacturer, jobber, or wholesaler to a retail merchant for resale by said merchant.

(g) Nothing herein contained shall be construed as repealing any law now prohibiting the sale of firecrackers or other explosives; nor shall this section be construed as authorizing the sale of explosives now prohibited by law. (1953, c. 877; 1969, c. 1224, s. 6; 1993, c. 539, s. 181; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applicability of Section to United States. — See Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Only the highest degree of care is commensurate with the dangerous nature of dynamite. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Such Care Is Required by Common Law and Statutes. — Both the common law and the statutes of North Carolina require persons having possession and control of dynamite to use the highest degree of care to keep the explosive safe and secure and to guard others against injury from it. Tayloe v. Southern Bell

Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Violation as Negligence. — A violation of a statute enacted for safety and protection of the general public, such as this section, is negligence per se. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

A person in North Carolina who has explosives under his control or in his possession must take adequate precautions to insure that no person, and especially children, are able to gain possession of these dangerous devices. If the person fails to take such precautions, under North Carolina law he is negligent. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Discarding Dynamite Cap Is Negligence. — To discard or leave a dynamite cap where either a child or unversed adult might pick it up and cause it to explode is positive negligence. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Dynamite Must Be Shown to Have Been Defendant's Property. — To hold a defendant liable for injury caused by dynamite there must be evidence, direct or circumstantial, sufficient to support a finding that it was his property, or property he had abandoned; otherwise, the verdict is a mere guess, which cannot be permitted. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

§ 14-284.2. Dumping of toxic substances.

(a) It shall be unlawful to deposit, place, dump, discharge, spill, release, burn, incinerate, or otherwise dispose of any toxic substances as defined in this section or radioactive material as defined in G.S. 104E-5 into the atmosphere, in the waters, or on land, except where such disposal is conducted pursuant to federal or State law, regulation, or permit. Any person who willfully violates the provisions of this section shall be guilty of a Class F felony. The fine authorized by G.S. 14-1.1(a)(8) for a conviction under this section may include a fine of up to one hundred thousand dollars ($100,000) per day of violation.

(b) Within the meaning of this section, toxic substances are defined as the following heavy metals and halogenated hydrocarbons:

(1) Heavy metals: mercury, plutonium, selenium, thallium and uranium;

(2) Halogenated hydrocarbons: polychlorinated biphenyls, kepone.

(c) Within the meaning of this section, the phrase "law, regulation or permit" includes controls over equipment or machinery that emits substances into the atmosphere, in waters, or on land (such as federal or State controls over motor vehicle emissions) and controls over sources of substances that are publicly consumed (such as drinking water standards), as well as controls over substances directly released into the atmosphere, in waters, or on land (such as pesticide controls and water pollution controls).

(d) Within the meaning of this section the term "person" includes any individual, firm, partnership, limited partnership, corporation or association. (1979, c. 981, s. 2; 1979, 2nd Sess., c. 1316, s. 17; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1224; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 14-285: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72.

§ 14-286. Giving false fire alarms; molesting fire-alarm, fire-detection or fire-extinguishing system.

It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet anyone in giving, a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any fire-alarm system, except in case of fire, or willfully misuse or damage a portable fire extinguisher, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of any fire-alarm, fire-detection, smoke-detection or fire-extinguishing system. Any person violating any of the provisions of this section shall be guilty of a Class 2 misdemeanor. (1921, c. 46; C.S., s. 4426(a); 1961, c. 594; 1969, c. 1224, s. 5; 1975, c. 346; 1993, c. 539, s. 182; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-286.1. Making false ambulance request.

It shall be unlawful for any person to willfully summon an ambulance or willfully report that an ambulance is needed when such person does not have good cause to believe that the services of an ambulance are needed. Every person convicted of willfully violating this section shall be guilty of a Class 3 misdemeanor. (1967, c. 343, s. 6; 1993, c. 539, s. 183; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-286.2. Interfering with emergency communication.

(a) Offense. — A person who intentionally interferes with an emergency communication, knowing that the communication is an emergency communication, and who is not making an emergency communication himself, is guilty of a Class A1 misdemeanor. In addition, a person who interferes with a communications instrument or other emergency equipment with the intent to prevent an emergency communication is guilty of a Class A1 misdemeanor.

(b) Repealed by Session Laws 2001-148, s. 1, effective December 1, 2001.

(b1) Definitions. — The following definitions apply in this section:

(1) Emergency communication. — The term includes communications to law enforcement agencies or other emergency personnel, or other individuals, relating or intending to relate that an individual is or is reasonably believed to be, or reasonably believes himself or another person to be, in imminent danger of bodily injury, or that an individual reasonably believes that his property or the property of another is in imminent danger of substantial damage, injury, or theft.

(2) Intentional interference. — The term includes forcefully removing a communications instrument or other emergency equipment from the possession of another, hiding a communications instrument or other emergency equipment from another, or otherwise making a communications instrument or other emergency equipment unavailable to another, disconnecting a communications instrument or other emergency equipment, removing a communications instrument from its connection to communications lines or wavelengths, damaging or otherwise interfering with communications equipment or connections between a communications instrument and communications lines or wavelengths, disabling a theft-prevention alarm system, providing false information to cancel an earlier call or otherwise falsely indicating that emergency assistance is no longer needed when it is, and any other type of interference that makes it difficult or impossible to make an emergency communication or that conveys a false impression that emergency assistance is unnecessary when it is needed. (1987, c. 690, s. 1; 1993, c. 539, s. 184; 1994, Ex. Sess., c. 24, s. 14(c); 2001-148, s. 1.)

§ 14-287. Leaving unused well open and exposed.

It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a Class 2 misdemeanor. (1923, c. 125; C.S., s. 4426(c); 1969, c. 1224, s. 5; 1993, c. 539, s. 185; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Wellons v. Sherrin, 217 N.C. 534, 8 S.E.2d 820 (1940).

§ 14-288. Unlawful to pollute any bottles used for beverages.

It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a Class 3 misdemeanor, and upon conviction shall be fined on the first offense, one dollar ($1.00) for each bottle so defiled, and for any subsequent offense not more than ten dollars ($10.00) for each bottle so defiled. (1929, c. 324, s. 1; 1993, c. 539, s. 186; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this Article:

(1) "Chairman of the board of county commissioners": The chairman of the board of county commissioners or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the county has specified who is to act in lieu of the chairman with respect to a particular power or duty set out in this Article, the term "chairman of the board of county commissioners" shall apply to the person generally authorized to act in lieu of the chairman.

(2) "Dangerous weapon or substance": Any deadly weapon, ammunition, explosive, incendiary device, radioactive material or device, as defined in G.S. 14-288.8(c)(5), or any instrument or substance designed for a use that carries a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used.

(3) "Declared state of emergency": A state of emergency found and proclaimed by the Governor under the authority of G.S. 14-288.15, by any mayor or other municipal official or officials under the authority of G.S. 14-288.12, by any chairman of the board of commissioners of

any county or other county official or officials under the authority of G.S. 14-288.13, by any chairman of the board of county commissioners acting under the authority of G.S. 14-288.14, by any chief executive official or acting chief executive official of any county or municipality acting under the authority of any other applicable statute or provision of the common law to preserve the public peace in a state of emergency, or by any executive official or military commanding officer of the United States or the State of North Carolina who becomes primarily responsible under applicable law for the preservation of the public peace within any part of North Carolina.

(4) "Disorderly conduct": As defined in G.S. 14-288.4(a).

(5) "Law-enforcement officer": Any officer of the State of North Carolina or any of its political subdivisions authorized to make arrests; any other person authorized under the laws of North Carolina to make arrests and either acting within his territorial jurisdiction or in an area in which he has been lawfully called to duty by the Governor or any mayor or chairman of the board of county commissioners; any member of the armed forces of the United States, the North Carolina National Guard, or the State defense militia called to duty in a state of emergency in North Carolina and made responsible for enforcing the laws of North Carolina or preserving the public peace; or any officer of the United States authorized to make arrests without warrant and assigned to duties that include preserving the public peace in North Carolina.

(6) "Mayor": The mayor or other chief executive official of a municipality or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the municipality has specified who is to act in lieu of the mayor with respect to a particular power or duty set out in this Article, the word "mayor" shall apply to the person generally authorized to act in lieu of the mayor.

(7) "Municipality": Any active incorporated city or town, but not including any sanitary district or other municipal corporation that is not a city or town. An "active" municipality is one which has conducted the most recent election required by its charter or the general law, whichever is applicable, and which has the authority to enact general police-power ordinances.

(8) "Public disturbance": Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(9) "Riot": As defined in G.S. 14-288.2(a).

(10) "State of emergency": The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent. (1969, c. 869, s. 1; 1975, c. 718, s. 5; 2009-281, s. 1.)

Cross References. — As to the Governor ordering a cessation of all sales, manufacture, and delivery of alcoholic beverages during a state of emergency, see G.S. 18B-110.

Effect of Amendments. — Session Laws 2009-281, s. 1, effective July 10, 2009, substituted "National Guard" for "national guard" in subdivision (5).

CASE NOTES

Constitutionality. — The statutory scheme of this Article is not unconstitutional in contravention of the U.S. Const., Amends. I, IV, IX, and XIV and N.C. Const., Art. I, § 19. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970), aff'd, 277 N.C. 484, 178 S.E.2d 449 (1971).

Action in Federal Court Attacking Constitutionality of Article. — The rule is that in addition to facial unconstitutionality of a statute, not susceptible of a limiting state court construction, involving fundamental constitutional rights, federal courts must abstain unless there is a showing of bad faith or harassment, and a showing that the enforcement of the statute will result in irreparable harm that is both great and immediate; a "chilling effect" on rights protected by U.S. Const., Amend. I will not by itself justify intervention. Therefore, where there was no showing of a bad faith use of this article or that it had been used in a threatening or harassing manner against the plaintiffs or anyone else, and a voluntary dismissal was taken in the State court suit for injunctive relief, which relief had been granted pursuant to G.S. 14-288.18, and there was no evidence that any of the plaintiffs had been arrested or threatened since they were charged with violating the article, an action attacking its constitutionality was dismissed. Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

Subdivision (8) Is Not an Essential Part of § 14-288.4(a)(4)a. — See State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

For discussion as to forest rangers and the public duty doctrine, see Myers v. McGrady, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005), rev'd and remanded, review improvidently allowed, 350 N.C. 460, 628 S.E.2d 761 (2006).

Applied in State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

Cited in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214 (1974).

§ 14-288.2. Riot; inciting to riot; punishments.

(a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

(b) Any person who willfully engages in a riot is guilty of a Class 1 misdemeanor.

(c) Any person who willfully engages in a riot is guilty of a Class H felony, if:

(1) In the course and as a result of the riot there is property damage in excess of fifteen hundred dollars ($1,500) or serious bodily injury; or

(2) Such participant in the riot has in his possession any dangerous weapon or substance.

(d) Any person who willfully incites or urges another to engage in a riot, so that as a result of such inciting or urging a riot occurs or a clear and present danger of a riot is created, is guilty of a Class 1 misdemeanor.

(e) Any person who willfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is property damage in excess of fifteen hundred dollars ($1,500) or serious bodily injury, shall be punished as a Class F felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 187, 188, 1225, 1226; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

This section is constitutionally valid. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

The scope of this section in no way infringes upon the freedom of nonviolent assemblage. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The reach of this section is not so pervasive as to include activity protected by the First Amendment. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The fact that correct application of this section requires a cross reference through interlocking statutory descriptions does not make this section so complex and imprecise as to be unconstitutional. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

This section is not unconstitutionally vague. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

There is no federal law restraining prosecutions for riot. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973), aff'd, 468 F.2d 639 (4th Cir. 1972).

The 1964 Federal Civil Rights Act does not in any sense void the anti-riot laws of North Carolina. Frinks v. North Carolina, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

The key words of the statutory definition of riot are "three persons," "violent conduct," and "clear and present danger of injury or damage." State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The words of this section are not words so vague and imprecise that men of common intelligence and understanding must guess at their meanings. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

One purpose for codifying riot as an offense was to simplify the common law by setting out in concrete form the essential elements that constitute this crime. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The State has a paramount duty to maintain order not only in the streets but in schools, hospitals and other public places. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The advocacy of imminent lawless action is not protected by U.S. Const., Amend. I. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Advocacy of imminent lawless action is the only type of speech that can come within the purview of this section. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Damage or Injury or Threat Thereof. — A public disturbance involving three or more people, no matter how noisy or boisterous, cannot, under the statutory definition, be a riot unless violence or the threat of immediate violence which poses a clear and present danger to persons or property is present. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Under subsection (a) the capacity of members of the assemblage to inflict injury or damage to persons or property or to create the clear and present danger of such injury or damage is material to the crime of riot and is relevant to establish the proposition defendant was engaged in a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The component elements that constitute the crime of riot are: (1) public disturbance; (2) assemblage; (3) three or more persons; (4) disorderly and violent conduct, or the imminent threat of such conduct; and (5) results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

The common-law crime of unlawful assembly, which is a component element of common-law riot, contains the following elements: (1) the participation of three or more persons; (2) a common intent to attain a purpose which will interfere with the rights of others by committing disorderly acts; and (3) a purpose to commit acts in such manner as would cause firm persons to apprehend a breach of peace. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Involuntariness Does Not Negate Fact of Assemblage. — While an assemblage of prison inmates is involuntary, the involuntariness does not negate the fact of an assemblage within the meaning of subsection (a) of this section. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

Warrant charging "engaging in a riot" states a proper cause of action. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Failure of Warrant to State Crime. — Warrant charging that defendant did unlawfully, willfully incite a riot by urging three or more persons to congregate at Prospect School, Robeson County, North Carolina, thereby creating a clear and present danger of a riot fails to state the commission of any criminal offense, much less the offense of inciting a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Petition for Removal of Prosecution to Federal Court. — Where defendants, charged with inciting and/or engaging in a riot, alleged in their petition for removal to the United States District Court that they were peaceably exercising their rights to public accommodations, removal under 28 U.S.C. § 1443(1) was not required simply by reason of an artfully drafted petition. Nor was an evidentiary hearing required because the petition alleged a peaceful exercise of civil rights. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973), aff'd, 468 F.2d 639 (4th Cir. 1972).

Evidence Held Sufficient. — Where several witnesses testified that they saw defendant in the company of three or four men harassing girls in truck, they also testified that defendant was fighting with the others present and that he pulled a knife and cut the three victims, the knife was identified at trial, and photographic evidence as well as testimony from treating personnel confirmed the severity of the knife wounds, there was evidence sufficient to go to the jury on a charge of felonious rioting. State v. Hunt, 100 N.C. App. 43, 394 S.E.2d 221 (1990).

Evidence of defendant's resistance to being arrested and the apparent assault on police officer did not by itself appear sufficient to support the charge of participation in riotous activity. However, this conduct when coupled with the defendant's deliberate act of running into the table upon which the officer was standing while the riot was taking place, was clearly sufficient to show that the defendant "willfully engaged" in the riot. State v. Mitchell, 110 N.C. App. 250, 429 S.E.2d 580 (1993).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971); State v. Yarborough, 55 N.C. App. 52, 284 S.E.2d 550 (1981).

§ 14-288.3. Provisions of Article intended to supplement common law and other statutes.

The provisions of this Article are intended to supersede and extend the coverage of the common-law crimes of riot and inciting to riot. To the extent that such common-law offenses may embrace situations not covered under the provisions of this Article, however, criminal prosecutions may be brought for such crimes under the common law. All other provisions of the Article are intended to be supplementary and additional to the common law and other statutes of this State and, except as specifically indicated, shall not be construed to abrogate, abolish, or supplant other provisions of law. In particular, this Article shall not be deemed to abrogate, abolish, or supplant such common-law offenses as unlawful assembly, rout, conspiracy to commit riot or other criminal offenses, false imprisonment, and going about armed to the terror of the populace and other comparable public-nuisance offenses. (1969, c. 869, s. 1.)

CASE NOTES

Applied in State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535 (1975).

§ 14-288.4. Disorderly conduct.

(a) Disorderly conduct is a public disturbance intentionally caused by any person who does any of the following:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.

(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace.

(3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative.

(4) Refuses to vacate any building or facility of any public or private educational institution in obedience to any of the following:

a. An order of the chief administrative officer of the institution, or the officer's representative, who shall include for colleges and universities the vice chancellor for student affairs or the vice-chancellor's equivalent for the institution, the dean of students or the dean's equivalent for the institution, the director of the law enforcement or security department for the institution, and the chief of the law enforcement or security department for the institution.

b. An order given by any fireman or public health officer acting within the scope of the fireman's or officer's authority.

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of the officer's authority.

(5) Shall, after being forbidden to do so by the chief administrative officer, or the officer's authorized representative, of any public or private educational institution:

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assemble, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility.

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

(6a) Engages in conduct which disturbs the peace, order, or discipline on any public school bus or public school activity bus.

(7) Except as provided in subdivision (8) of this subsection, disrupts, disturbs, or interferes with a religious service or assembly or engages in conduct which disturbs the peace or order at any religious service or assembly.

(8) Engages in conduct with the intent to impede, disrupt, disturb, or interfere with the orderly administration of any funeral, memorial service, or family processional to the funeral or memorial service, including a military funeral, service, or family processional, or with the normal activities and functions occurring in the facilities or buildings where a funeral or memorial service, including a military funeral or memorial service, is taking place. Any of the following conduct that occurs within one hour preceding, during, or within one hour after a funeral or memorial service shall constitute disorderly conduct under this subdivision:

a. Displaying, within 300 feet of the ceremonial site, location being used for the funeral or memorial, or the family's processional route to the funeral or memorial service, any visual image that conveys fighting words or actual or imminent threats of harm directed to any person or property associated with the funeral, memorial service, or processional route.

b. Uttering, within 300 feet of the ceremonial site, location being used for the funeral or memorial service, or the family's processional route to the funeral or memorial service, loud, threatening, or abusive language or singing, chanting, whistling, or yelling with or without noise amplification in a manner that would tend to impede, disrupt, disturb, or interfere with a funeral, memorial service, or processional route.

c. Attempting to block or blocking pedestrian or vehicular access to the ceremonial site or location being used for a funeral or memorial.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Except as provided in subsection (c) of this section, any person who willfully engages in disorderly conduct is guilty of a Class 2 misdemeanor.

(c) A person who commits a violation of subdivision (8) of subsection (a) of this section is guilty of:

(1) A Class 2 misdemeanor for a first offense.

(2) A Class 1 misdemeanor for a second offense.

(3) A Class I felony for a third or subsequent offense. (1969, c. 869, s. 1; 1971, c. 668, s. 1; 1973, c. 1347; 1975, c. 19, s. 4; 1983, c. 39, s. 5; 1987, c. 671, s. 1; 1993, c. 539, s. 189; 1994, Ex. Sess., c. 24, s. 14(c); 2001-26, s. 2; 2006-169, s. 1.)

Editor's Note. — Session Laws 1971, c. 668, which amended this section, in s. 2 provided: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

This section, as amended by Session Laws 2006-169, s. 1, effective December 1, 2006, is applicable to offenses committed on or after that date.

CASE NOTES

I. General Consideration.
II. Decisions under Former Provisions.
  A. Disturbing Schools.
  B. Disturbing Religious Congregations.

I. GENERAL CONSIDERATION.

Former Provisions Held Unconstitutional. — Former subdivision (a)(3) and a portion of subdivision (a)(2) as it stood before the 1971 amendment, which proscribed offensively coarse utterances and acts such as to alarm and disturb persons present, were unconstitutionally vague and overbroad. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Constitutionality of Subdivision (a)(4)a. — Subdivision (a)(4)a makes it clear that a violation of the statute occurs when a person intentionally refuses to vacate any building or facility of any public or private educational institution after having been ordered to do so by the chief administrative officer of the institution or his authorized representative, and the statute is not unconstitutionally vague. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, appeal dismissed, 288 N.C. 512, 219 S.E.2d 348 (1975).

Legislative Guidelines Not Needed. — The validity of subdivision (a)(4)a making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrative officer of the institution or his representative does not depend upon the enactment by the legislature of detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, appeal dismissed, 288 N.C. 512, 219 S.E.2d 348 (1975).

A motion to dismiss a juvenile petition is recognized by North Carolina statutory and case law. In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991).

Fighting or Insulting Words May Constitutionally Be Prevented and Punished. — There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been though to raise any constitutional problem. These include the insulting or "fighting" words which by their very utterance tend to incite an immediate breach of the peace. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

There can be no doubt that the General Assembly intended to prohibit "fighting words," words tending to cause an immediate breach of the peace willfully spoken in a public place, and that such an interpretation accurately expresses the legislative purpose. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989); State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377, appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

Profanities in Emergency Room. — Where defendant, when he was informed that the doctor whom he had demanded was not immediately available, began shouting profanities, cursing, and loudly voicing unfounded complaints, his words and mode of communication in hospital emergency room were not protected by the U.S. Const., Amend. I. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972), overruled on other grounds, State v. Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989).

Disorderly Conduct in School. — The conduct in question must substantially interfere with the operation of school to rise to the level of disorderly conduct. In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991).

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled. In re Eller, 103 N.C. App. 625, 406 S.E.2d 299, rev'd on other grounds, 331 N.C. 714, 417 S.E.2d 479 (1992).

Evidence that a student stopped talking after being asked a second time and that the class was only momentarily disrupted, even in the light most favorable to the State, was insufficient to establish a violation of subdivision (a)(6). In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991).

For charge of disorderly conduct involving schools, there needed to be substantial interference with, disruption of, and confusion of the operation of a school in its program of instructing and training the students there enrolled; a juvenile adjudication would be reversed where the evidence did not support a finding of disorderly conduct involving schools. In re Brown, 150 N.C. App. 127, 562 S.E.2d 583, 2002 N.C. App. LEXIS 401 (2002).

Given the severity and nature of defendant's language, coupled with the fact that a teacher was required to stop teaching her class for at least several minutes, defendant's actions substantially interfered with the operation of a classroom and supported a juvenile delinquency adjudication based on disorderly conduct in a school. In re Pineault, 152 N.C. App. 196, 566 S.E.2d 854, 2002 N.C. App. LEXIS 896 (2002), cert. denied, 356 N.C. 302, 570 S.E.2d 728 (2002).

Defendant, a juvenile, was properly adjudicated delinquent for disorderly conduct on school grounds where defendant yelled a profanity at other students and caused the reporting teacher to be away from assigned duties for several minutes, disrupting operations. In re M.G., 156 N.C. App. 414, 576 S.E.2d 398, 2003 N.C. App. LEXIS 130 (2003).

Disturbance in Bar. — The allegation that defendant created a "little bit of disturbance" earlier in a bar did not demonstrate sufficiently provocative behavior to rise to the level of disorderly conduct under this section. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), rev'd on other grounds, 298 N.C. 512, 259 S.E.2d 258 (1979), cert. denied, 454 U.S. 973, 102 S. Ct. 523, 70 L. Ed. 2d 392 (1981).

Vague Language in Warrant Disregarded as Surplusage. — Unconstitutionally vague and overly broad language in a warrant for disorderly conduct could be disregarded as surplusage and the conviction under the warrant upheld where, absent the unconstitutional language, the warrant still alleged all the essential elements of subdivision (a)(2). State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

Where the trial judge inadvertently failed to note the 1971 amendment to this section in his instructions to the jury and in so doing charged concerning disorderly conduct in the language of subdivisions (1) and (2) of subsection (a) as those subdivisions were originally enacted in 1969, the court's charge failed to limit the definition of disorderly conduct to embrace only actions and words likely to bring on an immediate breach of the peace, as would be required by the 1971 amendment. For this error in the charge, defendant was entitled to a new trial in the case charging him with failing to comply with a lawful order to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Evidence Insufficient for Disorderly Conduct Conviction. — Trial court erred in denying a juvenile's motion to dismiss the charge of disorderly conduct in a school in violation of G.S. 14-288.4(a)(6) because although the juvenile's behavior was an annoyance to the dean of students of a high school, it did not rise to the level of criminal activity; there was no evidence that the school or classroom instruction was substantially disrupted, that the juvenile was aggressive or violent, or that the juvenile used disturbing or vulgar language. In re S.M., 190 N.C. App. 579, 660 S.E.2d 653, 2008 N.C. App. LEXIS 992 (2008).

Applied in State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908 (1974); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Butts, 22 N.C. App. 504, 206 S.E.2d 806 (1974); State v. McLoud, 26 N.C. App. 297, 215 S.E.2d 872 (1975).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971); State v. Lightner, 108 N.C. App. 349, 423 S.E.2d 827 (1992); State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518, 2000 N.C. App. LEXIS 887 (2000); Martin v. Parker, 150 N.C. App. 179, 563 S.E.2d 216, 2002 N.C. App. LEXIS 366 (2002).

II. DECISIONS UNDER FORMER PROVISIONS.

A. Disturbing Schools.

Editor's Note. *— The cases below were decided under former G.S. 14-273.*

Although former § 14-273 has been repealed, it is instructive as to the meaning of "disruptive conduct." In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991).

"Interrupt" means "to break the uniformity or continuity of; to break in upon an action." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

"Disturb" means "to throw into disorder." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of, and confusion of the operation of the school in its program of instruction and training of students there enrolled. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

The elements of the offense punishable under former § 14-273 were: (1) some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968); State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Motive No Defense. — Nothing else appearing, the defendant's motive for doing willfully an act forbidden by former G.S. 14-273 was no defense to charge of violation of such section. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

Evidence Sufficient for Jury. — In a prosecution charging that defendants unlawfully and willfully interrupted a public school, the issue of defendants' guilt was properly submitted to the jury, where the State's evidence tended to show that (1) the defendants entered the office of the secretary to the principal and told her that they were going to interrupt the school that day; (2) the defendants locked the secretary out of her office, moved furniture about, scattered papers, and dumped books on the floor; (3) the secretary and several teachers were kept away from their jobs or classes by these actions; (4) the defendants also occupied the principal's office and operated the bells that normally signalled the change of classes; and (5) the principal, as a result of the commotion, was forced to dismiss school prior to the regular closing hour. State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

B. Disturbing Religious Congregations.

Editor's Note. *— The cases below were decided under former G.S. 14-275 and the statutes from which it was derived.*

People Must Be Collected. — In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. State v. Bryson, 82 N.C. 576 (1880).

And an indictment will not lie after the congregation has dispersed. State v. Davis, 126 N.C. 1059, 35 S.E. 600 (1900).

But the congregation need not be engaged in the act of worship. State v. Ramsey, 78 N.C. 448 (1878).

The act itself must disturb the congregation. Information of the act, for example that a fight is in progress, will not suffice. State v. Kirby, 108 N.C. 772, 12 S.E. 1045 (1891).

Persistent speaking in church after remonstrance from the minister was sufficient to sustain a verdict under former G.S. 14-275. See State v. Ramsey, 78 N.C. 448 (1878).

Persistence in singing off-key where the intention was not to disturb was not sufficient to sustain a verdict under former G.S. 14-275. State v. Linkhaw, 69 N.C. 214 (1873).

OPINIONS OF ATTORNEY GENERAL

Applicability to Non-riot Situation. — See opinion of Attorney General to Mr. G. Patrick Hunter, Jr., Charlotte Police Attorney, 40 N.C.A.G. 166 (1970).

§ 14-288.5. Failure to disperse when commanded a misdemeanor; prima facie evidence.

(a) Any law-enforcement officer or public official responsible for keeping the peace may issue a command to disperse in accordance with this section if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

(b) Any person who fails to comply with a lawful command to disperse is guilty of a Class 2 misdemeanor.

(c) If any person remains at the scene of any riot, or disorderly conduct by an assemblage of three or more persons, following a command to disperse and after a reasonable time for dispersal has elapsed, it is prima facie evidence that the person so remaining is willfully engaging in the riot or disorderly conduct, as the case may be. (1969, c. 869, s. 1; 1993, c. 539, s. 190; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

This section is constitutional. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Constitutionality. — This section is narrowly tailored to prohibit the unprotected activity of refusing to obey a valid police command under certain circumstances. Brooks v. North Carolina Dep't of Cor., 984 F. Supp. 940 (E.D.N.C. 1997).

Failure to Disperse Where No Disorderly Conduct Was Occurring. — Under this section the failure to disperse when commanded by an officer would be an offense where no disorderly conduct was occurring so long as it was shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377, appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

Evidence Required. — It was necessary under this section for the State to present evidence of defendant's failure to disperse on command to do so and that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Evidence sufficient to support jury's finding that defendant was guilty of charge of failing to comply with lawful command to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Applied in State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.6. Looting; trespass during emergency.

(a) Any person who enters upon the premises of another without legal justification when the usual security of property is not effective due to the occurrence or aftermath of riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity is guilty of a Class 1 misdemeanor of trespass during an emergency.

(b) Any person who commits the crime of trespass during emergency and, without legal justification, obtains or exerts control over, damages, ransacks, or destroys the property of another is guilty of the felony of looting and shall be punished as a Class H felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 191, 1227; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

§ 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.

(a) Except as otherwise provided in this section, it is unlawful for any person to transport or possess off his own premises any dangerous weapon or substance in any area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring.

(b) This section does not apply to persons exempted from the provisions of G.S. 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(c) Any person who violates any provision of this section is guilty of a Class 1 misdemeanor. (1969, c. 869, s. 1; 1993, c. 539, s. 192; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Penalty Not Limited to That Prescribed by Ordinance. — Since this section itself makes the possession of a disassembled shotgun and the shotgun shells in the area in question a criminal offense and specifies the penalty therefor, and since the warrant relating to this offense was founded upon the statute, not the ordinance, the sentence imposable in this case was not limited to the penalty prescribed for such conduct by the ordinance. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Applied in State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

Cited in State v. Hinton, 361 N.C. 207, 639 S.E.2d 437, 2007 N.C. LEXIS 33 (2007).

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

(a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction.

(b) This section does not apply to:

(1) Persons exempted from the provisions of G.S. 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(2) Importers, manufacturers, dealers, and collectors of firearms, ammunition, or destructive devices validly licensed under the laws of the United States or the State of North Carolina, while lawfully engaged in activities authorized under their licenses.

(3) Persons under contract with the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts.

(4) Inventors, designers, ordnance consultants and researchers, chemists, physicists, and other persons lawfully engaged in pursuits designed to enlarge knowledge or to facilitate the creation, development, or manufacture of weapons of mass death and destruction intended for use in a manner consistent with the laws of the United States and the State of North Carolina.

(c) The term "weapon of mass death and destruction" includes:

(1) Any explosive or incendiary:

a. Bomb; or

b. Grenade; or

c. Rocket having a propellant charge of more than four ounces; or
d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or
e. Mine; or
f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or

(3) Any firearm capable of fully automatic fire, any shotgun with a barrel or barrels of less than 18 inches in length or an overall length of less than 26 inches, any rifle with a barrel or barrels of less than 16 inches in length or an overall length of less than 26 inches, any muffler or silencer for any firearm, whether or not such firearm is included within this definition. For the purposes of this section, rifle is defined as a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder; or

(4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

(d) Any person who violates any provision of this section is guilty of a Class F felony. (1969, c. 869, s. 1; 1975, c. 718, ss. 6, 7; 1977, c. 810; 1983, c. 413, ss. 1, 2; 1993, c. 539, s. 1228; 1994, Ex. Sess., c. 24, s. 14(c); 2001-470, s. 3.)

Cross References. — As to nuclear, biological, or chemical weapons of mass destruction, see G.S. 14-288.21 et seq.

CASE NOTES

Constitutionality. — This section does not completely ban a class of weapons protected by the Constitution; the statute permits possession of shotguns, with the exception of those which have been tampered with so as to shorten the barrel and State can regulate the length of a particular firearm as long as there is a reasonable purpose for doing so. State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989).

Construction with Other Provisions. — Reading this section in pari materia with G.S. 14-415.1, it is clear that the footnote to this section which reads "nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or ... place of business" does not apply to weapons of mass death and destruction; North Carolina did not intend to restore to its ex-felons the right to possess such weapons within their own homes, in contravention of the general federal prohibition against felons possessing firearms. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

The focus of this section is weapons of mass death and destruction which is considerably different from the concept of any gun used in G.S. 14-269.2(b). In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Operability is not an element of the crime to be proven by the State; it is, rather, an affirmative defense. State v. Fennell, 95 N.C.

App. 140, 382 S.E.2d 231 (1989).

Devices listed in the statute lose their status as weapons of mass death and destruction once they are found to be totally inoperable and incapable of being readily made operable. State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989).

Inoperability is defense only to the extent that the defendant can prove the pieces seized were not designed or intended for use in converting any device into a weapon of mass death and destruction. State v. Jackson, 353 N.C. 495, 546 S.E.2d 570, 2001 N.C. LEXIS 529 (2001).

Potential Inoperability Did Not Shift Burden of Proof. — Where defendant offered no evidence that the weapon was inoperable, but merely raised the possibility that the weapon was incapable of being fired and no witness opined that the weapon was inoperable, defendant's simply raising the issue of potential inoperability was not sufficient to shift the burden of proof to the State. State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989).

Fact That Weapon Had Been Disassembled Did Not Remove It from Scope of Section. — Subsection (c) merely defines what weapons qualify as weapons of mass death and destruction; included in this list are sawed-off shotguns and, under subdivision (c)(4), any combination of parts that may be readily assembled into weapons listed in the other subsections; the fact that the weapon had been disassembled by the time it was found by the officers did not lessen its quality as a weapon of mass death and destruction. State v. Fennell, 95 N.C. App. 140, 382 S.E.2d 231 (1989).

Sawed-Off Shotgun. — With limited and specific exceptions, no one in North Carolina, ex-felon or otherwise, may possess, store or acquire a sawed-off shotgun for any reason or under any circumstance. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

Admission of hearsay evidence that a sawed-off shotgun was not an antique, and thereby not exempt, under 18 U.S.C.S. § 921(16)(A), from the prohibition in G.S. 14-288.8 against possession of a weapon of mass destruction, was not plain error because there was no evidence that the shotgun was an antique; thus, the jury would not have been able to so find if the hearsay evidence had not been admitted and defendant would likely still have been convicted of violating the statute. State v. Blackwell, 163 N.C. App. 12, 592 S.E.2d 701, 2004 N.C. App. LEXIS 249 (2004), cert. denied, 358 N.C. 378, 597 S.E.2d 768 (2004).

Assertion that a sawed-off shotgun was an antique, and thereby exempt from the prohibition in G.S. 14-288.8 against possessing a weapon of mass destruction, under 18 U.S.C.S. § 921(16)(A), was an affirmative defense on which defendant bore the initial burden of proof to demonstrate the weapon's antique status, and defendant's evidence that the gun had belonged to his father, who received it from an 83-year-old woman whose father had owned it was not evidence that the weapon met the technical definition of an antique in 18 U.S.C.S. § 921(16)(A). State v. Blackwell, 163 N.C. App. 12, 592 S.E.2d 701, 2004 N.C. App. LEXIS 249 (2004), cert. denied, 358 N.C. 378, 597 S.E.2d 768 (2004).

Jury Instruction on Malice. — Where the trial court's jury instruction referred to both express and implied malice and was in accordance with the pattern jury instructions for arson and homicide, the trial court's instruction was proper. State v. Sexton, 357 N.C. 235, 581 S.E.2d 57, 2003 N.C. LEXIS 608 (2003).

Applied in State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138, 2001 N.C. App. LEXIS 1246 (2001); State v. Crump, 178 N.C. App. 717, 632 S.E.2d 233, 2006 N.C. App. LEXIS 1671 (2006).

Cited in State v. Jones, 304 N.C. 323, 283 S.E.2d 483 (1981); State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); State v. Moore, 339 N.C. 456, 451 S.E.2d 232 (1994); United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995); State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998); State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (2004); State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005); State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

OPINIONS OF ATTORNEY GENERAL

Effect on Permit Requirements. — The provisions of this section relating to weapons of mass death and destruction do not abrogate or abolish permit requirements of G.S. 14-409 and 14-409.9. See opinion of Attorney General to Mr. T.A. Radewicz, Sheriff, New Hanover County, 50 N.C.A.G. 109 (1981).

§ 14-288.9. Assault on emergency personnel; punishments.

(a) An assault upon emergency personnel is an assault upon any person coming within the definition of "emergency personnel" which is committed in an area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring or is imminent.

(b) The term "emergency personnel" includes law-enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency.

(c) Any person who commits an assault upon emergency personnel is guilty of a Class 1 misdemeanor. Any person who commits an assault upon emergency personnel with or through the use of any dangerous weapon or substance shall be punished as a Class F felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 193, 1229; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

Cited in State v. Jones, 358 N.C. 473, 598 S.E.2d 125 (2004).

§ 14-288.10. Frisk of persons during violent disorders; frisk of curfew violators.

(a) Any law-enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he has reasonable grounds to believe that the person is or may become unlawfully involved in an existing riot and when the person is close enough to such riot that he could become immediately involved in the riot. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

(b) Any law-enforcement officer may frisk any person he finds violating the provisions of a curfew proclaimed under the authority of G.S. 14-288.12, 14-288.13, 14-288.14, or 14-288.15 or any other applicable statutes or provisions of the common law in order to discover whether the person possesses any dangerous weapon or substance. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession. (1969, c. 869, s. 1.)

§ 14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies.

(a) Notwithstanding the provisions of Article 4 of Chapter 15, any law-enforcement officer may, under the conditions specified in this section, obtain a warrant authorizing inspection of vehicles under the conditions and for the purpose specified in subsection (b).

(b) The inspection shall be for the purpose of discovering any dangerous weapon or substance likely to be used by one who is or may become unlawfully involved in a riot. The warrant may be sought to inspect:

(1) All vehicles entering or approaching a municipality in which a state of emergency exists; or

(2) All vehicles which might reasonably be regarded as being within or approaching the immediate vicinity of an existing riot.

(c) The warrant may be issued by any judge or justice of the General Court of Justice.

(d) The issuing official shall issue the warrant only when he has determined that the one seeking the warrant has been specifically authorized to do so by the head of the law-enforcement agency of which the affiant is a member, and:

(1) If the warrant is being sought for the inspection of vehicles entering or approaching a municipality, that a state of emergency exists within the municipality; or

(2) If the warrant being sought is for the inspection of vehicles within or approaching the immediate vicinity of a riot, that a riot is occurring within that area.

Facts indicating the basis of these determinations must be stated in an affidavit and signed by the affiant under oath or affirmation.

(e) The warrant must be signed by the issuing official and must bear the hour and date of its issuance.

(f) The warrant must indicate whether it is for the inspection of vehicles entering or approaching a municipality or whether it is for the inspection of vehicles within or approaching the immediate vicinity of a riot. In either case, it must also specify with reasonable precision the area within which it may be exercised.

(g) The warrant shall become invalid 24 hours following its issuance and must bear a notation to that effect.

(h) Warrants authorized under this section shall not be regarded as search warrants for the purposes of application of Article 4 of Chapter 15.

(i) Nothing in this section is intended to prevent warrantless frisks, searches, and inspections to the extent that they may be constitutional and consistent with common law and governing statutes. (1969, c. 869, s. 1.)

Editor's Note. — Article 4 of Chapter 15, referred to in subsections (a) and (h) of this section, has been repealed. See now G.S. 15A-241 et seq.

CASE NOTES

When Search of Automobile Without Warrant Is Reasonable. — Because of its mobility, a search of an automobile without a warrant is reasonable if it is based on probable cause. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Search May Be Conducted After Automobile Is Transported to Police Station. — If there is probable cause to search the automobile at the place where it was stopped, it matters not that the search is conducted sometime later after the automobile has been transported to the police station. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

§ 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.

(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places, including directing and compelling the evacuation of all or part of the population from any stricken or threatened area within the governing body's jurisdiction, to prescribe routes, modes of transportation, and destinations in connection with evacuation; and to control ingress and egress of a disaster area, and the movement of persons within the area;

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;
(3) Upon the possession, transportation, sale, purchase, and consumption of alcoholic beverages;
(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and
(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) This section is intended to supplement and confirm the powers conferred by G.S. 160A-174(a), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

(d) Any ordinance of a type authorized by this section promulgated prior to June 19, 1969 shall, if otherwise valid, continue in full force and effect without reenactment.

(e) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a Class 3 misdemeanor. (1969, c. 869, s. 1; 1981, c. 412, s. 4(4); c. 747, s. 66; 1989, c. 770, s. 2; 1993, c. 539, s. 194; 1994, Ex. Sess., c. 24, s. 14(c); 2009-146, s. 1.)

Cross References. — As to powers of counties to enact ordinances to deal with states of emergency, see G.S. 14-288.13. As to power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality, see G.S. 14-288.14.

Effect of Amendments. — Session Laws 2009-146, s. 1, effective June 19, 2009, added "including directing and compelling the evacuation of all or part of the population from any stricken or threatened area within the governing body's jurisdiction, to prescribe routes, modes of transportation, and destinations in connection with evacuation; and to control ingress and egress of a disaster area, and the movement of persons within the area" at the end of subdivision (b)(1).

CASE NOTES

Constitutionality. — The contention that this statute is unconstitutionally vague in that it fails to provide a standard for the exercise of the discretion conferred is clearly without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Freedom of Travel May Be Limited. — The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Freedom of travel, like freedom of speech, may be subject to reasonable limitations as to time and place. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Incidental Restriction on Freedom of Speech May Be No Greater Than Essential to Government Interest. — The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction of U.S. Const., Amend. I freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Control of Civil Disorders Is Within Police Power. — Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Section Delegates Portion of Police Power to Municipalities. — By this section, the State has delegated a portion of its police power to its municipalities. This statute authorizes the city to enact an ordinance prohibiting the movement of people in public places "during a state of emergency" as defined in G.S. 14-288.1(10). State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

The "state of emergency" is the condition precedent to the exercise of this power by the city. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Only when local law-enforcement is no longer able to maintain order and and protect lives and property may the emergency powers be invoked. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Maintenance of Public Order Is Duty of Executive. — The responsibility for maintaining public peace on a day-to-day basis is lodged with the executive branch of government. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Public peace in our cities may be suddenly breached by massive civil disorder. Dealing with such an emergency situation requires an immediacy of action that is not possible for judges. It would be highly inappropriate for the court, removed from the primary responsibility for maintaining order and with the benefit of time for reflection not available to the mayor, to substitute its judgment of necessity for his. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Precise Definition Would Destroy Executive's Broad Discretion. — Attempting to precisely define under what specific conditions each of the authorized restrictions might be imposed would destroy the "broad discretion" necessary for the executive to deal with an emergency situation. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Mayor's Power Subject to Definite Standard. — The mayor's power to impose the restraints enumerated in this section and Asheville City Ordinance No. 613 is subject to a narrow, objective, and definite standard. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Standard Is That Which Applies to Executive's Use of Military. — The standard is essentially the same as that which applies to the executive's inherent power to restore order through the use of the military. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Mayor's Actions Subject to Judicial Review. — The executive's decision that civil control has broken down to the point where emergency measures are necessary is not conclusive or free from judicial review, but the scope of review must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Where actual violence, good faith, and a relation between means and ends are shown, an executive's finding of necessity will be upheld in court. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Declaration of State of Emergency Must Be Necessary to Preserve Order. — The declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order. United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Imposition of Curfew is Proper Exercise of Police Power. — Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of "domestic tranquility" becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Prohibiting Use of Public Parks at Night and Forbidding Transportation of Arms. — The restrictions imposed by a proclamation which only prohibited use of the public parks at night or forbade transportation of dangerous arms or substances were clearly among those authorized by subsection (b) of this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Arrest Without Warrant. — The presence of the defendant and his driver upon the streets, while the curfew was in effect, was a violation of the ordinance, declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having at least reasonable grounds to believe that the defendant had committed a misdemeanor in his presence, arrest without a warrant was lawful. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Search Incident to Arrest. — The search of the defendant's person was incidental to such arrest and, consequently, the four shotgun shells found tucked in the tops of his boots were properly admitted into evidence. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Burden of Proof. — The defendant's contention that the burden was on the State to prove that his presence on the streets was for a purpose other than those excepted by the ordinance and by the curfew proclamation was without merit. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

A defendant charged with the crime, who seeks protection by reason of the exception, has the burden of proving that he comes within the same. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-288.13. Powers of counties to enact ordinances to deal with states of emergency.

(a) The governing body of any county may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit the same prohibitions and restrictions to be imposed as enumerated in G.S. 14-288.12(b). The ordinances may delegate to the chairman of the board of county commissioners the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) No ordinance enacted by a county under the authority of this section shall apply within the corporate limits of any municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless the municipality by resolution consents to its application.

(d) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a Class 3 misdemeanor. (1969, c. 869, s. 1; 1993, c. 539, s. 195; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to powers of municipalities to enact ordinances to deal with states of emergency, see G.S. 14-288.12. As to power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality, see G.S. 14-288.14.

CASE NOTES

Constitutionality. — The limited delegation of the State's police power which the legislature deemed wise to grant by this Article to local governmental units in order to assist them in maintaining public peace and order during periods of emergency is constitutional. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Responsibilities and Powers of Local Executive Officials. — This Article wisely provides for placing in local executive officials, whose first and primary duty it is to maintain public order, powers adequate to their responsibilities and the initial decision as to whether a "state of emergency" in fact exists must be made by those who bear primary responsibility and who are closest to the scene. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

The local official may not act arbitrarily or without some factual basis to support his determination that a state of emergency in fact exists, and the prohibitions and restrictions which he imposes must be among those authorized by this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

And His Decision Is Subject to Review. — The decision of the responsible local official as to whether a "state of emergency" in fact exists, while entitled to great respect, is not conclusive or entirely free from judicial review. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

The scope of judicial review, in cases reviewing the validity of a proclamation, is limited to the type of review which traditionally is for the judge, and not for the jury, to perform. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Proclamation Need Not Make Reference to Section. — That a proclamation makes no reference to this section in no way affects its validity; the existence of the statute, not reference to it in the proclamation, is all that matters. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Uniform Enforcement. — That the activities of an organization may have been a major factor in bringing on the conditions which prompted declaration of the state of emergency furnishes no valid support for the contention that that organization and its members were unfairly discriminated against, if once the proclamation was issued, it was uniformly enforced as to all. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Cited in Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998).

§ 14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.

(a) The chairman of the board of commissioners of any county who has been requested to do so by a mayor may by proclamation extend the effect of any one or more of the prohibitions and restrictions imposed in that mayor's municipality pursuant to the authority granted in G.S. 14-288.12. The chairman may extend such prohibitions and restrictions to any area within his county in which he determines it to be necessary to assist in controlling the state of emergency within the municipality. No prohibition or restriction extended by proclamation by the chairman under the authority of this section shall apply within the limits of any other municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless that other municipality by resolution consents to its application.

(b) Whenever any chairman of the board of county commissioners extends the effect of municipal prohibitions and restrictions under the authority of this section to any area of the county, it shall be deemed that a state of emergency has been validly found and declared with respect to such area of the county.

(c) Any chairman of a board of county commissioners extending prohibitions and restrictions under the authority of this section must take reasonable steps to give notice of its terms to those likely to be affected. The chairman of the board of commissioners shall proclaim the termination of any prohibitions and restrictions extended under the authority of this section upon:

(1) His determination that they are no longer necessary; or

(2) The determination of the board of county commissioners that they are no longer necessary; or

(3) The termination of the prohibitions and restrictions within the municipality.

(d) The powers authorized under this section may be exercised whether or not the county has enacted ordinances under the authority of G.S. 14-288.13. Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any ordinances enacted by the county under the authority of G.S. 14-288.13.

(e) Any person who violates any provision of any prohibition or restriction extended by proclamation under the authority of this section is guilty of a Class 3 misdemeanor. (1969, c. 869, s. 1; 1993, c. 539, s. 196; 1994, Ex. Sess., c. 14, s. 7; c. 24, s. 14(c).)

CASE NOTES

Cited in Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998).

§ 14-288.15. Authority of Governor to exercise control in emergencies.

(a) When the Governor determines that a state of emergency exists in any part of North Carolina, he may exercise the powers conferred by this section if he further finds that local control of the emergency is insufficient to assure adequate protection for lives and property.

(b) Local control shall be deemed insufficient only if:

(1) Needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances or issued appropriate proclamations as authorized by G.S. 14-288.12, 14-288.13, or 14-288.14; or

(2) Local authorities have not taken implementing steps under such ordinances or proclamations, if enacted or proclaimed, for effectual control of the emergency that has arisen; or

(3) The area in which the state of emergency exists has spread across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; or

(4) The scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.

(c) The Governor when acting under the authority of this section may:

(1) By proclamation impose prohibitions and restrictions in all areas affected by the state of emergency; and

(2) Give to all participating State and local agencies and officers such directions as may be necessary to assure coordination among them. These directions may include the designation of the officer or agency responsible for directing and controlling the participation of all public agencies and officers in the emergency. The Governor may make this designation in any manner which, in his discretion, seems most likely to be effective. Any law-enforcement officer participating in the control of a state of emergency in which the Governor is exercising control under this section shall have the same power and authority as a sheriff throughout the territory to which he is assigned.

(d) The Governor in his discretion, as appropriate to deal with the emergency then occurring or likely to occur, may impose any one or more or all of the types of prohibitions and restrictions enumerated in G.S. 14-288.12(b), and may amend or rescind any prohibitions and restrictions imposed by local authorities.

(e) Any person who violates any provision of a proclamation of the Governor issued under the authority of this section is guilty of a Class 2 misdemeanor. (1969, c. 869, s. 1; 1993, c. 539, s. 197; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-288.16. Effective time, publication, amendment, and recision of proclamations.

(a) This section applies to proclamations issued under the authority of G.S. 14-288.12, 14-288.13, 14-288.14, and 14-288.15, and any other applicable statutes and provisions of the common law.

(b) All prohibitions and restrictions imposed by proclamation shall take effect immediately upon publication of the proclamation in the area affected unless the proclamation sets a later time. For the purpose of requiring compliance, publication may consist of reports of the substance of the prohibitions and restrictions in the mass communications media serving the affected area or other effective methods of disseminating the necessary information quickly. As soon as practicable, however, appropriate distribution of the full text of any proclamation shall be made. This subsection shall not be governed by the provisions of G.S. 1-597.

(c) Prohibitions and restrictions may be extended as to time or area, amended, or rescinded by proclamation. Prohibitions and restrictions imposed by proclamation under the authority of G.S. 14-288.12, 14-288.13, and 14-288.14 shall expire five days after their last imposition unless sooner terminated under G.S. 14-288.14(c)(3), by proclamation, or by the governing body of the county or municipality in question. Prohibitions and restrictions imposed by proclamation of the Governor shall expire five days after their last imposition unless sooner terminated by proclamation of the Governor. (1969, c. 869, s. 1.)

§ 14-288.17. Municipal and county ordinances may be made immediately effective if state of emergency exists or is imminent.

(a) Notwithstanding any other provision of law, whether general or special, relating to the promulgation or publication of ordinances by any municipality or county, this section shall control with respect to any ordinances authorized by G.S. 14-288.11 and 14-288.12.

(b) Upon proclamation by the mayor or chairman of the board of county commissioners that a state of emergency exists within the municipality or the county, or is imminent, any ordinance enacted under the authority of this article shall take effect immediately unless the ordinance sets a later time. If the effect of this section is to cause an ordinance to go into effect sooner than it otherwise could under the law applicable to the municipality or county, the mayor or chairman of the board of county commissioners, as the case may be, shall take steps to cause reports of the substance of any such ordinance to be disseminated in a fashion that such substance will likely be communicated to the public in general, or to those who may be particularly affected by the ordinance if it does not affect the public generally. As soon as practicable thereafter, appropriate distribution or publication of the full text of any such ordinance shall be made. (1969, c. 869, s. 1.)

§ 14-288.18. Injunction to cope with emergencies at public and private educational institutions.

(a) The chief administrative officer, or his authorized representative, of any public or private educational institution may apply to any superior court judge for injunctive relief if a state of emergency exists or is imminent within his institution. For the purposes of this section, the superintendent of any city or county administrative school unit shall be deemed the chief administrative officer of any public elementary or secondary school within his unit.

(b) Upon a finding by a superior court judge, to whom application has been made under the provisions of this section, that a state of emergency exists or is imminent within a public or private educational institution by reason of riot, disorderly conduct by three or more persons, or the imminent threat of riot, the judge may issue an injunction containing provisions appropriate to cope with the emergency then occurring or threatening. The injunction may be addressed to named persons or named or described groups of persons as to whom there is satisfactory cause for believing that they are contributing to the existing or imminent state of emergency, and ordering such persons or groups of persons to take or refrain or desist from taking such various actions as the judge finds it appropriate to include in his order. (1969, c. 869, s. 1.)

CASE NOTES

This section envisions an action in the nature of a civil action for a permanent injunction, in which the parties to be enjoined are named or described with at least a modicum of particularity. State ex rel. Moore v. Doe, 19 N.C. App. 131, 198 S.E.2d 236, appeal dismissed, 284 N.C. 121, 199 S.E.2d 663 (1973).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.19. Governor's power to order evacuation of public building.

(a) When it is determined by the Governor that a great public crisis, disaster, riot, catastrophe, or any other similar public emergency exists, or the occurrence of any such condition is imminent, and, in the Governor's opinion it is necessary to evacuate any building owned or controlled by any department, agency, institution, school, college, board, division, commission or subdivision of the State in order to maintain public order and safety or to afford adequate protection for lives or property, the Governor is hereby authorized to issue an order of evacuation directing all persons within the building to leave the building and its premises forthwith. The order shall be delivered to any law-enforcement officer or officer of the National Guard, and such officer shall, by a suitable public address system, read the order to the occupants of the building and demand that the occupants forthwith evacuate said building within the time specified in the Governor's order.

(b) Any person who willfully refuses to leave the building as directed in the Governor's order shall be guilty of a Class 2 misdemeanor. (1969, c. 1129; 1993, c. 539, s. 198; 1994, Ex. Sess., c. 24, s. 14(c); 2009-281, s. 1.)

Effect of Amendments. — Session Laws 2009-281, s. 1, effective July 10, 2009, substituted "National Guard" for "national guard" in the last sentence of subsection (a).

§ 14-288.20. Certain weapons at civil disorders.

(a) The definitions in G.S. 14-288.1 do not apply to this section. As used in this section:

(1) The term "civil disorder" means any public disturbance involving acts or violence by assemblages of three or more persons, which causes an immediate danger of damage or injury to the property or person of any other individual or results in damage or injury to the property or person of any other individual.

(2) The term "firearm" means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of such a weapon.

(3) The term "explosive or incendiary device" means (i) dynamite and all other forms of high explosives, (ii) any explosive bomb, grenade, missile, or similar device, and (iii) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting that flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

(4) The term "law-enforcement officer" means any officer of the United States, any state, any political subdivision of a state, or the District of Columbia charged with the execution of the laws thereof; civil officers of the United States; officers and soldiers of the organized militia and state guard of any state or territory of the United States, the

Commonwealth of Puerto Rico, or the District of Columbia; and members of the armed forces of the United States.

(b) A person is guilty of a Class H felony, if he:

(1) Teaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder; or

(2) Assembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, intending to employ unlawfully the training, practicing, instruction, or technique for use in, or in furtherance of, a civil disorder.

(c) Nothing contained in this section shall make unlawful any act of any law-enforcement officer which is performed in the lawful performance of his official duties. (1981, c. 880, ss. 1, 2; 1993, c. 539, s. 1230; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Conduct Carried Out by Defendant's Agents. — Although defendant never had direct involvement in any activities that violated this section, it was sufficient, in order to find defendant in contempt of a court order prohibiting violation of this section, that the violative conduct was carried out by defendant's agents under his direct orders. Person v. Miller, 854 F.2d 656 (4th Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989).

Acts Need Not Threaten "Immediate" Danger. — In an action for contempt of a court order prohibiting violation of this section, prosecution need not prove that the acts engaged in threatened "immediate" danger but, rather, that the prohibited activities were engaged in with the intent of furthering civil disorder at some point in time. Person v. Miller, 854 F.2d 656 (4th Cir. 1988), cert. denied, 489 U.S. 1011, 109 S. Ct. 1119, 103 L. Ed. 2d 182 (1989).

Cited in State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

ARTICLE 36B.

Nuclear, Biological, or Chemical Weapons of Mass Destruction.

§ 14-288.21. Unlawful manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of a nuclear, biological, or chemical weapon of mass destruction; exceptions; punishment.

(a) Except as otherwise provided in this section, it is unlawful for any person to knowingly manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire a nuclear, biological, or chemical weapon of mass destruction.

(b) This section does not apply to:

(1) Persons listed in G.S. 14-269(b) with respect to any activities lawfully engaged in while carrying out their duties.

(2) Persons under contract with, or working under the direction of, the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts or pursuant to lawful direction.

(3) Persons lawfully engaged in the development, production, manufacture, assembly, possession, transport, sale, purchase, delivery or

acquisition of any biological agent, disease organism, toxic or poisonous chemical, radioactive substance or their immediate precursors, for preventive, protective, or other peaceful purposes.

(4) Persons lawfully engaged in accepted agricultural, horticultural, or forestry practices; aquatic weed control; or structural pest and rodent control, in a manner approved by the federal, State, county, or local agency charged with authority over such activities.

(c) The term "nuclear, biological, or chemical weapon of mass destruction", as used in this Article, means any of the following:

(1) Any weapon, device, or method that is designed or has the capability to cause death or serious injury through the release, dissemination, or impact of:
  a. Radiation or radioactivity;
  b. A disease organism; or
  c. Toxic or poisonous chemicals or their immediate precursors.

(2) Any substance that is designed or has the capability to cause death or serious injury and:
  a. Contains radiation or radioactivity;
  b. Is or contains toxic or poisonous chemicals or their immediate precursors; or
  c. Is or contains one or more of the following:
    1. Any select agent that is a microorganism, virus, bacterium, fungus, rickettsia, or toxin listed in Appendix A of Part 72 of Title 42 of the Code of Federal Regulations.
    2. Any genetically modified microorganisms or genetic elements from an organism on Appendix A of Part 72 of Title 42 of the Code of Federal Regulations, shown to produce or encode for a factor associated with a disease.
    3. Any genetically modified microorganisms or genetic elements that contain nucleic acid sequences coding for any of the toxins listed on Appendix A of Part 72 of Title 42 of the Code of Federal Regulations, or their toxic submits.

The term "nuclear, biological, or chemical weapon of mass destruction" also includes any combination of parts or substances either designed or intended for use in converting any device or substance into any nuclear, biological, or chemical weapon of mass destruction or from which a nuclear, biological, or chemical weapon of mass destruction may be readily assembled or created.

(d) Any person who violates any provision of this section is guilty of a Class B1 felony. (2001-470, s. 1.)

Cross References. — For provisions relating to terrorist incident using nuclear, biological, or chemical agents, see G.S. 130A-475 et seq.

§ 14-288.22. Unlawful use of a nuclear, biological, or chemical weapon of mass destruction; punishment.

(a) Any person who unlawfully and willfully injures another by the use of a nuclear, biological, or chemical weapon of mass destruction is guilty of a Class A felony and shall be sentenced to life imprisonment without parole.

(b) Any person who attempts, solicits another, or conspires to injure another by the use of a nuclear, biological, or chemical weapon of mass destruction is guilty of a Class B1 felony.

(c) Any person who for the purpose of violating any provision of this Article, deposits for delivery or attempts to have delivered, a nuclear, biological, or chemical weapon of mass destruction by the United States Postal Service or other public or private business engaged in the delivery of mail, packages, or parcels is guilty of a Class B1 felony. (2001-470, s. 1.)

§ 14-288.23. Making a false report concerning a nuclear, biological, or chemical weapon of mass destruction; punishment; restitution.

(a) Any person who, by any means of communication to any person or group of persons, makes a report, knowing or having reason to know the report is false, that causes any person to reasonably believe that there is located at any place or structure whatsoever any nuclear, biological, or chemical weapon of mass destruction is guilty of a Class D felony.

(b) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from disruption of the normal activity that would have otherwise occurred but for the false report, pursuant to Article 81C of Chapter 15A of the General Statutes.

(c) For purposes of this section, the term "report" shall include making accessible to another person by computer. (2001-470, s. 1.)

§ 14-288.24. Perpetrating hoax by use of false nuclear, biological, or chemical weapon of mass destruction; punishment; restitution.

(a) Any person who, with intent to perpetrate a hoax, conceals, places, or displays any device, object, machine, instrument, or artifact, so as to cause any person reasonably to believe the same to be a nuclear, biological, or chemical weapon of mass destruction is guilty of a Class D felony.

(b) The court may order a person convicted under this section to pay restitution, including costs and consequential damages resulting from disruption of the normal activity that would have otherwise occurred but for the hoax, pursuant to Article 81C of Chapter 15A of the General Statutes. (2001-470, s. 1.)

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

Article 37.

Lotteries, Gaming, Bingo and Raffles.

Part 1. Lotteries and Gaming.

§ 14-289. Advertising lotteries.

Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if anyone by writing or printing or by circular or letter or in any other way, advertises or publishes an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a Class 2 misdemeanor. News medium as defined in G.S. 8-53.11 shall be exempt from this section provided the publishing is in connection with a lawful activity of the news medium. (1887, c. 211; Rev., s. 3725; C.S., s. 4427; 1979, c. 893, s. 3; 1983, c. 896, s. 1;

1993, c. 539, s. 199; 1994, Ex. Sess., c. 24, s. 14(c); 2005-276, s. 31.1(v2); 2005-344, s. 3(a).)

Local Modification. — (As to Article 37) Carteret: 1971, c. 221; Cleveland: 1971, c. 627; Jones: 1971, c. 627; 1977, c. 157; Lincoln: 1971, c. 627; 1977, c. 66; Pamlico: 1971, c. 627; 1977, c. 157; Polk: 1971, c. 627; Rutherford: 1971, c. 627; Union: 1971, c. 627; 1977, c. 157.

Editor's Note. — Session Laws 1983, c. 896, s. 3, effective Oct. 1, 1983, designated existing Article 37 of Chapter 14 as Part 1 of such Article and added a new Part 2.

Session Laws 1983, c. 896, which amended this section and G.S. 14-290, 14-291, 14-291.1, and 14-292, in s. 5.1, provided: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina."

Legal Periodicals. — See the discussion in 5 N.C.L. Rev. 31 (1927).

CASE NOTES

Constitutionality. — With the exception of the provision relating to homeowner and property owner associations (now found in G.S. 14-309.6(1)), this section and G.S. 14-290 and former G.S. 14-292.1 (now replaced by G.S. 14-309.5 et seq.) do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

Illegal Lottery Not Shown. — Trial court properly found that sale of a corporation's prepaid phone cards with game pieces was not an illegal lottery where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the price being charged and had sufficient value and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces without purchasing the phone card via written request. Am. Treasures, Inc. v. State, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989); Hatcher v. Harrah's NC Casino Co., LLC, 169 N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005).

§ 14-290. Dealing in lotteries.

Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed two thousand dollars ($2,000). Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. This section shall not apply to the possession of a lottery ticket or share for a lottery game being lawfully conducted in another state. (1834, c. 19, s. 1; R.C., c. 34, s. 69; 1874-5, c. 96; Code, s. 1047; Rev., s. 3726; C.S., s. 4428; 1933, c. 434; 1937, c. 157; 1979, c. 893, s. 4; 1983, c. 896, s. 1; 1993, c. 539, s. 200; 1994, Ex. Sess., c. 24, s. 14(c); 2005-344, s. 3(b).)

Cross References. — See Editor's Note to G.S. 14-289.

CASE NOTES

Constitutionality. — With the exception of the provision relating to homeowner and property owner associations (now found in G.S. 14-309.6(1)), this section and G.S. 14-289 and former G.S. 14-292.1 (now replaced by G.S. 14-309.5 et seq.) do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

The 1933 amendment to this section, which made the possession of tickets, etc., used in the operating of a lottery prima facie evidence of violation of the section, was constitutional and valid, the presumption being a rational one. State v. Fowler, 205 N.C. 608, 172 S.E. 191 (1934).

Statutes, such as this section, regulating such schemes violate neither the State nor federal Constitution. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. Brevard Mfg. Co. v. W. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916). See State v. Lumsden, 89 N.C. 572 (1883).

Lottery Defined. — A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Lipkin, 169 N.C. 265, 84 S.E. 340 (1915); State v. Simmons, 59 N.C. App. 287, 296 S.E.2d 805 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983), overruled on other grounds, State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991).

This Section and § 14-291.1 Distinguished. — This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while G.S. 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same, but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. State v. Robinson, 224 N.C. 412, 30 S.E.2d 320 (1944).

Section Not Applicable To Purchaser. — This section does not embrace persons who buy lottery tickets. State v. Bryant, 74 N.C. 207 (1876).

Lottery Privilege Not a Contract. — A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the State, but a mere privilege or license, and is revocable at will by the legislative power. State v. Morris, 77 N.C. 512 (1877).

Note for Lottery Contract Unenforceable. — Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforceable in the courts of the State. Brevard Mfg. Co. v. W. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916).

Surety to Lottery Contract. — A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforceable against the surety thereon as the contract upon which it is founded. Basnight v. American Mfg. Co., 174 N.C. 206, 93 S.E. 734 (1917).

Legal Effect of Lottery Ticket. — A lottery ticket entitles the holder to demand and receive one of the prizes awarded. It is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title. State v. Simmons, 59 N.C. App. 287, 296 S.E.2d 805 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983), overruled on other grounds, State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991).

First clause of the last sentence creates a separate offense that is applicable to those participating in a lottery as well as to those conducting the lottery. This offense comprises the possession of tickets, certificates or orders that are used in the operation of a lottery. State v. Simmons, 59 N.C. App. 287, 296 S.E.2d 805 (1982), cert. denied, 307 N.C. 701, 301 S.E.2d 395 (1983), overruled on other grounds, State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991).

Actual Physical Possession of Tickets Unnecessary. — The possession of lottery tickets sufficient to raise prima facie evidence of the violation of this section need not be actual physical possession, and the tickets need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Admissibility of Evidence. — In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. State v. Ingram, 204 N.C. 557, 168 S.E. 837 (1933).

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Evidence Held Sufficient. — Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant was sufficient to be submitted to the jury in a prosecution under this section, and defendant's contention that there was no evidence that he was in charge of the store was untenable when the record disclosed that several witnesses referred to the locus in quo as defendant's place of business. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same was sufficient to be submitted to the jury in prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a prima facie case under the provisions of this section. State v. Powell, 219 N.C. 220, 13 S.E.2d 232 (1941).

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Applied in State v. Blanton, 207 N.C. 872, 180 S.E. 81 (1935); State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994); United States v. $61,433.04 U.S. Currency, 894 F. Supp. 906 (E.D.N.C. 1995).

§ 14-291. Selling lottery tickets and acting as agent for lotteries.

Except as provided in Chapter 18C of the General Statutes or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a Class 2 misdemeanor. (1834, c. 19, s. 2; R.C., c. 34, s. 70; Code, s. 1048; Rev., s. 3727; C.S., s. 4429; 1979, c. 893, s. 5; 1983, c. 896, s. 1; 1993, c. 539, s. 201; 1994, Ex. Sess., c. 24, s. 14(c); 2005-344, s. 3(c).)

Cross References. — See Editor's Note to G.S. 14-289.

CASE NOTES

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Cited in Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

Except as provided in Chapter 18C of the General Statutes, in connection with a lawful lottery conducted in another state, or in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a Class 2 misdemeanor. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550; 1979, c. 893, s. 6; 1983, c. 896, s. 1; 1993, c. 539, s. 202; 1994, Ex. Sess., c. 24, s. 14(c); 2005-344, s. 3(d).)

Cross References. — See Editor's Note to G.S. 14-289.

CASE NOTES

Lottery Defined. — A lottery is any scheme for the distribution or prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, modified on other grounds, 27 N.C. App. 295, 219 S.E.2d 76, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

"Barter" and "sell" are not used as synonyms in this section. Barter is a contract by which parties exchange one commodity for another. It differs from a sale, in that the latter is a transfer of goods for a specified price, payable in money. This being so, an accused may violate this section in four distinct ways. He may sell the illegal articles, or he may barter them, or he may cause another to sell them, or he may cause another to barter them. State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953).

Warrant Sufficient. — Warrant charging the defendant with the sale of tickets and tokens to be used in a numbers "lottery" omits none of the essential elements of the offense. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, modified on other grounds, 27 N.C. App. 295, 219 S.E.2d 76, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

Racketeering Activity. — Gambling in houses of public entertainment in violation of G.S. 14-293, operating or possessing gambling devices in violation of G.S. 14-302, and selling or possessing numbers tickets in violation of this section are gambling offenses chargeable as a general misdemeanor punishable by up to two years' imprisonment, thereby satisfying the federal criteria for racketeering activity under 18 U.S.C. § 1961(1). Therefore, the gambling offenses constituted "racketeering activity" under the alternate definition established in G.S. 75D-3(c)(2). State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Admissibility of Evidence. — In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously, like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945); State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Instructions. — In a prosecution for possession of lottery tickets, the trial court properly instructed the jury that the State had the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets, but the court erred in instructing that, "under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed." State v. Mayo, 27 N.C. App. 336, 219 S.E.2d 255 (1975).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complied with the requirements of the statute requiring the judge to declare and explain the law arising on the evidence given in the case. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Punishment. — A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under G.S. 14-299 is in rem and is no part of the personal judgment against the accused. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947). See note to § 14-299.

Applied in State v. Upchurch, 267 N.C. 417, 148 S.E.2d 259 (1966).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); State v. Lyons, 330 N.C. 298, 410 S.E.2d 906 (1991).

§ 14-291.2. Pyramid and chain schemes prohibited.

(a) No person shall establish, operate, participate in, or otherwise promote any pyramid distribution plan, program, device or scheme whereby a participant pays a valuable consideration for the opportunity or chance to receive a fee or compensation upon the introduction of other participants into the program, whether or not such opportunity or chance is received in conjunction with the purchase of merchandise. A person who establishes or operates a pyramid distribution plan is guilty of a Class H felony. A person who participates in or otherwise promotes a pyramid distribution plan is deemed to participate in a lottery and is guilty of a Class 2 misdemeanor.

(b) "Pyramid distribution plan" means any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program; and

"Compensation" does not mean payment based on sales of goods or services to persons who are not participants in the scheme, and who are not purchasing in order to participate in the scheme.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or district attorney of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may assess civil penalties and attorneys' fees to the Attorney General or the District Attorney pursuant to G.S. 75-15.2 and 75-16.1; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme. The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(d) Any contract hereafter created for which a part of the consideration consisted of the opportunity or chance to participate in a program described in subsection (a) is hereby declared to be contrary to public policy and therefore void and unenforceable. (1971, c. 875, s. 1; 1973, c. 47, s. 2; 1983, c. 721, s. 2; 1993, c. 539, s. 203; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 19.25(x); 1998-215, s. 96.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Injunctive Relief at Instance of State. — Even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of our State. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Applied in State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981); State ex rel. Edmisten v. Challenge, Inc., 71 N.C. App. 575, 322 S.E.2d 658 (1984).

§ 14-292. Gambling.

Except as provided in Chapter 18C of the General Statutes or in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a Class 2 misdemeanor. This section shall not apply to a person who plays at or bets on any lottery game being lawfully conducted in any state. (1891, c. 29; Rev., s. 3715; C.S., s. 4430; 1979, c. 893, s. 1; 1983, c. 896, s. 1; 1993, c. 539, s. 204; 1994, Ex. Sess., c. 24, s. 14(c); 2005-344, s. 3(e).)

Cross References. — As to gaming contracts, see G.S. 16-1 et seq. See Editor's Note to G.S. 14-289.

Legal Periodicals. — For reference to acts legalizing pari-mutuel racetrack betting, see 11 N.C.L. Rev. 248 (1933).

For comment, "Place Your Bets.On the Keyboard: Are Internet Casinos Legal?," 25 Campbell L. Rev. 135 (2002).

CASE NOTES

Betting is essential to the offense; playing without betting is not indictable. State v. Brannen, 53 N.C. 208 (1860).

The section does not apply to prizes given for skill. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Games of Chance and Games of Skill Distinguished. — A game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

The universal acceptation of "a game of chance" is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance. State v. Gupton, 30 N.C. 271 (1848).

Illegal Bingo. — In plaintiff's action for declaratory judgment seeking declaration of promotional schemes' legality, where affidavits plainly showed that patrons came to play bingo, not because they wanted or needed to purchase combs and candy, and affidavits also showed patrons understood their purchases to be the basis for the opportunity to play bingo, no unresolved issue of fact regarding the existence of consideration remained for trial; the plaintiffs' own evidence showed that consideration was an element of the bingo game offered by corporate solicitor; therefore, the game was "gambling" in violation of this section, and defendants were entitled to summary judgment as a matter of law. Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Where some patrons obtained bingo cards without first buying combs or candy, this fact alone did not transform the bingo games offered by corporation into "free bingo"; patrons who obtained the cards without making a purchase received fewer cards than patrons who did buy the items; therefore, the other patrons had to pay to obtain a greater number of bingo cards. Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Blackjack. — Whether blackjack was a game of chance or one of skill was a question for the jury to decide from the evidence. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Poker. — Poker club owner's proposed operation of a poker club was illegal under G.S. 14-292 because chance predominated over skill in the game of poker, thus making poker a game of chance and the proposed poker club illegal under G.S. 14-292. Joker Club, L.L.C. v. Hardin, 183 N.C. App. 92, 643 S.E.2d 626, 2007 N.C. App. LEXIS 838 (2007).

Tenpins is not a game of chance. State v. King, 113 N.C. 631, 18 S.E. 169 (1893).

Horse racing is included in the category of "gaming" or "gambling." The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on horse racing, or on any other sort of race, in an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of this section. State ex rel. Taylor v. California Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Calling Transaction a Raffle Does Not Change its Character. — Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Ordinances as to Gambling Void. — Gambling being an offense under the general law, a city ordinance covering the same subject is void. State v. McCoy, 116 N.C. 1059, 21 S.E. 690 (1895).

All who engage in gambling are principals. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Sufficiency of Indictment. — An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Where misdemeanor statement of charges referenced the violation and stated that defendant unlawfully and willfully operated a game of chance, "a poker machine by paying a player money for said player's score," the misdemeanor statement of charges were sufficiently alleged so as to charge defendant with two counts of gambling. State v. Chase, 117 N.C. App. 686, 453 S.E.2d 195 (1995).

Applied in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975); Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986).

Cited in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954); Walter Kidde & Co. v. Bradshaw, 56 N.C. App. 718, 289 S.E.2d 571 (1982); United States v. Smith, 704 F.2d 723 (4th Cir. 1983); State v. Campbell, 79 N.C. App. 468, 339 S.E.2d 674 (1986); Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994); Hatcher v. Harrah's NC Casino Co., 151 N.C. App. 275, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (2002).

§ 14-292.1: Repealed by Session Laws 1983, c. 896, s. 2.

Cross References. — For present provisions concerning bingo and raffles, see G.S. 14-309.5 et seq.

§ 14-293. Allowing gambling in houses of public entertainment; penalty.

Except as provided in Chapter 18C of the General Statutes, if any keeper of an ordinary or other house of entertainment, or of a house wherein alcoholic beverages are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a Class 2 misdemeanor. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this State. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. (1799, c. 526, P.R.; 1801, c. 581, P.R.; 1831, c. 26; R.C., c. 34, s. 76; Code, s. 1043; 1901, c. 753; Rev., s. 3716; C.S., 4431; 1967, c. 101, s. 1; 1981, c. 412, s. 4(4); c. 747, s. 66; 1993, c. 539, s. 205; 1994, Ex. Sess., c. 24, s. 14(c); 2005-344, s. 3(f).)

CASE NOTES

Gambling in Leased Room of Tavern. — Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. State v. Keisler, 51 N.C. 73 (1858).

House Where Liquor Is Retailed. — For case under this provision, see State v. Terry, 20 N.C. 325 (1839).

Sufficiency of Warrant. — A warrant charging that defendant did operate a house in which various types of gambling "is continuously carried on" and did permit named persons to engage in a game of cards in which money was bet, held sufficient to charge defendant with operating a gambling house. State v. Anderson, 259 N.C. 499, 130 S.E.2d 857 (1963).

Racketeering Activity. — Gambling in houses of public entertainment in violation of this section, operating or possessing gambling devices in violation of G.S. 14-302, and selling or possessing numbers tickets in violation of G.S. 14-291.1 are gambling offenses chargeable as a general misdemeanor punishable by up to two years' imprisonment, thereby satisfying the federal criteria for racketeering activity under 18 U.S.C. § 1961(1). Therefore, the gambling offenses constituted "racketeering activity" under the alternate definition established in G.S. 75D-3(c)(2). State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Punishment. — For violation of this section a fine of $2,000 and imprisonment of 30 days, and thereafter until the fine and costs were paid, was held not excessive punishment. State v. Miller, 94 N.C. 904 (1886).

Cited in State v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 14-294. Gambling with faro banks and tables.

If any person shall open, establish, use or keep a faro bank, or a faro table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a Class 2 misdemeanor. (1848, c. 34; R.C., c. 71; 1856-7, c. 25; Code, s. 1044; Rev., s. 3717; C.S., s. 4432; 1993, c. 539, s. 206; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to compelling testimony in cases when this section and G.S. 14-295 through 14-297 have been violated, see G.S. 8-55.

CASE NOTES

Cited in State v. Norwood, 94 N.C. 935 (1886); State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.

If any person shall establish, use or keep any gaming table (other than a faro bank), by whatever name such table may be called, an illegal punchboard or an illegal slot machine, at which games of chance shall be played, he shall be guilty of a Class 2 misdemeanor; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a Class 2 misdemeanor. (1791, c. 336, P.R.; 1798, c. 502, s. 2, P.R.; R.C., c. 34, s. 72; Code, s. 1045; Rev., s. 3718; C.S., s. 4433; 1931, c. 14, s. 2; 1993, c. 539, s. 207; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to gambling generally, see G.S. 14-292.

Editor's Note. — See Editor's note to G.S. 14-296.

CASE NOTES

This section prohibits establishing, using or keeping an illegal punchboard. Actual operation of the device is not an element of the offense. State v. Warren, 61 N.C. App. 549, 301 S.E.2d 126 (1983).

Sufficiency of Indictment. — An indictment under this section is good without any averment that the act was done "willfully and unlawfully" or that the games of chance were played at such table for money or other property. State v. Howe, 100 N.C. 449, 5 S.E. 671 (1888).

Indictment Quashed. — A bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. State v. Norwood, 94 N.C. 935 (1886).

Evidence Admissible. — Where defendants admit keeping gaming tables, evidence may be admitted tending to show that they were continuously present at the place and tending to show their large share in the receipts of these tables. State v. Galloway, 188 N.C. 416, 124 S.E. 745 (1924).

Applied in State v. Campbell, 79 N.C. App. 468, 339 S.E.2d 674 (1986).

Cited in State v. Bryant, 74 N.C. 207 (1876); State v. Humphries, 210 N.C. 406, 186 S.E. 473 (1936); State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940); State v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955); Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

§ 14-296. Illegal slot machines and punchboards defined.

An illegal slot machine or punchboard within the contemplation of G.S. 14-295 through 14-298 is defined as a device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306. (1931, c. 14, s. 1; 1989, c. 406, s. 2.)

Editor's Note. — The act from which this section was taken amended G.S. 14-295 through 14-298 to make them applicable to illegal slot machines and punchboards. The act expressly provided that it should not have the effect of modifying in any way G.S. 14-301 through 14-303 and should be construed as supplemental thereto.

CASE NOTES

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.

If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by G.S. 14-289 through 14-300 or any illegal punchboard or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars ($200.00), and shall also be guilty of a Class 2 misdemeanor. (1798, c. 502, s. 3, P.R.; 1800, c. 5, s. 2, P.R.; R.C., c. 34, s. 73; Code, s. 1046; Rev., s. 3719; C.S., s. 4434; 1931, c. 14, s. 3; 1993, c. 539, s. 208; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — See Editor's Note to G.S. 14-296.

CASE NOTES

Evidence Insufficient. — Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant. Nivens v. Justice, 210 N.C. 349, 186 S.E. 237 (1936).

Cited in State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

§ 14-298. Seizure of illegal gaming items.

Upon a determination that probable cause exists to believe that any gaming table prohibited to be used by G.S. 14-289 through G.S. 14-300, any illegal punchboard or illegal slot machine, or any video game machine prohibited to be used by G.S. 14-306 or G.S. 14-306.1A, or any game terminal described in G.S. 14-306.3(b) is in the illegal possession or use of any person within the limits of their jurisdiction, all sheriffs and law enforcement officers are authorized to seize the items in accordance with applicable State law. Any law enforcement agency in possession of that item shall retain the item pending a disposition order from a district or superior court judge. Upon application by the law enforcement agency, district attorney, or owner, and after notice and opportunity to be heard by all parties, if the court determines that the item is unlawful to possess, it shall enter an order releasing the item to the law enforcement agency for destruction or for training purposes. If the court determines that the item is not unlawful to possess and will not be used in violation of the law, the item shall be ordered released to its owner upon satisfactory proof of ownership. The foregoing procedures for release shall not apply, however, with respect to an item seized for use as evidence in any criminal action or proceeding until after entry of final judgment. (1791, c. 336, P.R.; 1798, c. 502, s. 2, P.R.; R.C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C.S., s. 4435; 1931, c. 14, s. 4; 1973, c. 108, s. 11; 2000-151, s. 5; 2004-199, ss. 47(a), 47(b); 2004-203, s. 20(a); 2007-484, s. 3(a); 2008-122, s. 2.)

Editor's Note. — See Editor's Note to G.S. 14-296.

Session Laws 2004-199, s. 47(a), repealed Session Laws 2004-203, s. 20, which also had amended this section.

Session Laws 2004-203, s. 20(b), also provides for the repeal of S.L. 2004-203, s. 20(a), in the event that Section 3 of Senate Bill 6, 2003 Regular Session becomes law. Senate Bill 6, 2003 Regular Session, did not become law.

The first sentence, as amended by Session Laws 2007-484, s. 3, effective August 30, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-122, s. 2, effective December 1, 2008, and applicable to offenses committed on or after that date, inserted "or any game terminal described in G.S. 14-306.3(b)" near the beginning of the paragraph.

CASE NOTES

Constitutionality. — G.S. 14-306.1(a)(1)(a)-(b) and G.S. 14-298 are unconstitutional under the United States Constitution; the absence of a definition of the term "warehouse," the application of G.S. 14-298 to allow destruction of video gaming machines without adequate process, and retroactive prohibitions demonstrate the absence of a rational relationship to the legislative interest of preventing an influx of video gaming machines into North Carolina in response to a South Carolina ban on video poker. Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

This section provided no opportunity for the owner of a machine to be heard in court on the lawfulness of its use before the owner's video gaming machines were destroyed; the district court was correct to conclude that this section provided law officers the power to destroy the video game machines without adequate process. Helton v. Hunt, 330 F.3d 242, 2003 U.S. App. LEXIS 10489 (4th Cir. 2003), cert. denied, 540 U.S. 967, 124 S. Ct. 436, 157 L. Ed. 2d 312 (2003).

Where a motion for an order directing destruction of gambling equipment was made without an underlying pending action, the superior court was without jurisdiction to hear the motion. State v. Campbell, 79 N.C. App. 468, 339 S.E.2d 674 (1986).

Enjoining Officers. — The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940).

Cited in Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905).

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.

Except as provided in Chapter 18C of the General Statutes or in G.S. 14-292, all moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, including any motor vehicle used in the conduct of a lottery within the purview of G.S. 14-291.1, shall be liable to be seized by any court of competent jurisdiction or by any person acting under its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall (after deducting the expenses of keeping the property and the costs of the sale and after paying, according to their priorities all known prior, bona fide liens which were created without the lienor having knowledge or notice that the motor vehicle or other property was being used or to be used in connection with the conduct of such game or lottery) be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (1798, c. 502, s. 3, P.R.; R.C., c. 34, s. 77; Code, s. 1051; Rev., s. 3722; C.S., s. 4436; 1943, c. 84; 1957, c. 501; 1973, c. 108, s. 12; 2005-344, s. 3(g).)

CASE NOTES

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-291.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating G.S. 14-291.1, and at the same time prosecute an appeal from an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947).

This section controls when the procedure used in a raffle violates the "randomness" provision of § 14-309.15; accordingly, proceeds from the tainted raffle should have been paid over to the county's general fund rather than to defendant, whose mistakes alternately prohibited the proper awarding of the promised grand prize that had served as an inducement in the sale of tickets. Keene Convenient Mart, Inc. v. SSS Band Backers, 109 N.C. App. 384, 427 S.E.2d 322 (1993).

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888); Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994).

§ 14-300. Opposing destruction of gaming tables and seizure of property.

If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars ($1,000), for the use of the State and the person so opposed, and shall, moreover, be guilty of a Class 2 misdemeanor. (1798, c. 502, s. 4, P.R.; R.C., c. 34, s. 78; Code, s. 1052; Rev., s. 3723; C.S., s. 4437; 1993, c. 539, s. 209; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

§ 14-301. Operation or possession of slot machine; separate offenses.

It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine or device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C.S., s. 4437(a); 1989, c. 406, s. 3.)

Editor's Note. — See Editor's note to G.S. 14-296.

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — This section and G.S. 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by G.S. 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

And Involve Separate and Distinct Offenses. — Where an indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, G.S. 14-304 through 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this section and G.S. 14-302 and 14-303, it was held that the different counts in the bill could stand as separate and distinct offenses, and separate judgments could be entered thereon, and defendant's contention of duplicity was untenable. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

What Value Is Required to Be Given. — Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

Only Lawful Machines Will Be Licensed. — The State license issued for the operation of a slot machine is for one that is lawful and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

Sufficiency of Indictment. — An indictment charging that the defendant "unlawfully and willfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., was insufficient because it failed to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute was cited. State v. Ballangee, 191 N.C. 700, 132 S.E. 795 (1926).

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.

It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, slot machine or device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306. Each time said punchboard, slot machine or device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306 is operated, played, or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C.S., s. 4437(b); 1989, c. 406, s. 4.)

Editor's Note. — See Editor's note to G.S. 14-296.

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — This section and G.S. 14-301 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by G.S. 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Operation of Device Essential. — An essential element of the offense created by this section is the operation of the gambling device or the keeping in possession of such device for the purpose of being operated; the mere having in possession of gambling devices, and nothing more, is not made a criminal offense. State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

Racketeering Activity. — Gambling in houses of public entertainment in violation of G.S. 14-293, operating or possessing gambling devices in violation of this section, and selling or possessing numbers tickets in violation of G.S. 14-291.1 are gambling offenses chargeable as a general misdemeanor punishable by up to two years' imprisonment, thereby satisfying the federal criteria for racketeering activity under 18 U.S.C. § 1961(1). Therefore, the gambling offenses constituted "racketeering activity" under the alternate definition established in G.S. 75D-3(c)(2). State ex rel. Thornburg v. Lot & Bldgs. at 800 Waughtown St., 107 N.C. App. 559, 421 S.E.2d 374, cert. denied, 333 N.C. 170, 424 S.E.2d 915 (1992).

Indictment Held Defective. — An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective. State v. Jones, 218 N.C. 734, 12 S.E.2d 292 (1940); State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

The omission in a warrant of a charge that the defendant operated the gambling devices or that he kept such devices in his own or the possession of other persons for the purpose of being operated is a fatal defect in the warrant, since an essential element of the offense as provided by this section is the operation of the gambling device or the keeping of the device in his possession for the purpose of being operated. Mere possession of a gambling device is not a criminal offense. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-303. Violation of two preceding sections a misdemeanor.

A violation of any of the provisions of G.S. 14-301 or 14-302 shall be a Class 2 misdemeanor. (1923, c. 138, s. 5; C.S., s. 4437(c); 1993, c. 366, s. 2, c. 539, s. 210; 1994, Ex. Sess., c. 14, s. 8(a), (b).)

Editor's Note. — See Editor's note to G.S. 14-296.

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — This section and G.S. 14-301 and 14-302, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by G.S. 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.

It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306. (1937, c. 196, s. 1; 1989, c. 406, s. 5.)

Legal Periodicals. — For comment on this and the following sections, see 15 N.C.L. Rev. 340 (1937).

CASE NOTES

Constitutionality. — This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wages may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the State to suppress gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State. Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938); State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by this section and G.S. 14-305 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Not Repealed by § 105-65.1. — The provisions of the Flanagan Act, ch. 196, Public Laws of 1937, proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine were not repealed by G.S. 105-65.1. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Testimony as to Description and Operation of Machines. — In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

Cited in State v. Finch, 218 N.C. 511, 11 S.E.2d 547 (1940).

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Storage of Video Games or Video Poker Machines Not Permitted. — Video games or video poker machines, the operation of which would be illegal under North Carolina law, may not be lawfully stored or warehoused in the state. See Opinion of Attorney General to The Honorable R.C. Soles, Jr., North Carolina Senate, 2000 N.C. AG LEXIS 15 (6/7/2000).

§ 14-305. Agreements with reference to slot machines or devices made unlawful.

It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device where the user may become entitled to receive any money, credit, allowance, or any thing of value, as defined in G.S. 14-306 pursuant to which the user thereof may become entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2; 1989, c. 406, s. 6.)

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by this section and G.S. 14-305 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

§ 14-306. Slot machine or device defined.

(a) Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-296 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.

(b) The definition contained in subsection (a) of this section and G.S. 14-296, 14-301, 14-302, and 14-305 does not include coin-operated machines, video games, pinball machines, and other computer, electronic or mechanical devices that are operated and played for amusement, that involve the use of skill or dexterity to solve problems or tasks or to make varying scores or tallies and that:

(1) Do not emit, issue, display, print out, or otherwise record any receipt, paper, coupon, token, or other form of record which is capable of being redeemed, exchanged, or repurchased for cash, cash equivalent, or prizes, or award free replays; or

(2) In actual operation, limit to eight the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise with a value not exceeding ten dollars ($10.00), but may not be exchanged or converted to money.

(c) Any video machine, the operation of which is made lawful by subsection (b)(2) of this section, shall have affixed to it in view of the player a sticker informing that person that it is a criminal offense with the potential of imprisonment to pay more than that which is allowed by law. In addition, if the machine has an attract chip which allows programming, the static display shall contain the same message.

(d) The exception in subsection (b)(2) of this section does not apply to any machine that pays off in cash. The exemption in subsection (b)(2) of this section does not apply where the prizes, merchandise, credits, or replays are (i) repurchased for cash or rewarded by cash, (ii) exchanged for merchandise of a value of more than ten dollars ($10.00), or (iii) where there is a cash payout of any kind, by the person operating or managing the machine or the premises, or any agent or employee of that person. It is also a criminal offense, punishable under G.S. 14-309, for the person making the unlawful payout to the player of the machine to violate this section, in addition to any other person whose conduct may be unlawful. (1937, c. 196, s. 3; 1967, c. 1219; 1977, c. 837; 1985, c. 644; 1989, c. 406, s. 1; 1993, c. 366, s. 1; 2000-151, s. 4.)

CASE NOTES

Constitutionality. — The definition of "slot machine" as set forth in this section is not unconstitutionally vague. State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (1997).

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by this section and G.S. 14-305 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Test of Character of Game. — In State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953), the N.C. Supreme Court determined that the test of the character of a game is whether it is a game of chance or a game of skill, not whether it contains an element of chance or skill, but which is the dominating element that determines the result of the game; or, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. Collins Coin Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994).

Sufficiency of Indictment. — An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made follows the language of this section and is sufficient to charge the offense therein defined. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Valuation of Gaming Machines. — Defendant could not use the time period in G.S. 105-312(3), dealing with valuation of gaming machines, to defeat his conviction for possessing illegal gambling machines under G.S. 14-306.1(a)(1); the trial court did not err in instructing the jury on the illegal gaming machine charge and in refusing defendant's requested charge where there was sufficient evidence that defendant's warrantless arrest was proper. State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207, 2002 N.C. App. LEXIS 1472 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 899 (2003).

Evidence. — Where it was admitted that the machines in question were owned by one defendant and rented by him to the other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools did not amount to a failure of the State's evidence upon the critical issue. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

Video Card Game Held Illegal. — Where the operation of video card game depended upon chance rather than a player's skill or dexterity, and a player could win, from a single hand, coupons worth more than ten dollars ($10.00), plaintiff's machines did not fall within the exception in this section and were illegal slot machines. Collins Coin Music Co. v. North Carolina ABC Comm'n, 117 N.C. App. 405, 451 S.E.2d 306 (1994).

Exception for Gaming by a Federally Recognized Indian Tribe. — Prohibition by the State of North Carolina against the operation of video gaming machines does not apply to gaming activities undertaken by a federally recognized Indian Tribe under the Indian Gaming Regulatory Act, 25 U.S.C.S. § 2710 et seq. Hatcher v. Harrah's NC Casino Co., LLC, 169

N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005).

Applied in State v. Campbell, 79 N.C. App. 468, 339 S.E.2d 674 (1986).

Cited in Ford v. State, Dep't of Crime Control & Pub. Safety, 115 N.C. App. 556, 445 S.E.2d 425 (1994); Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

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Legal Video Poker Machines. — Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm., 117 N.C. App. 405, cert. denied, 340 N.C. 110 (1995), is no longer controlling when determining whether a video poker machine is a legal machine as defined in this section. In order to be exempt under present law from the definition of an illegal slot machine, the video poker machine must satisfy each of the following statutory criteria: 1. the machine must be "used for amusement;" 2. the players ability to make varying scores and receive coupons must "involve the use of skill or dexterity;" 3. in actual operation, the number of accumulated credits or replays that may be played at one time and which may award free replays or paper coupons that may be exchanged for prizes or merchandise is limited to eight; and 4. the coupons or credits that a player can accumulate in a single hand may not be exchanged for cash and may not be exchanged for merchandise having a value greater than $10.00. See opinion of Attorney General to The Honorable Billy J. Creech N.C. House of Representatives, 1997 N.C.A.G. 66 (11/5/97).

§ 14-306.1: Repealed by Session 2006-6, s. 3, effective July 1, 2007, and applicable to offenses committed on or after that date.

Editor's Note. — Session-Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

CASE NOTES

Constitutionality. — G.S. 14-306.1(a)(1)(a)-(b) and G.S. 14-298 are unconstitutional under the United States Constitution; the absence of a definition of the term "warehouse," the application of G.S. 14-298 to allow destruction of video gaming machines without adequate process, and retroactive prohibitions demonstrate the absence of a rational relationship to the legislative interest of preventing an influx of video gaming machines into North Carolina in response to a South Carolina ban on video poker. Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

Subdivision (a)(1) of this section was rationally related to North Carolina's legitimate government interest in the supervision of the video gaming industry; the establishment of two dates, one on which any such machine must have been in operation within the State and the other, earlier date upon which the machine must have been listed on the tax rolls rationally furthered that purpose. Helton v. Hunt, 330 F.3d 242, 2003 U.S. App. LEXIS 10489 (4th Cir. 2003), cert. denied, 540 U.S. 967, 124 S. Ct. 436, 157 L. Ed. 2d 312 (2003).

§ 14-306.1A. Types of machines and devices prohibited by law; penalties.

(a) Ban on Machines. — It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.

(b) Definitions. — As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as, by way of illustration:

(1) A video poker game or any other kind of video playing card game.
(2) A video bingo game.
(3) A video craps game.
(4) A video keno game.
(5) A video lotto game.
(6) Eight liner.
(7) Pot-of-gold.
(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2) unless conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. For the purpose of this section, a video gaming machine does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(c) Exemption for Certain Machines. — This section shall not apply to:

(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or
(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(d) Ban on Warehousing. — It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (c) of this section.

(e) Exemption for Activities Under IGRA. — Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8.

(f) Machines described in G.S. 14-306(b)(1) are excluded from this section. (2006-6, s. 4; 2006-259, s. 6.)

Editor's Note. — Session Laws 2006-6, s. 12, makes this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

§ 14-306.2. Violation of G.S. 14-306.1A a violation of the ABC laws.

Violation of G.S. 14-306.1A is a violation of the gambling statutes for the purposes of G.S. 18B-1005(a)(3). (2000-151, s. 2.; 2006-6, s. 5.)

Editor's Note. — Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

This section, as amended by Session Laws 2006-6, s. 5, effective July 1, 2007, is applicable to offenses committed on or after that date.

§ 14-306.3. Certain game promotions unlawful.

(a) It is unlawful to promote, operate, or conduct a server-based electronic game promotion.

(b) It is unlawful for any person to possess any game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A for the purpose of promoting, operating, or conducting a server-based electronic game promotion.

(c) As used in this section, "server-based electronic game promotion" means a system that meets all of the following criteria:

(1) A database contains a pool of entries with each entry associated with a prize value.

(2) Participants purchase, or otherwise obtain by any means, a prepaid card.

(3) With each prepaid card purchased or obtained, the participant also obtains one or more entries.

(4) Entries may be revealed in any of the following ways:

a. At a point-of-sale terminal at the time of purchase or later.

b. At a game terminal with a display that simulates a game ordinarily played on a slot machine regulated under G.S. 14-306 or a video gaming machine regulated under G.S. 14-306.1A.

(d) Upon conviction or plea of guilty, all of the following held by the person shall be automatically revoked:

(1) A permit issued under Chapter 18B of the General Statutes.

(2) A contract to sell tickets or shares under Article 5 of Chapter 18C of the General Statutes.

(e) Nothing in this section shall apply to the form of Class III gaming legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. (2008-122, s. 1.)

Editor's Note. — Session Laws 2008-122, s. 4, made this section effective December 1, 2008, and applicable to offenses committed on or after that date.

§ 14-307. Issuance of license prohibited.

There shall be no State, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by G.S. 14-304 through 14-309. (1937, c. 196, s. 4.)

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by this section and G.S. 14-305 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

§ 14-308. Declared a public nuisance.

An article or apparatus maintained or kept in violation of G.S. 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by G.S. 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Cited in Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002).

§ 14-309. Violation made criminal.

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class H felony for a second offense and a Class G felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.1A involving the operation of five or more machines prohibited by that section is guilty of a Class G felony.

(c) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of G.S. 14-306.3(b) involving the possession of five or more machines prohibited by that subsection is guilty of a Class G felony. (1937, c. 196, s. 6; 1993, c. 366, s. 3, c. 539, s. 211; 1994, Ex. Sess., c. 14, s. 9(a), (b); 2000-151, s. 3; 2006-6, s. 11; 2008-122, s. 3.)

Editor's Note. — Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

Subsections (a) and (b), as amended by Session Laws 2006-6, s. 11, effective July 1, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-122, s. 3, effective December 1, 2008, and applicable to offenses committed on or after that date, added subsection (c).

CASE NOTES

Sections 14-301 to 14-303 and §§ 14-304 to 14-309 Are Complementary. — Sections 14-301, 14-302 and 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by G.S. 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Cited in Helton v. Good, 208 F. Supp. 2d 597, 2002 U.S. Dist. LEXIS 12436 (W.D.N.C. 2002); Hatcher v. Harrah's NC Casino Co., LLC, 169 N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005).

§ 14-309.1. Defense to possession; antique slot machines.

(a) In any prosecution for possession of a slot machine or device as defined in G.S. 14-306, it is a defense that the slot machine was not intended to be used in the operation or promotion of unlawful gambling activity or enterprise and that the slot machine is an antique. For purposes of this section a slot machine manufactured 25 years ago or earlier is conclusively presumed to be an antique.

(b) When a defendant raises the defense provided in subsection (a), any slot machine seized from the defendant shall not be destroyed or otherwise altered until a final court determination is rendered. If the court determines that the defense has been proved the slot machine shall be returned immediately to the defendant. (1979, 2nd Sess., c. 1090.)

§ 14-309.2: Repealed by Session Laws 2005-276, s. 31.1(v2), effective July 1, 2005.

§§ 14-309.3, 14-309.4: Reserved for future codification purposes.

Part 2. Bingo and Raffles.

§ 14-309.5. Bingo.

(a) The purpose of the conduct of bingo is to insure a maximum availability of the net proceeds exclusively for application to the charitable, nonprofit causes and undertakings specified herein; that the only justification for this Part is to support such charitable, nonprofit causes; and such purpose should be carried out to prevent the operation of bingo by professionals for profit, prevent commercialized gambling, prevent the disguise of bingo and other game forms or promotional schemes, prevent participation by criminal and other undesirable elements, and prevent the diversion of funds for the purpose herein authorized.

(b) It is lawful for an exempt organization to conduct bingo games in accordance with the provisions of this Part. Any licensed exempt organization who conducts a bingo game in violation of any provision of this Part shall be guilty of a Class 2 misdemeanor. Upon conviction such person shall not conduct a bingo game for a period of one year. It is lawful to participate in a bingo game conducted pursuant to this Part. It shall be a Class I felony for any person: (i) to operate a bingo game without a license; (ii) to operate a bingo game while license is revoked or suspended; (iii) to willfully misuse or misapply any moneys received in connection with any bingo game; or (iv) to contract with or provide consulting services to any licensee. It shall not constitute a violation of any State law to advertise a bingo game conducted in accordance with this Part. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 1-4; 1989 (Reg.

Sess., 1990), c. 826, s. 1; 1993, c. 539, ss. 212, 1231; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1983, c. 896, which enacted this Part, in s. 5.1 provided: "Sec. 5.1. Should the Supreme Court of North Carolina or a federal court having jurisdiction over North Carolina find and determine in any manner, whether on the merits or by denial of petition for discretionary review, that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons, then this act and G.S. 14-292.1 are repealed in their entirety, and no person may conduct bingo or raffles under any circumstances not permitted by the gambling laws of North Carolina."

CASE NOTES

Constitutionality. — With the exception of the provision relating to homeowner and property owner associations (now found in G.S. 14-309.6(1)), G.S. 14-289 and 14-290 and former G.S. 14-292 (now replaced by G.S. 14-309.5 et seq.) do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

Plaintiff could proceed by civil action for an injunction against enforcement of this section, a criminal statute, where plaintiff would otherwise not be able to operate bingo games, which had provided it with income, unless the persons operating the games were willing to subject themselves to at least one prosecution for a felony, and the superior court had jurisdiction to hear such case. Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84, cert. denied and appeal dismissed, 316 N.C. 552, 344 S.E.2d 5 (1986).

Bingo as Part of Fundraising Scheme. — Where corporate solicitor operated bingo games in connection with their promotion of the sale of combs and candies, the element of bingo in corporate solicitor's fundraising scheme brought all activity connected to the operation of that game within the ambit of the bingo statutes, even if corporate solicitor sale of combs and candies fit within Chapter 131C's definition of "charitable sales promotion." Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.6. Definitions.

For purposes of this Part, the term:

(1) "Exempt organization" means an organization that has been in continuous existence in the county of operation of the bingo game for at least one year and that is exempt from taxation under section 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code and is exempt under similar provisions of the General Statutes as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters, the term "exempt organization" means the local branch or chapter operating the bingo game);

(2) "Bingo game" means a specific game of chance played with individual cards having numbered squares ranging from one to 75, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers (but shall not include "instant bingo" which is a game of chance played by the selection of one or more prepackaged cards, with winners determined by the appearance of a preselected designation on the card);

(3) Repealed by Session Laws 1983 (Regular Session 1984), c. 1107, s. 5.

(4) "Local law-enforcement agency" means for any bingo game conducted outside the corporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force:

a. The county police force; or

b. The county sheriff's office in a county with no county police force;

(5) "Local law-enforcement agency" means the municipal police for any bingo game conducted within the corporate limits of a municipality having a police force;

(6) "Beach bingo games" means bingo games which have prizes of ten dollars ($10.00) or less or merchandise that is not redeemable for cash and that has a value of ten dollars ($10.00) or less; and

(7) "Licensed exempt organization" means an exempt organization which possesses a currently valid license. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 5.)

CASE NOTES

Constitutionality. — With the exception of the provision relating to homeowner and property owner associations (now found in subdivision (1) of this section), G.S. 14-289 and 14-290 and former G.S. 14-292.1 (now replaced by G.S. 14-309.5 et seq.) do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

The statutory provision permitting homeowner or property owner associations to conduct bingo games or raffles bears no rational relation to the purposes of the gambling prohibitions or the charitable exemption, and has the effect of treating similarly situated persons and groups differently, without a rational basis for such differential treatment. Thus, the provision is inconsistent with the constitutional guaranty of equal protection contained in N.C. Const., Art. I, § 19 and with N.C. Const., Art. I, § 32, which provides that no person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd 311 N.C. 397, 316 S.E.2d 870 (1984), decided under former § 14-292.1.

The portion of former G.S. 14-292.1(d) (see now G.S. 14-309.11(a)) requiring exempt organization facilities financed by bingo or raffle proceeds to be made available for use by the general public "from time to time" is simply insufficient to prevent the grant of a special gambling privilege to homeowner or property owner associations from violating the exclusive emoluments clause of the North Carolina Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

Activities Within Purview of Statutes. — Any activity which meets the Part 2, Article 37, definition of bingo in this section is within the purview of the bingo statutes, whether or not consideration is paid to play the game. Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Consideration Not Condition Precedent to Violation. — Violation of Part 1 of Article 37 is not a prerequisite to violation of Part 2 of this Article, and payment of consideration to play bingo is not a condition precedent to violation of Part 2. Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

Cited in Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84 (1986); Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986); Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.7. Licensing procedure.

(a) An exempt organization may not operate a bingo game at a location without a license. Application for a bingo license shall be made to the Department of Crime Control and Public Safety on a form prescribed by the Department. The Department shall charge an annual application fee of two hundred dollars ($200.00) to defray the cost of issuing bingo licenses and handling bingo audit reports. The fees collected shall be deposited in the General Fund of the State. This license shall expire one year after the granting of the license. This license may be renewed yearly, if the applicant pays the application fee and files an audit with the Department pursuant to G.S. 14-309.11. A copy of the application and license shall be furnished to the local law-enforcement agency in the county or municipality in which the licensee intends to operate before bingo is conducted by the licensee.

(b) Each application and renewal application shall contain the following information:

(1) The name and address of the applicant and if the applicant is a corporation, association or other similar legal entity, the name and home address of each of the officers of the organization as well as the name and address of the directors, or other persons similarly situated, of the organization.

(2) The name and home address of each of the members of the special committee.

(3) A copy of the application for recognition of exemptions and a determination letter from the Internal Revenue Service and the Department of Revenue that indicates that the organization is an exempt organization and stating the section under which that exemption is granted; except that if the organization is a State or local branch, lodge, post, or chapter of a national organization, a copy of the determination letter of the national organization satisfies this requirement.

(4) The location at which the applicant will conduct the bingo games. If the premises are leased, a copy of the lease or rental agreement.

(c) In order for an exempt organization to have a member familiar with the operation of bingo present on the premises at all times when bingo is being played and for this member to be responsible for the receiving, reporting and depositing of all revenues received, the exempt organization may pay one member for conducting a bingo game. Such pay shall be on an hourly basis only for the time bingo is actually being played and shall not exceed one and one-half times the existing minimum wage in North Carolina. The member paid under this provision shall be a member in good standing of the exempt organization for at least one year and shall not be the lessor or an employee or agent of the lessor. No other person may be compensated for conducting a bingo game from funds derived from any activities occurring in, or simultaneously with, the playing of bingo, including funds derived from concessions. An exempt organization shall not contract with any person for the purpose of conducting a bingo game. Except as provided in subsection (e) of this section, an exempt organization may hold a bingo game only in or on property owned (either legally or equitably and the buildings must be of a permanent nature with approved plumbing for bathrooms and not movable or of a temporary nature such as a tent or lean-to) or leased by the organization from the owner or bona fide property management agent (no subleasing is permitted) at a total monthly rental in an amount not to exceed one and one-quarter percent (1 1/4%) of the total assessed ad valorem tax value of the portion of the building actually used for the bingo games and the land value on which the building is located (not to exceed two acres) for all activities conducted therein including the playing of bingo for a period of not less than one year and actually occupied and used by that organization on a regular basis for purposes other than bingo for at least six months before the game; and all equipment used by the exempt organization in conducting the bingo game must be owned by the organization. Unless the exempt organization leases the property in accordance with this subsection, an exempt organization may conduct a bingo game only in or on property that is exempt from property taxes levied under Subchapter II of Chapter 105 of the General Statutes, or that is classified and not subject to any property taxes levied under Subchapter II of Chapter 105 of the General Statutes. It shall be unlawful for any person to operate beach bingo games at a location which is being used by any licensed exempt organization for the purpose of conducting bingo games.

(d) Conduct of a bingo game or raffle under this Part on such property shall not operate to defeat an exemption or classification under Subchapter II of Chapter 105 of the General Statutes.

(e) An exempt organization that wants to conduct only an annual or semiannual bingo game may apply to the Department of Crime Control and Public Safety for a limited occasion permit. The Department of Crime Control and Public Safety may require such information as is reasonable and necessary to determine that the bingo game is conducted in accordance with the provisions of this Part but may not require more information than previously specified in this section for application of a regular license. The application shall be made to the Department on prescribed forms at least 30 days prior to the scheduled date of the bingo game. In lieu of the reporting requirements of G.S. 14-309.11(b) the exempt organization shall file with the licensing agency and local law-enforcement a report on prescribed forms no later than 30 days following the conduct of the bingo game for which the permit was obtained. Such report may require such information as is reasonable and necessary to determine that the bingo game was conducted in accordance with the provisions of this Part but may not require more information than specified in G.S. 14-309.11(b). Any licensed exempt organization may donate or loan its equipment or use of its premises to an exempt organization which has secured a limited occasion permit provided such arrangement is disclosed in the limited occasion permit application and is approved by the Department of Crime Control and Public Safety. Except as stated above, all provisions of this Part shall apply to any exempt organization operating a bingo game under this provision. (1983, c. 896, s. 3; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 4, 6; 1987, c. 866, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1001, s. 1; 1997-443, s. 11A.118(a); 2002-159, ss. 3(a), 3(b); 2009-451, s. 17.6.)

Editor's Note. — Session Laws 1999-237, s. 11.18, provides that the Bingo Program in the Department of Health and Human Services, Division of Facility Services, and all functions, powers, duties, and obligations vested in the Department of Health and Human Services for the Bingo Program, are transferred to and vested in the Department of Crime Control and Public Safety by a Type I transfer, as defined in G.S. 143A-6.

Session Laws 2009-451, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2009'."

Session Laws 2009-451, s. 28.5 is a severability clause.

Effect of Amendments. — Session Laws 2009-451, s. 17.6, effective September 1, 2009, substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in the second sentence of subsection (a).

CASE NOTES

State Interest in Licensing Bingo Games. — Conditions for licenses to operate bingo games set out in this section and G.S. 14-309.8 are reasonably related to a legitimate state interest that bingo games not be operated by full-time professionals for profit. Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84, cert. denied and appeal dismissed, 316 N.C. 552, 344 S.E.2d 5 (1986).

Cited in State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983); Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.8. Limit on sessions.

The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per session. No two sessions of bingo shall be held within a 48-hour period of time. No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any one calendar week and if two sessions are held, they must be held by the same exempt organization. This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of

Chapter 106 of the General Statutes. (1983, c. 896, s. 3; c. 923, s. 217; 1983 (Reg. Sess., 1984), c. 1107, ss. 6, 7.)

CASE NOTES

Constitutionality. — In the context of the statute as a whole, the meaning of the words "session" and "sessions" is quite plain to anyone of common understanding and the statute is not unconstitutionally vague. Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 744 (1987).

The 48-hour provision, under which the first organization to conduct its bingo session in a given location during that period is not subject to prosecution but the second organization is, does not violate equal protection. One purpose of the distinction in question, a laudable and proper one, is to limit gambling, an offense against public morals when not conducted as the statute specifies. Except for this or some similar limitation, licensed bingo, instead of providing brief and occasional opportunities for harmless recreation, could fill the weekends of many people to their ruinous cost in money and otherwise. Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 744 (1987).

Limiting exempt organizations to one session of bingo during a 48-hour period does not unduly restrict their right to solicit charitable contributions. While soliciting contributions is certainly protected by U.S. Const., Amend. I, this statute does not impinge upon the right to solicit contributions, charitable or otherwise. The statute restricts only the conducting of bingo, which is gambling, and no one has a constitutional right to operate a gambling business. Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 744 (1987).

State Interest in Licensing Bingo Games. — Conditions for licenses to operate bingo games set out in G.S. 14-309.7 and this section are reasonably related to a legitimate state interest that bingo games not be operated by full-time professionals for profit. Durham Council of Blind v. Edmisten, 79 N.C. App. 156, 339 S.E.2d 84, cert. denied and appeal dismissed, 316 N.C. 552, 344 S.E.2d 5 (1986).

A "session" of bingo, as used in the statute, means a period of time in which bingo is conducted or sponsored by a particular exempt organization in one location, and "sessions" is more than one session. Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 744 (1987).

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.9. Bingo prizes.

(a) The maximum prize in cash or merchandise that may be offered or paid for any one game of bingo is five hundred dollars ($500.00). The maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session of bingo is one thousand five hundred dollars ($1,500). Provided, however, that if an exempt organization holds only one session of bingo during a calendar week, the maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session is two thousand five hundred dollars ($2,500).

(b) Repealed by Session Laws 1983 (Regular Session 1984), c. 1107, s. 8.

(c) This section shall not apply to bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 6, 8.)

CASE NOTES

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.10. Operation of bingo.

The operation of bingo games shall be the direct responsibility of, and controlled by, a special committee selected by the governing body of the exempt organization in the manner provided by the rules of the exempt organization. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 9.)

CASE NOTES

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.11. Accounting and use of proceeds.

(a) All funds received in connection with a bingo game shall be placed in a separate bank account. No funds may be disbursed from this account except the exempt organization may expend proceeds for prizes, advertising, utilities, and the purchase of supplies and equipment used [in conducting the raffle and] in playing bingo, taxes and license fees related to bingo and the payment of compensation as authorized by G.S. 14-309.7(c) and for the purposes set forth below for the remaining proceeds. Such payments shall be made by consecutively numbered checks. Any proceeds available in the account after payment of the above expenses shall inure to the exempt organization to be used for religious, charitable, civic, scientific, testing, public safety, literary, or educational purposes or for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition, or for the prevention of cruelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

(b) An audit of the account required by subsection (a) of this section shall be prepared annually for the period of January 1 through December 31 or otherwise as directed by the Department of Crime Control and Public Safety and shall be filed with the Department of Crime Control and Public Safety and the local law-enforcement agency at a time directed by the Department of Crime Control and Public Safety. The audit shall be prepared on a form approved by the Department of Crime Control and Public Safety and shall include the following information:

(1) The number of bingo games conducted or sponsored by the exempt organization;
(2) The location and date at which each bingo game was conducted and the prize awarded;
(3) The gross receipts of each bingo game;
(4) The cost or amount of any prize given at each bingo game;
(5) The amount paid in prizes at each session;
(6) The net return to the exempt organization; and
(7) The disbursements from the separate account and the purpose of those disbursements, including the date of each transaction and the name and address of each payee.

(c) Any person who shall willfully furnish, supply, or otherwise give false information in any audit or statement filed pursuant to this section shall be guilty of a Class 2 misdemeanor.

(d) All books, papers, records and documents relevant to determining whether an organization has acted or is acting in compliance with this section shall be open to inspection by the law-enforcement agency or its designee, or the district attorney or his designee, or the Department of Crime Control and Public Safety at reasonable times and during reasonable hours. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, ss. 2, 3, 9; 1987, c. 866, s. 3; 1987 (Reg. Sess., 1988), c. 1001, s. 1; 1993, c. 539, s. 213; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 2002-159, ss. 4(a), (b).)

Editor's Note. — The phrase "in conducting the raffle and" which appears in the second sentence of subsection (a) was not changed by Session Laws 1983 (Reg. Sess., 1984), c. 1107, which deleted the other references to raffles from this section. However, it would appear that the retention of this phrase may have been inadvertent.

Session Laws 1999-237, s. 11.18, provides that the Bingo Program in the Department of Health and Human Services, Division of Facility Services, and all functions, powers, duties, and obligations vested in the Department of Health and Human Services for the Bingo Program, are transferred to and vested in the Department of Crime Control and Public Safety by a Type I transfer, as defined in G.S. 143A-6.

CASE NOTES

Constitutionality. — With the exception of the provision relating to homeowner and property owner associations (now found in G.S. 14-309.6(1)), G.S. 14-289 and 14-290 and former G.S. 14-292.1 (now replaced by G.S. 14-309.5 et seq.) do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

The portion of former G.S. 14-292.1(d) (see now subsection (a) of this section) requiring exempt organization facilities financed by bingo or raffle proceeds to be made available for use by the general public "from time to time" is simply insufficient to prevent the grant of a special gambling privilege to homeowner or property owner associations from violating the exclusive emoluments clause of the North Carolina Constitution. State v. McCleary, 65 N.C. App. 174, 308 S.E.2d 883 (1983), aff'd, 311 N.C. 397, 316 S.E.2d 870 (1984).

Applied in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.12. Violation is gambling.

A bingo game conducted otherwise than in accordance with the provisions of this Part is "gambling" within the meaning of G.S. 19-1 et seq., and proceedings against such bingo game may be instituted as provided for in Chapter 19 of the General Statutes. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 2.)

CASE NOTES

Applied in Durham Hwy. Fire Protection Ass'n v. Baker, 82 N.C. App. 583, 347 S.E.2d 86 (1986).

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989).

§ 14-309.13. Public sessions.

Any exempt organization operating a bingo game which is open to persons other than members of the exempt organization, their spouses, and their children shall make such bingo game open to the general public. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 4.)

§ 14-309.14. Beach bingo.

Nothing in this Article shall apply to "beach bingo" games except for the following subdivisions:

(1) No beach bingo game may offer a prize having a value greater than ten dollars ($10.00). Any person offering a greater than ten-dollar ($10.00) but less than fifty-dollar ($50.00) prize is guilty of a Class 2 misdemeanor. Any person offering a prize of fifty dollars ($50.00) or greater is guilty of a Class I felony.

(2) No beach bingo game may be held in conjunction with any other lawful bingo game, with any "promotional bingo game", or with any offering of an opportunity to obtain anything of value, whether for valuable consideration or not. No beach bingo game may offer free bingo games as a promotion, for prizes or otherwise. Any person who violates this subsection is guilty of a Class I felony.

(3) G.S. 18B-308 shall apply to beach bingo games.

(4) Upon conviction under any provision of this section, such person shall not conduct a bingo game for a period of at least one year. (1983, c. 896, s. 3; 1983 (Reg. Sess., 1984), c. 1107, s. 10; 1987, c. 701; 1989 (Reg. Sess., 1990), c. 826, s. 2; 1993, c. 539, ss. 214, 1232; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 1232 redesignated former subdivisions (a) and (b) as (1) and (2), respectively, but left the subdivision designations (c) and (d) unchanged. Subdivisions (c) and (d) have been redesignated as subdivisions (3) and (4), respectively, at the direction of the Revisor of Statutes.

CASE NOTES

Violation Shown. — Requiring a player to have four or five bingos during the same sequence of calling numbers merely extends the single game and does not convert it into five individual games; thus, defendants violated this section by offering $40.00 and $50.00 prizes. State v. Crabtree, 126 N.C. App. 729, 487 S.E.2d 575 (1997).

Cited in Animal Protection Soc'y of Durham, Inc. v. State, 95 N.C. App. 258, 382 S.E.2d 801 (1989); Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

§ 14-309.15. Raffles.

(a) It is lawful for any nonprofit organization or association, recognized by the Department of Revenue as tax-exempt pursuant to G.S. 105-130.11(a), or for any bona fide branch, chapter, or affiliate of such organization, and for any government entity within the State, to conduct raffles in accordance with this section. Any person who conducts a raffle in violation of any provision of this section shall be guilty of a Class 2 misdemeanor. Upon conviction that person shall not conduct a raffle for a period of one year. It is lawful to participate in a raffle conducted pursuant to this section. It shall not constitute a violation of State law to advertise a raffle conducted in accordance with this section. A raffle conducted pursuant to this section is not "gambling".

(b) For purposes of this section "raffle" means a game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances.

(c) Raffles shall be limited to two per nonprofit organization per year.

(d) Except as provided in subsection (g) of this section, the maximum cash prize that may be offered or paid for any one raffle is one hundred twenty-five thousand dollars ($125,000) and if merchandise is used as a prize, and it is not redeemable for cash, the maximum fair market value of that prize may be one hundred twenty-five thousand dollars ($125,000). The total cash prizes offered or paid by any nonprofit organization or association may not exceed one hundred twenty-five thousand dollars ($125,000) in any calendar year. The total fair market value of all prizes offered by any nonprofit organization or association, either in cash or in merchandise that is not redeemable for cash, may not exceed one hundred twenty-five thousand dollars ($125,000) in any calendar year.

(e) Raffles shall not be conducted in conjunction with bingo.

(f) As used in this subsection, "net proceeds of a raffle" means the receipts less the cost of prizes awarded. No less than ninety percent (90%) of the net proceeds of a raffle shall be used by the nonprofit organization or association for charitable, religious, educational, civic, or other nonprofit purposes. None of the net proceeds of the raffle may be used to pay any person to conduct the raffle, or to rent a building where the tickets are received or sold or the drawing is conducted.

(g) Real property may be offered as a prize in a raffle. The maximum appraised value of real property that may be offered for any one raffle is five hundred thousand dollars ($500,000). The total appraised value of all real estate prizes offered by any nonprofit organization or association may not exceed five hundred thousand dollars ($500,000) in any calendar year. (1983 (Reg. Sess., 1984), c. 1107, s. 11; 1993, c. 219, s. 1; c. 539, s. 215; 1994, Ex. Sess., c. 24, s. 14(c); 1997-10, s. 1; 2005-276, s. 17.31; 2005-345, s. 31; 2006-264, s. 3(a); 2009-49, s. 1.)

Editor's Note. — Session Laws 1993, c. 219, which amended this section, in s. 2 provides that for purposes of the act, government entities within the State of North Carolina shall be considered nonprofit as defined in G.S. 105-130.11(a). Session Laws 2006-264, s. 3(b) repealed Session Laws 1993, c. 219, s. 2, effective August 27, 2006.

Effect of Amendments. — Session Laws 2009-49, s. 1, effective June 1, 2009, in subsection (a), inserted "or for any bona fide branch, chapter, or affiliate of such organization," in the first sentence; in subsection (b), substituted "one hundred twenty-five thousand dollars ($125,000)" for "fifty thousand dollars ($50,000)" throughout, in the first sentence, substituted "Except as provided in subsection (g) of this section, the maximum" for "The maximum", and deleted the former second sentence, which read: "No real property may be offered as a prize in a raffle."; and added subsection (g).

CASE NOTES

Obligation of One Conducting "Raffle." — By using a "raffle," with a car as the grand prize, as an inducement for people to buy tickets at a price of $100.00 each, defendant was obligated, by virtue of subsection (b) of this section, to ensure that (1) the designated prize would be given to a ticket holder, and (2) the method of selecting that ticket holder would be random. Keene Convenient Mart, Inc. v. SSS Band Backers, 109 N.C. App. 384, 427 S.E.2d 322 (1993).

Randomness. — Defendant, by putting the ticket of ticket purchaser, which had been inadvertently omitted from basket, in the basket out of which names were being drawn, after some of the names already had been drawn, changed the character of the event. The event lost its character of a random drawing and from that point forward constituted a slanted game of chance which did not comply the term "raffle" as defined in this section and, as such, was void as against public policy. Keene Convenient Mart, Inc. v. SSS Band Backers, 109 N.C. App. 384, 427 S.E.2d 322 (1993).

§§ 14-309.16 through 14-309.19: Reserved for future codification purposes.

Part 3. Greyhound Racing.

§ 14-309.20. Greyhound racing prohibited.

(a) No person shall hold, conduct, or operate any greyhound races for public exhibition in this State for monetary remuneration.

(b) No person shall transmit or receive interstate or intrastate simulcasting of greyhound races for commercial purposes in this State.

(c) Any person who violates this section shall be guilty of a Class 1 misdemeanor. (1998-212, s. 17.16(d).)

ARTICLE 38.

Marathon Dances and Similar Endurance Contests.

§§ 14-310 through 14-312: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(13)-(15), effective October 1, 1994.

ARTICLE 39.

Protection of Minors.

§ 14-313. Youth access to tobacco products.

(a) Definitions. — The following definitions apply in this section:

(1) Distribute. — To sell, furnish, give, or provide tobacco products, including tobacco product samples, or cigarette wrapping papers to the ultimate consumer.

(2) Proof of age. — A drivers license or other photographic identification that includes the bearer's date of birth that purports to establish that the person is 18 years of age or older.

(3) Sample. — A tobacco product distributed to members of the general public at no cost for the purpose of promoting the product.

(4) Tobacco product. — Any product that contains tobacco and is intended for human consumption.

(b) Sale or distribution to persons under the age of 18 years. — If any person shall distribute, or aid, assist, or abet any other person in distributing tobacco products or cigarette wrapping papers to any person under the age of 18 years, or if any person shall purchase tobacco products or cigarette wrapping papers on behalf of a person, less than 18 years, the person shall be guilty of a Class 2 misdemeanor; provided, however, that it shall not be unlawful to distribute tobacco products or cigarette wrapping papers to an employee when required in the performance of the employee's duties. Retail distributors of tobacco products shall prominently display near the point of sale a sign in letters at least five-eighths of an inch high which states the following:

N.C. LAW STRICTLY PROHIBITS

THE PURCHASE OF TOBACCO PRODUCTS

BY PERSONS UNDER THE AGE OF 18.

PROOF OF AGE REQUIRED.

Failure to post the required sign shall be an infraction punishable by a fine of twenty-five dollars ($25.00) for the first offense and seventy-five dollars ($75.00) for each succeeding offense.

A person engaged in the sale of tobacco products shall demand proof of age from a prospective purchaser if the person has reasonable grounds to believe that the prospective purchaser is under 18 years of age. Failure to demand proof of age as required by this subsection is a Class 2 misdemeanor if in fact the prospective purchaser is under 18 years of age. Retail distributors of tobacco products shall train their sales employees in the requirements of this law. Proof of any of the following shall be a defense to any action brought under this subsection:

(1) The defendant demanded, was shown, and reasonably relied upon proof of age in the case of a retailer, or any other documentary or written evidence of age in the case of a nonretailer.

(2) The defendant relied on the electronic system established and operated by the Division of Motor Vehicles pursuant to G.S. 20-37.02.

(3) The defendant relied on a biometric identification system that demonstrated (i) the purchaser's age to be at least the required age for the purchase and (ii) the purchaser had previously registered with the seller or seller's agent a drivers license, a special identification card issued under G.S. 20-377.7, a military identification card, or a passport showing the purchaser's date of birth and bearing a physical description of the person named on the card.

(b1) Vending machines. — Tobacco products shall not be distributed in vending machines; provided, however, vending machines distributing tobacco products are permitted (i) in any establishment which is open only to persons 18 years of age and older; or (ii) in any establishment if the vending machine is under the continuous control of the owner or licensee of the premises or an employee thereof and can be operated only upon activation by the owner, licensee, or employee prior to each purchase and the vending machine is not accessible to the public when the establishment is closed. The owner, licensee, or employee shall demand proof of age from a prospective purchaser if the person has reasonable grounds to believe that the prospective purchaser is under 18 years of age. Failure to demand proof of age as required by this subsection is a Class 2 misdemeanor if in fact the prospective purchaser is under 18 years of age. Proof that the defendant demanded, was shown, and reasonably relied upon proof of age shall be a defense to any action brought under this subsection. Vending machines distributing tobacco products in establishments not meeting the above conditions shall be removed prior to December 1, 1997. Any person distributing tobacco products through vending machines in violation of this subsection shall be guilty of a Class 2 misdemeanor.

(c) Purchase by persons under the age of 18 years. — If any person under the age of 18 years purchases or accepts receipt, or attempts to purchase or accept receipt, of tobacco products or cigarette wrapping papers, or presents or offers to any person any purported proof of age which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product or cigarette wrapping papers, the person shall be guilty of a Class 2 misdemeanor.

(d) Send or assist person less than 18 years to purchase or receive tobacco product. — If any person shall send a person less than 18 years of age to purchase, acquire, receive, or attempt to purchase, acquire, or receive tobacco products or cigarette wrapping papers, or if any person shall aid or abet a person who is less than 18 years of age in purchasing, acquiring, or receiving or attempting to purchase, acquire, or receive tobacco products or cigarette wrapping papers, the person shall be guilty of a Class 2 misdemeanor; provided, however, persons under the age of 18 may be enlisted by police or local sheriffs' departments to test compliance if the testing is under the direct supervision of that law enforcement department and written parental consent is provided; provided further, that the Department of Health and Human Services shall have the authority, pursuant to a written plan prepared by the Secretary of Health and Human Services, to use persons under 18 years of age in annual, random, unannounced inspections, provided that prior written parental consent is given for the involvement of these persons and that the inspections are conducted for the sole purpose of preparing a scientifically and methodologically valid statistical study of the extent of success the State has achieved in reducing the availability of tobacco products to persons under the age of 18, and preparing any report to the extent required by section 1926 of the federal Public Health Service Act (42 USC § 300x-26).

(e) Statewide uniformity. — It is the intent of the General Assembly to prescribe this uniform system for the regulation of tobacco products to ensure the eligibility for and receipt of any federal funds or grants that the State now receives or may receive relating to the provisions of G.S. 14-313. To ensure uniformity, no political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules or regulations concerning the sale, distribution, display or promotion of tobacco products or cigarette wrapping papers on or after September 1, 1995. This subsection does not apply to the regulation of vending machines, nor does it prohibit the Secretary of Revenue from adopting rules with respect to the administration of the tobacco products taxes levied under Article 2A of Chapter 105 of the General Statutes.

(f) Deferred prosecution. — Notwithstanding G.S. 15A-1341(a1), any person charged with a misdemeanor under this section shall be qualified for deferred prosecution pursuant to Article 82 of Chapter 15A of the General Statutes provided the defendant has not previously been placed on probation for a violation of this section and so states under oath. (1891, c. 276; Rev., s. 3804; C.S., s. 4438; 1969, c. 1224, s. 3; 1991, c. 628, s. 1; 1993, c. 539, s. 216; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 241, s. 1; 1997-434, ss. 1-6; 1997-443, s. 11A.118(a); 2001-461, s. 5; 2002-159, s. 5; 2005-350, s. 6(b).)

Editor's Note. — Session Laws 1995, c. 241, s. 2, provides that subsection (e), as enacted by that act, does not affect local ordinances adopted before September 1, 1995.

OPINIONS OF ATTORNEY GENERAL

Applicable to State Training Schools. — See opinion of Attorney General to Mr. James M. Paige, Office of Youth Development, 42 N.C.A.G. 203 (1973).

§ 14-314: Repealed by Session Laws 1971, c. 31.

§ 14-315. Selling or giving weapons to minors.

(a) Sale of Weapons Other Than Handguns. — If a person sells, offers for sale, gives, or in any way transfers to a minor any pistol cartridge, brass knucks, bowie knife, dirk, shurikin, leaded cane, or slungshot, the person is guilty of a Class 1 misdemeanor and, in addition, shall forfeit the proceeds of any sale made in violation of this section.

(a1) Sale of Handguns. — If a person sells, offers for sale, gives, or in any way transfers to a minor any handgun as defined in G.S. 14-269.7, the person is guilty of a Class H felony and, in addition, shall forfeit the proceeds of any sale made in violation of this section. This section does not apply in any of the following circumstances:

(1) The handgun is lent to a minor for temporary use if the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(2) The handgun is transferred to an adult custodian pursuant to Chapter 33A of the General Statutes, and the minor does not take possession of the handgun except that the adult custodian may allow the minor

temporary possession of the handgun in circumstances in which the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(3) The handgun is a devise or legacy and is distributed to a parent or guardian under G.S. 28A-22-7, and the minor does not take possession of the handgun except that the parent or guardian may allow the minor temporary possession of the handgun in circumstances in which the minor's possession of the handgun is lawful under G.S. 14-269.7 and G.S. 14-316 and is not otherwise unlawful.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 597, s. 2.

(b1) Defense. — It shall be a defense to a violation of this section if all of the following conditions are met:

(1) The person shows that the minor produced an apparently valid permit to receive the weapon, if such a permit would be required under G.S. 14-402 or G.S. 14-409.1 for transfer of the weapon to an adult.

(2) The person reasonably believed that the minor was not a minor.

(3) The person either:

a. Shows that the minor produced a drivers license, a special identification card issued under G.S. 20-37.7, a military identification card, or a passport, showing the minor's age to be at least the required age for purchase and bearing a physical description of the person named on the card reasonably describing the minor; or

b. Produces evidence of other facts that reasonably indicated at the time of sale that the minor was at least the required age. (1893, c. 514; Rev., s. 3832; C.S., s. 4440; 1985, c. 199; 1993, c. 259, s. 3; 1993, c. 539, s. 217; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 597, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 20.13(b).)

Editor's Note. — Section 14-409.1, referred to in this section was repealed by Session Laws, 1995, c. 487, s. 4.

CASE NOTES

Cited in State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470, 2008 N.C. App. LEXIS 1474 (2008).

§ 14-315.1. Storage of firearms to protect minors.

(a) Any person who resides in the same premises as a minor, owns or possesses a firearm, and stores or leaves the firearm (i) in a condition that the firearm can be discharged and (ii) in a manner that the person knew or should have known that an unsupervised minor would be able to gain access to the firearm, is guilty of a Class 1 misdemeanor if a minor gains access to the firearm without the lawful permission of the minor's parents or a person having charge of the minor and the minor:

(1) Possesses it in violation of G.S. 14-269.2(b);

(2) Exhibits it in a public place in a careless, angry, or threatening manner;

(3) Causes personal injury or death with it not in self defense; or

(4) Uses it in the commission of a crime.

(b) Nothing in this section shall prohibit a person from carrying a firearm on his or her body, or placed in such close proximity that it can be used as easily and quickly as if carried on the body.

(c) This section shall not apply if the minor obtained the firearm as a result of an unlawful entry by any person.

(d) "Minor" as used in this section means a person under 18 years of age who is not emancipated. (1993, c. 558, s. 2; 1994, Ex. Sess., c. 14, s. 11.)

§ 14-315.2. Warning upon sale or transfer of firearm to protect minor.

(a) Upon the retail commercial sale or transfer of any firearm, the seller or transferor shall deliver a written copy of G.S. 14-315.1 to the purchaser or transferee.

(b) Any retail or wholesale store, shop, or sales outlet that sells firearms shall conspicuously post at each purchase counter the following warning in block letters not less than one inch in height the phrase: "IT IS UNLAWFUL TO STORE OR LEAVE A FIREARM THAT CAN BE DISCHARGED IN A MANNER THAT A REASONABLE PERSON SHOULD KNOW IS ACCESSIBLE TO A MINOR."

(c) A violation of subsection (a) or (b) of this section is a Class 1 misdemeanor. (1993, c. 558, s. 2; 1994, Ex. Sess., c. 14, s. 12.)

§ 14-316. Permitting young children to use dangerous firearms.

(a) It shall be unlawful for any parent, guardian, or person standing in loco parentis, to knowingly permit his child under the age of 12 years to have the possession, custody or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such weapon be loaded or unloaded, except when such child is under the supervision of the parent, guardian or person standing in loco parentis. It shall be unlawful for any other person to knowingly furnish such child any weapon enumerated herein. Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(b) Air rifles, air pistols, and BB guns shall not be deemed "dangerous firearms" within the meaning of subsection (a) of this section except in the following counties: Anson, Caldwell, Caswell, Chowan, Cleveland, Cumberland, Durham, Forsyth, Gaston, Harnett, Haywood, Mecklenburg, Stanly, Stokes, Surry, Union, Vance. (1913, c. 32; C.S., s. 4441; 1965, c. 813; 1971, c. 309; 1993, c. 539, s. 218; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Store was in full compliance with this section when it sold a 12-year-old a BB gun. Rosser ex rel. Brown v. Wal-Mart Stores, Inc., 947 F. Supp. 903 (E.D.N.C. 1996).

§ 14-316.1. Contributing to delinquency and neglect by parents and others.

Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty of a Class 1 misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Juvenile Justice and Delinquency Prevention under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Department of Juvenile Justice and

Delinquency Prevention, who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C.S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692; 1983, c. 175, ss. 8, 10; c. 720, s. 4; 1993, c. 539, s. 219; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a); 1998-202, s. 4(b); 2000-137, s. 4.(c).)

Editor's Note. — This section formerly appeared as G.S. 110-39. It was transferred to its present position by Session Laws 1969, c. 911, s. 4.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For note on the indigent parent's right to state furnished counsel in parental status termination proceedings, see 17 Wake Forest L. Rev. 961 (1981).

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Campbell L. Rev. 415 (1983).

For comment, "The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For article, "Evolutionary Analysis in Law: An Introduction and Application to Child Abuse," see 75 N.C.L. Rev. 1117 (1997).

CASE NOTES

This section is not unconstitutional for vagueness. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

The words used in this section are ordinary words in common usage, and adequate warning is provided those inclined to violate them. Simply stated, any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the section. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Second-Degree Rape Is a Separate and Distinct Crime. — Even though the crimes of second-degree rape and contributing to the delinquency of a minor are related in character and grow out of the same transaction, they are legally distinct and separate crimes. The prosecution for one is not a bar to a prosecution for the other. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

It is clear from the statutory definition of the two crimes described in this section and G.S. 14-27.3 that all of the essential elements of the offense of second-degree rape are not essential to the offense of contributing to the delinquency of a minor. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Contributing to Delinquency of a Minor Not Lesser Included Offense of Second-Degree Rape. — The act of sexual intercourse is not inherent to the crime of contributing to the delinquency of a minor under this section. Therefore, this offense is not a lesser included offense of second-degree rape pursuant to G.S. 14-27.3. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Double Jeopardy Not Shown. — At trial on charges of second-degree rape, the defendant was furnished with an opportunity to plead and offer evidence to sustain his plea of former jeopardy by proving that the sexual act at issue, not the alcohol-related instances were the basis of his earlier plea of guilty to contributing to the delinquency of a minor, based upon the same factual circumstances. This, however, defendant failed to do. Thus, defendant's assertion that the factual basis for the acceptance of his guilty plea was solely based upon the sexual act was too speculative and wholly insufficient to establish his burden of proof. State v. Cronan, 100 N.C. App. 641, 397 S.E.2d 762 (1990), discretionary review denied and appeal dismissed, 328 N.C. 573, 403 S.E.2d 516 (1991).

Unanimous Verdict. — When defendant was convicted of contributing to the delinquency of a minor under G.S. 14-316.1, a jury did not have to unanimously agree as to the act that defendant encouraged or assisted the minor involved in the crime to commit, for which the juvenile could be adjudicated a delinquent, as long as it agreed that he encouraged or assisted the juvenile in the performance of such an act, because a conviction properly resulted from producing, promoting or contributing to any condition of delinquency, and the crime's gravamen was defendant's conduct, rather than that of the juvenile. State v. Cousart, 182 N.C. App. 150, 641 S.E.2d 372, 2007 N.C. App. LEXIS 493 (2007).

Proof of Delinquency Not Required. — Statutes such as this section are preventive as well as punitive in nature and it is not necessary to allege or prove that the child in fact is or has become a delinquent. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

This section does not require that the creation of a state of delinquency be accomplished; the legislative intent was to protect children from wrongful influence by adults, and in protection of minors the State should not await the result of the wrong perpetrated before punishing the offender. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

Conviction of Minor Not Required. — It is not necessary that a minor be convicted of the charges contained in a juvenile petition before a person may be prosecuted under this section for contributing to the delinquency of the minor. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Duty of Parents to Protect and Provide for Minor Children. — Parents in this State have an affirmative legal duty to protect and provide for their minor children. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Imposition of Duty to Prevent Harm to Child Is Reasonable. — To require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent; this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

And Requires Reasonable Steps to Prevent Harm. — While parents do not have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children, parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children. What is reasonable in any given case will be a question for the jury after proper instructions from the trial court. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Failure to Protect Child from Assault. — A mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

The failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Trial court properly allowed the jury to consider a verdict of guilty of assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, solely on the ground that defendant mother was present when her child was brutally beaten by third party but failed to take all steps reasonable to prevent the attack or otherwise protect the child from injury. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Neglect Resulting in Death of Child As Involuntary Manslaughter. — Where evidence was sufficient to show that the child's death resulted from the culpably negligent omission of defendants to perform their legal duty with respect to the child, the trial court did not err in overruling defendants' motions for nonsuit as to involuntary manslaughter. State v. Mason, 18 N.C. App. 433, 197 S.E.2d 79, cert. denied, 283 N.C. 669, 197 S.E.2d 878 (1973).

Defendant was not denied his right against double jeopardy by his conviction in superior court of child neglect in violation of this section after a judgment of nonsuit was entered in a prosecution of defendant in the district court for child abuse in violation of G.S. 14-318.2. State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Acquittal Not A Bar to Use of Sentencing Aggravator. — In a case alleging that defendant had used a 13 year old boy to sell drugs, a jury's acquittal of charges of contributing to the delinquency of a minor, G.S. 14-316.1, and employing and using a minor to commit a controlled substance offense, G.S. 90-95.4, did not mean that the jury found there was insufficient evidence that the boy was a minor; by convicting defendant of conspiracy to sell a controlled substance, the jury found that defendant and the boy were conspirators, and the trial court's consideration as an aggravating sentencing factor that defendant involved a person under 16 years of age in the commission of a crime was proper. State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (2004).

Applied in State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Harper, 72 N.C. App. 471, 325 S.E.2d 30 (1985).

Cited in In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

§ 14-317. Permitting minors to enter barrooms or billiard rooms.

If the manager or owner of any barroom, wherein beer, wine, or any alcoholic beverages are sold or consumed, or billiard room shall knowingly allow any minor under 18 years of age to enter or remain in such barroom or billiard room, where before such minor under 18 years of age enters or remains in such barroom or billiard room, the manager or owner thereof has been notified in writing by the parents or guardian of such minor under 18 years of age not to allow him to enter or remain in such barroom or billiard room, he shall be guilty of a Class 3 misdemeanor. (1897, c. 278; Rev., s. 3729; C.S., s. 4442; 1967, c. 1089; 1993, c. 539, s. 220; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-318. Exposing children to fire.

If any person shall leave any child under the age of eight years locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a Class 1 misdemeanor. (1893, c. 12; Rev., s. 3795; C.S., s. 4443; 1983, c. 175, s. 9, 10; c. 720, s. 4; 1993, c. 539, s. 221; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment, "The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

§ 14-318.1. Discarding or abandoning iceboxes, etc.; precautions required.

It shall be unlawful for any person, firm or corporation to discard, abandon, leave or allow to remain in any place any icebox, refrigerator or other container, device or equipment of any kind with an interior storage area of more than one and one-half cúbic feet of clear space which is airtight, without first removing the door or doors or hinges from such icebox, refrigerator, container, device or equipment. This section shall not apply to any icebox, refrigerator, container, device or equipment which is being used for the purpose for which it was originally designed, or is being used for display purposes by any retail or wholesale merchant, or is crated, strapped or locked to such an extent that it is impossible for a child to obtain access to any airtight compartment thereof. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1955, c. 305; 1993, c. 539, s. 222; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-318.2. Child abuse a misdemeanor.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

(b) The Class A1 misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) A parent who abandons an infant less than seven days of age pursuant to G.S. 14-322.3 shall not be prosecuted under this section for any acts or omissions related to the care of that infant. (1965, c. 472, s. 1; 1971, c. 710, s. 6; 1993, c. 539, s. 223; 1994, Ex. Sess., c. 14, s. 13; c. 24, s. 14(c); 2001-291, s. 4; 2008-191, s. 1; 2009-570, s. 6.)

Editor's Note. — Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plan shall contain information on responsible parenting in addition to information about the provisions of the act. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2008-191, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Sesson Laws 2008-191, s. 1, effective December 1, 2008, substituted "Class A1" for "Class 1" in subsections (a) and (b). See Editor's note for effective date and applicability.

Session Laws 2009-570, s. 6, effective August 28, 2009, deleted "Class 1" preceding "misdemeanor" in the section heading.

Legal Periodicals. — For article reviewing the development of protective services for children in this State, see 54 N.C.L. Rev. 743 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Campbell L. Rev. 415 (1983).

For comment, "The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

CASE NOTES

I. In General.
II. Nature and Proof of Offense.

I. IN GENERAL.

Standing to Challenge Constitutionality. — Where defendant's case was submitted to the jury only on the issue of whether defendant actually inflicted her child's injuries, defendant could not complain of alleged unconstitutional vagueness in the provision of this section making it a criminal offense to create or allow to be created a substantial risk of physical injury upon a child since provisions of this section are severable. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973).

Child Abuse Is Not a Lesser Included Offense. — The General Assembly did not intend child abuse to be a lesser included offense, or to merge with any other offense. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Neither § 14-32(b) nor this section proscribes a crime which is a lesser included offense of the other, and conviction or acquittal of one will not support a plea of former jeopardy against a charge for violation of the other. State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982).

Charges of child abuse and child neglect were not merged into a charge of second-

degree murder. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Conviction Under § 14-316.1 After Nonsuit Under This Section. — Defendant was not denied his right against double jeopardy by his conviction in superior court of child neglect in violation of G.S. 14-316.1 after a judgment of nonsuit was entered in a prosecution of defendant in the district court for child abuse in violation of this section. State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Parents have the duty to take every step reasonably possible under the circumstances to prevent harm to their children. Failure to perform this duty is negligence. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Court's Duty on Review of Denial of Motion to Dismiss. — The Court of Appeals improperly considered exculpatory evidence presented by the defendant in reversing the trial court's denial of defendant's motions to dismiss where the State presented substantial evidence of involuntary manslaughter and felonious or misdemeanor child abuse sufficient to survive defendant's motions to dismiss. State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451, 2000 N.C. LEXIS 241 (2000), cert. denied, 531 U.S. 890, 121 S. Ct. 213, 148 L. Ed. 2d 150 (2000).

Sentencing. — The aggravating factor that the defendant took advantage of a position of trust or confidence cannot be used to increase a sentence beyond the presumptive sentence for involuntary manslaughter when the manslaughter conviction could have been based on the predicate crime of misdemeanor child abuse, which has as an element that the defendant was a parent of the victim, or by a finding that defendant committed a criminally negligent act. State v. Darby, 102 N.C. App. 297, 401 S.E.2d 791 (1991).

Cited in State v. Heiser, 36 N.C. App. 358, 244 S.E.2d 170 (1978); State v. Ausley, 78 N.C. App. 791, 338 S.E.2d 547 (1986); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000); State v. Morgan, 156 N.C. App. 523, 577 S.E.2d 380, 2003 N.C. App. LEXIS 187 (2003); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

II. NATURE AND PROOF OF OFFENSE.

This section provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980); State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983); State v. Woods, 70 N.C. App. 584, 321 S.E.2d 4 (1984).

By the enactment of this section the General Assembly intended to provide for three separate and independent offenses, none dependent on the other; therefore, the first provision of this section, making infliction of injury upon the child by the parent himself a punishable offense, is divisible and separable from the remainder of the statute. State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

And the State Needs to Prove Only One of the Three. — To convict a parent of child abuse under this section it is necessary that the State prove only one of three separate and distinct acts or courses of conduct; that the parent, other than by accidental means, (1) inflicted physical injury upon the child, (2) allowed physical injury to be inflicted upon the child, or (3) created or allowed to be created a substantial risk of physical injury upon the child. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973); State v. Armistead, 54 N.C. App. 358, 283 S.E.2d 162 (1981).

Injuries Must Be Inflicted Other Than by Accidental Means. — An essential element of proof under this section is a showing that the injuries suffered by the child were inflicted by other than accidental means. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983), overruled on other grounds, State v. Childress, 321 N.C. 231, 362 S.E.2d 263 (1987).

Intentional Act Is Required. — The word "inflict" means to lay on or impose, and is aptly used in connection with punishment. Thus, to violate this section, an intentional, rather than accidental, act causing physical injury is required; but an intent to injure is not required. The phrase "accidental means" relates to unintentional acts. State v. Young, 67 N.C. App. 139, 312 S.E.2d 665 (1984).

Intent to Punish as Sufficient Intent. — Where child is injured because defendant intentionally put her in hot water, if one of defendant's purposes in doing so was to punish the child, defendant would be guilty of misdemeanor child abuse, even though she may not have intended to cause an injury. State v. Young, 67 N.C. App. 139, 312 S.E.2d 665 (1984).

A violation of this section proximately resulting in death would support a conviction of involuntary manslaughter. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983), overruled on other grounds, State v. Childress, 321 N.C. 231, 362 S.E.2d 263 (1987).

The "battered child syndrome" is a medicolegal term which describes the diagnosis of a medical expert based on scientific studies that when a child suffers certain types of continuing injuries that the injuries were not caused by accidental means. Upon such a finding, it is logical to presume that someone "caring" for the child was responsible for the injuries. State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983), overruled on other grounds, State v. Childress, 321 N.C. 231, 362 S.E.2d 263 (1987).

For landmark case in North Carolina on the "battered child syndrome," see State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Byrd, 309 N.C. 132, 305 S.E.2d 724 (1983), overruled on other grounds, State v. Childress, 321 N.C. 231, 362 S.E.2d 263 (1987).

Evidence of Separate Incident of Abuse Held Not Prejudicial. — Although in a prosecution for child abuse it was error to allow introduction of testimony concerning a separate incident in which defendant struck his child, the error was not prejudicial where there was ample uncontradicted evidence that defendant intentionally inflicted some physical injury on his child, and defendant failed to meet the burden of proving a reasonable probability that a different result would have occurred had the court not admitted the testimony. State v. Armistead, 54 N.C. App. 358, 283 S.E.2d 162 (1981).

Evidence Held Sufficient. — Where alleged victim of child abuse had his face burned while he was under defendant's supervision and no other adults were present, competent medical evidence at trial was that victim's facial burn looked like the child's face had been immersed in a bowl or cup of liquid, and the medical evidence included an opinion that victim suffered from battered child syndrome and an opinion that he had been abused, the evidence was sufficient to take the charge to the jury. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

§ 14-318.3: Repealed by Session Laws 1971, c. 710, s. 7.

§ 14-318.4. Child abuse a felony.

(a) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E felony, except as otherwise provided in subsection (a3) of this section.

(a1) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child, who commits, permits, or encourages any act of prostitution with or by the child is guilty of child abuse and shall be punished as a Class E felon.

(a2) Any parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class E felony.

(a3) A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.

(a4) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class E felony if the act or omission results in serious bodily injury to the child.

(a5) A parent or any other person providing care to or supervision of a child less than 16 years of age whose willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life is guilty of a Class H felony if the act or omission results in serious physical injury to the child.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

(c) Abandonment of an infant less than seven days of age pursuant to G.S. 14-322.3 may be treated as a mitigating factor in sentencing for a conviction under this section involving that infant.

(d) The following definitions apply in this section:

(1) Serious bodily injury. — Bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a

permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

(2) Serious physical injury. — Physical injury that causes great pain and suffering. The term includes serious mental injury. (1979, c. 897, s. 1; 1979, 2nd Sess., c. 1316, s. 18; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 653, s. 1; c. 916, § 1; 1985, c. 509, s. 5; c. 668; 1993, c. 539, s. 1233; 1994, Ex. Sess., c. 24, s. 14(c); 1999-451, s. 1; 2001-291, s. 5; 2008-191, s. 2.)

Editor's Note. — Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plan shall contain information on responsible parenting in addition to information about the provisions of the act. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

Session Laws 2008-191, s. 3, provides: "This act becomes effective December 1, 2008, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Sesson Laws 2008-191, s. 2, substituted "child" for "juvenile" in subsection (a1); substituted "the child" for "a juvenile" in subsection (a2); deleted the second sentence in subsection (a3), which defined "serious bodily injury"; added subsections (a4), (a5), and (d). See Editor's note for effective date and applicability.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

For article on a model act to prevent the sexual exploitation of children, see 17 Wake Forest L. Rev. 535 (1981).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For note discussing a new means to combat child abuse in light of State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982), see 5 Campbell L. Rev. 415 (1983).

For comment, "The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

For article concerning the state's failure to protect children and substantive due process, see 68 N.C.L. Rev. (1990).

CASE NOTES

Definition. — Felony child abuse is the intentional infliction of serious injuries by a caretaker to a child. State v. Phillips, 328 N.C. 1, 399 S.E.2d 293, cert. denied, 501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).

Defendant Held to Be a Caretaker. — A caretaker under the Juvenile Code included an adult member of the juvenile's household; thus, there was substantial evidence that defendant, who lived with the child and his mother and watched the child for short periods of time, provided supervision of the child within the meaning of the felony child abuse statute, and was a caretaker to the child. State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47, 2002 N.C. App. LEXIS 280 (2002).

A violation of this section is a crime of moral turpitude, and where the complaint indicated that defendant had accused the plaintiff of violating this section, the plaintiff alleged slander per se and presented evidence sufficient to withstand defendant's motion for summary judgment. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710, 1999 N.C. App. LEXIS 894 (1999), cert. denied, 351 N.C. 187, 541 S.E.2d 728 (1999).

Inference Raised by "Battered Child Syndrome." — A finding that the alleged victim suffered from the "battered child syndrome" — a medicolegal term describing the diagnosis of a medical expert, based on scientific studies, that when a child suffers certain type of continuing injuries, the injuries were not caused by accidental means — raises the inference that the person supervising her intentionally inflicted the injuries suffered by the child. State v. Campbell, 75 N.C. App. 266, 330 S.E.2d 502 (1985), rev'd on other grounds, 316 N.C. 168, 340 S.E.2d 474 (1986).

What Intent Is Required Under Subsection (a). — Under subsection (a) of this section, the element of intent is sufficiently established if a defendant intentionally inflicts injury that proves to be serious on a child of less than 16 years of age in his care. He need not specifically intend that the injury be serious. State v. Campbell, 316 N.C. 168, 340 S.E.2d 474 (1986).

There was sufficient evidence of defendant's intent to assault the three-year-old victim for denial of defendant's motion to dismiss his prosecution under G.S. 14-318.4(a), where the victim stated several times that defendant kicked the victim, and several doctors testified that significant force was necessary to cause the victim's injuries. State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772, 2002 N.C. App. LEXIS 1272 (2002).

Evidence Sufficient to Show Intent. — Evidence was sufficient to show that defendant intentionally inflicted injury on two-year-old that proved to be serious, as the nature and extent of burns raised the inference that someone other than the child herself intentionally held the child's hands under hot water for a period of 10 to 15 seconds and the fact that defendant alone was with the child at the time she was injured raised an inference that defendant held the child's hands under water. State v. Campbell, 316 N.C. 168, 340 S.E.2d 474 (1986).

Trial court properly denied defendant's motions to dismiss pursuant to G.S. 15A-1227 in a prosecution for felony child abuse of defendant's minor daughter in violation of G.S. 14-318.4(a); with respect to G.S. 14-318.4, when an adult had exclusive custody of a child for a period of time during which the child suffered injuries that were neither self-inflicted nor accidental, there was sufficient evidence to create an inference that the adult intentionally inflicted those injuries, and in the instant case defendant had exclusive custody of the child during the period when the child's injuries occurred, and testimony to two doctors indicated that the injures to the child were intentionally inflicted. State v. Liberato, 156 N.C. App. 182, 576 S.E.2d 118, 2003 N.C. App. LEXIS 75 (2003).

Age as Aggravating Factor in Crime Where Age Is Already an Element. — Where mother/defendant was accused of shaking her three-week old infant to death, the trial court did not err in finding as an aggravating factor, under G.S. 15A-1340.16(d)(11), that the victim was of a very young age, even though the victim's age had already been used as an element of the crime under subsection (a) of this section. State v. Burgess, 134 N.C. App. 632, 518 S.E.2d 209 (1999).

Evidence held sufficient to find that defendant intentionally inflicted injury on two year old child who suffered serious immersion burns on her hands, resulting in permanent disfigurement, substantial impairment of the function of her hands, and substantial impairment of her physical health, in violation of this section. State v. Campbell, 316 N.C. 168, 340 S.E.2d 474 (1986).

Where the medical evidence in a child abuse trial was that second-degree burns, which cause a layer of skin to peel, (1) are very painful, (2) if not treated, cause permanent disfigurement, and (3) if over a joint, the scars left by such burns permanently impede movement of the joint, the trial court did not err in refusing to dismiss the charge of felonious child abuse for lack of proof of serious physical injury. State v. Church, 99 N.C. App. 647, 394 S.E.2d 468 (1990).

The evidence was sufficient for a conviction under this section where the child suffered numerous, severe injuries which were inflicted on various occasions, including burns, head trauma, fractures to the leg, arm and ribs, facial bruising, and puncture marks, where the defendant was laughing and talking with co-defendant outside of the emergency room and even appeared to doze when the doctor informed her of the child's condition, and where the defendant's statements exonerated every other member of the household. The jury could also have found defendant guilty under a theory of aiding and abetting because the evidence indicated that she was present when the child was injured by the co-defendant who plead guilty. State v. Noffsinger, 137 N.C. App 418, 528 S.E.2d 605, 2000 N.C. App. LEXIS 420 (2000).

Substantial evidence supported the conclusion that the defendant committed assault, in violation of this section, where defendant was the parent of the victim, was providing care to him, and he was under sixteen years of age at the time of his death. Defendant admitted that she shook him and threw him down, and as a result, seriously injured him; and had assaulted the victim on occasions prior to the assault which led to his death. State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

Evidence that defendant struck eight-year-old daughter on the buttocks with a board multiple times while disciplining her and that the blows caused a large bruise on the daughter's buttocks that was crusted around the outside, had a spot near the middle that was open and oozing, and was painful to the touch, was sufficient for a jury to reasonably infer that defendant caused great pain and suffering, and the trial court did not err by denying defendant's motion to dismiss charges of felonious child abuse and felonious assault inflicting serious bodily injury or by submitting the issue of defendant's guilt or innocence to the jury. State v. Williams, 154 N.C. App. 176, 571 S.E.2d 619, 2002 N.C. App. LEXIS 1397 (2002).

Evidence presented by the State on a charge of felony child abuse resulting in serious bodily injury, a violation of G.S. 14-318.4(a3), was sufficient to defeat defendant's motion to dismiss where the evidence showed that (1) defendant had exclusive care of the victim while the victim's mother was at work; (2) the victim, who was almost two years old, suffered severe abdominal injuries caused by trauma of a kind only usually observed with victims of car wrecks or intentional child abuse; (3) the injuries occurred during a time when defendant was with the victim either alone or with the victim's mother and a guest; (4) defendant testified that neither the victim's mother nor the guest injured the victim; and (5) during later visits supervised by a social worker, the victim interacted freely with the mother and others, but cried when the mother tried to coax the victim to interact with defendant. State v. Chapman, 154 N.C. App. 441, 572 S.E.2d 243, 2002 N.C. App. LEXIS 1467 (2002), cert. denied, 356 N.C. 682, 577 S.E.2d 898 (2003).

Despite a defendant's argument that the evidence as to his infliction of serious injury upon his victims was insufficient, the evidence was sufficient to establish the "serious bodily injury" element for his convictions for felonious child abuse inflicting serious injury under G.S. 14-318.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b). State v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850, 2002 N.C. App. LEXIS 1530 (2002).

Where defendant hit his son, a one-year-old child, in the head with a belt causing a visible bruise, there was sufficient evidence of serious physical injury to convict defendant of felony child abuse in violation of G.S. 14-318.4(a); serious physical injury could have been inferred from the testimony about the bruise and photographs of it. State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208, 2004 N.C. App. LEXIS 729 (2004).

Sufficient evidence supported defendant's conviction of child abuse; defendant's child suffered cigarette and scalding burns, neglect, and a blood clot on the brain, and physicians and experts testified that injuries were intentional; defendant, who had exclusive custody of the child when the injuries occurred, posited no alternative explanation, and admitted that she lied to physicians, nurses, social workers, friends, and family as to the cause of the injuries. State v. Wilson, 181 N.C. App. 540, 640 S.E.2d 403, 2007 N.C. App. LEXIS 253 (2007).

There was sufficient evidence to support defendant's conviction of Class E child abuse under G.S. 14-318.4(a) as defendant inflicted a serious injury on a child with the required intent since: (1) defendant beat the child four different times with a belt for a total time between 40 minutes and 100 minutes; (2) the child was bleeding, short of breath (due to asthma), and vomited; (3) and both the child's arms were almost entirely covered with bruises, the child's legs were swollen and puffy, the child's buttocks were black and blue, and the child was in pain for two weeks. State v. Williams, 184 N.C. App. 351, 646 S.E.2d 613, 2007 N.C. App. LEXIS 1465 (2007).

Inconsistency Between Indictment and Proof. — Dismissal of a felonious child abuse prosecution was not required, where indictment charged the defendant intentionally inflicted serious injury on the victim that resulted in a subdural hematoma, but evidence showed that defendant inflicted an epidural hematoma and subdural hematoma at different times, because the indictment appropriately charged the elements of the crime, and the reference to the subdural hematoma was mere surplusage. State v. Qualls, 130 N.C. App. 1, 502 S.E.2d 31 (1998), aff'd, 350 N.C. 56, 510 S.E.2d 376 (1999).

Trial judge's instruction to jury properly defined "serious physical injury" as "such physical injury as causes great pain and suffering." State v. Phillips, 328 N.C. 1, 399 S.E.2d 293, cert. denied, 501 U.S. 1208, 111 S. Ct. 2804, 115 L. Ed. 2d 977 (1991).

Failure to Instruct Regarding "Serious Bodily Injury." — Because a trial court failed to instruct the jury regarding "serious bodily injury" as alleged in the indictment, it was error to sentence defendant for felonious child abuse inflicting serious bodily injury because the jury was only instructed on the lesser offense of felony child abuse inflicting serious physical injury. State v. Locklear, 178 N.C. App.

732, 632 S.E.2d 516, 2006 N.C. App. LEXIS 1641 (2006).

Jury Instructions Proper. — Jury instruction allowing the jury to find defendant guilty of felonious child abuse if the jury found that defendant intentionally inflicted serious bodily injury to the child or intentionally assaulted the child proximately resulting in serious bodily injury was proper, as was a jury instruction providing that the jury could find the requisite intent through culpable or criminal negligence. State v. Oakman, 191 N.C. App. 796, 663 S.E.2d 453, 2008 N.C. App. LEXIS 1493 (2008).

Trial court did not commit plain error by instructing the jury on three alternative theories of felonious child abuse, because the evidence supported the instruction, requiring the jury to find that defendant engaged in a sexual act with the victim. State v. Lark, — N.C. App. —, 678 S.E.2d 693, 2009 N.C. App. LEXIS 1101 (July 7, 2009).

Felony child abuse is not a lesser included offense of murder; it requires proof of facts not required for murder and it addresses a distinct evil, the serious physical abuse of children by parents or other persons providing care to children. State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996), cert. denied, 520 U.S. 1106, 117 S. Ct. 1111, 137 L. Ed. 2d 312 (1997).

Felony Murder Conviction Upheld. — The court rejected the defendant's ex post facto objections and upheld the defendant's conviction, under G.S. 14-17, of murder while committing felonious child abuse, in violation of this section, with the use of her hands as a deadly weapon although this theory had not, at the time of the victim's death, been used to support such a first degree felony murder conviction. State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569, 2000 N.C. App. LEXIS 541 (2000).

Trial court did not err by electing to arrest judgment on a felonious child abuse with a deadly weapon conviction as only one felony was necessary to support a felony murder conviction, and the jury found that five felonies could support a felony murder charge including forcible rape, statutory rape, forcible sex offense, statutory sex offense, and felony child abuse with a deadly weapon. State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886, 2007 N.C. App. LEXIS 1823 (2007).

Applied in State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Young, 67 N.C. App. 139, 312 S.E.2d 665 (1984); State v. Reber, 71 N.C. App. 256, 321 S.E.2d 484 (1984); State v. Riggsbee, 72 N.C. App. 167, 323 S.E.2d 502 (1984); State v. Harper, 72 N.C. App. 471, 325 S.E.2d 30 (1985); State v. Watkins, 77 N.C. App. 325, 335 S.E.2d 232 (1985); State v. France, 94 N.C. App. 72, 379 S.E.2d 701 (1989).

Cited in State v. Medlin, 62 N.C. App. 251, 302 S.E.2d 483 (1983); State v. Farmer, 60 N.C. App. 779, 299 S.E.2d 842 (1983); State v. Darby, 102 N.C. App. 297, 401 S.E.2d 791 (1991); State v. Elliott, 344 N.C. 242, 475 S.E.2d 202 (1996); State v. Fritsch, 132 N.C. App. 262, 511 S.E.2d 325, 1999 N.C. App. LEXIS 120 (1999); State v. Fritsch, 351 N.C. 373, 526 S.E.2d 451, 2000 N.C. LEXIS 241 (2000); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

§ 14-319: Repealed by Session Laws 1975, c. 402.

§ 14-320: Repealed by Session Laws 1987, c. 716, s. 2.

Cross References. — As to prohibited practices in connection with adoption, see G.S. 48-10-101 et seq.

§ 14-320.1. Transporting child outside the State with intent to violate custody order.

When any federal court or state court in the United States shall have awarded custody of a child under the age of 16 years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State. Such crime shall be punishable as a Class I felony. Provided that keeping a child outside the limits of the State in violation of a court order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking. (1969, c. 81; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 563, s. 1; 1993, c. 539, s. 1234; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

Legal Periodicals. — For note discussing criminal sanctions against "child-snatching," see 55 N.C.L. Rev. 1275 (1977).

CASE NOTES

Cited in Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Clayton v. Clayton, 54 N.C. App. 612, 284 S.E.2d 125 (1981); Clark v. Link, 855 F.2d 156 (4th Cir. 1988).

OPINIONS OF ATTORNEY GENERAL

Removal of Child After Award By Clerk But in Violation of Restraining Order Issued by Succeeding District Court. — See opinion of Attorney General to Mr. John Morton, Attorney at Law, 40 N.C.A.G. 711 (1969).

§ 14-321. Failing to pay minors for doing certain work.

Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a Class 3 misdemeanor. (1893, c. 309; Rev., s. 3428a; C.S., s. 4446; 1993, c. 539, s. 224; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to youth employment, see G.S. 95-25.5, 95-25.23.

§ 14-321.1. Prohibit baby sitting service by sex offender or in the home of a sex offender.

(a) For purposes of this section the term "baby sitting service" means providing, for profit, supervision or care for a child under the age of 13 years who is unrelated to the provider by blood, marriage, or adoption, for more than two hours per day while the child's parents or guardian are not on the premises.

(b) Notwithstanding any other provision of law, no person who is an adult may provide or offer to provide a baby sitting service in any of the following circumstances:

(1) The baby sitting service is offered in a home and a resident of the home is a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes.

(2) A provider of care for the baby sitting service is a sex offender who is registered in accordance with Article 27A of Chapter 14 of the General Statutes.

(c) A violation of this section that is a first offense is a Class 1 misdemeanor. A violation of this section that is a second or subsequent offense is a Class H felony. (2005-416, s. 4.)

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment and failure to support spouse and children.

(a) For purposes of this Article:

(1) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

(2) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(b) Any supporting spouse who shall willfully abandon a dependent spouse without providing that spouse with adequate support shall be guilty of a Class 1 or 2 misdemeanor and upon conviction shall be punished according to subsection (f).

(c) Any supporting spouse who, while living with a dependent spouse, shall willfully neglect to provide adequate support for that dependent spouse shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f).

(d) Any parent who shall willfully neglect or refuse to provide adequate support for that parent's child, whether natural or adopted, and whether or not the parent abandons the child, shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f). Willful neglect or refusal to provide adequate support of a child shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child of the parent shall reach the age of 18 years.

(e) Upon conviction for an offense under this section, the court may make such order as will best provide for the support, as far as may be necessary, of the abandoned spouse or child, or both, from the property or labor of the defendant. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c). For child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply.

(f) A first offense under this section is a Class 2 misdemeanor. A second or subsequent offense is a Class 1 misdemeanor. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C.S., s. 4447; 1925, c. 290; 1949, c. 810; 1957, c. 369; 1969, c. 1045, s. 1; 1981, c. 683, s. 1; 1989, c. 529, s. 4; 1993, c. 517, s. 3; c. 539, ss. 225, 226; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For provision making spouse competent and compellable to testify in a prosecution for abandonment, see G.S. 8-57. As to when offense of failure to support child deemed committed in State, see G.S. 14-325.1.

Legal Periodicals. — For discussion of statutory abandonment, see 38 N.C.L. Rev. 1 (1959).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

For survey of 1980 family law, see 59 N.C.L. Rev. 1194 (1981).

For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

CASE NOTES

I. General Consideration.
II. Nonsupport of Spouse.
III. Nonsupport of Children.

I. GENERAL CONSIDERATION.

The duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

This section must be strictly construed. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

The district court has exclusive original jurisdiction of misdemeanors, including action to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

The constructive domicile of the wife is that of her husband, and where he has resided in another state and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of the State statute making it a misdemeanor. State v. Sneed, 197 N.C. 668, 150 S.E. 197 (1929).

Plea in Abatement After Plea of Not Guilty. — Where the defendant had been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement came too late after his plea of not guilty. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Order of the Judge Providing for Support. — It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of willfully abandoning them, and an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of $1,000 comes within the provisions of the statute. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Where a husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the superior court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Application of Collateral Estoppel in Subsequent Civil Action. — A conviction under this section necessitates a finding that defendant is the father of the minor children involved. Thus, a criminal conviction under this section for the willful neglect of and refusal to support his minor children estops defendant from relitigating the issue of paternity in a subsequent civil action against him for reimbursement of public assistance pay for the support of his children and an order to provide continued support. The doctrine of collateral estoppel bars defendant from relitigating the paternity issue. State ex rel. New Bern Child Support Agency v. Lewis, 311 N.C. 727, 319 S.E.2d 145 (1984).

Applied in State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896); National Council Junior Order of United Am. Mechanics v. Tate, 212 N.C. 305, 193 S.E. 397, 113 A.L.R. 1514 (1937); State v. Evans, 262 N.C. 492, 137 S.E.2d 811 (1964); State v. Smith, 18 N.C. App. 308, 196 S.E.2d 519 (1973); State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977); State v. Neeley, 307 N.C. 247, 297 S.E.2d 389 (1982); State v. Caudill, 68 N.C. App. 268, 314 S.E.2d 592 (1984); Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78 (1985).

Cited in Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1889); Jeffreys v. Hocutt, 195 N.C. 339, 142 S.E. 226 (1928); State v. Henderson, 207 N.C. 258, 176 S.E. 758 (1934); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941); State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951); State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956); Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); In re Hughes, 254 N.C. 434, 119 S.E.2d 189 (1961); State v. Stevens, 11 N.C. App. 402, 181 S.E.2d 159 (1971); State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977); In re Dinsmore, 36 N.C. App. 720, 245 S.E.2d 386 (1978); State v. Neeley, 57 N.C. App. 211, 290 S.E.2d 727 (1982); State ex rel. New Bern Child Support Agency ex rel. Lewis v. Lewis, 63 N.C. App. 98, 303 S.E.2d 627 (1983); North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987); State v. Zuniga, 320 N.C. 233, 357 S.E.2d 898 (1987); Tate v. Tate, 95 N.C. App. 774, 384 S.E.2d 48 (1989); Vann v. Vann, 128 N.C. App. 516, 495 S.E.2d 370 (1998); State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); In re J.S.B., 183 N.C. App. 192, 644 S.E.2d 580, 2007 N.C. App. LEXIS 1041 (2007).

II. NONSUPPORT OF SPOUSE.

Abandonment under § 50-7(1) is not synonymous with the criminal offense defined in this section. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

Indictment. — An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N.C. 1020, 43 S.E. 819 (1903).

Abandonment and Failure to Support Must Be Willful. — By express language the abandonment and failure to support must be willful to create criminal offenses. State v. Westmoreland, 255 N.C. 725, 122 S.E.2d 702 (1961).

Willful Abandonment May Signify Whether Failure to Support Was Willful. — Under certain circumstances the willful abandonment of a wife by a husband may be a significant factor in determining whether his failure to provide adequate support was willful, as when he leaves and goes to a new community where there is no prospect of equally satisfactory employment. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

Separation by Consent. — Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

Where consent to separation is induced by the misconduct of one spouse, a charge of voluntary abandonment may still be maintained. State v. Talbot, 123 N.C. App. 698, 474 S.E.2d 143 (1996).

Institution of bastardy proceedings prior to birth of child is insufficient to establish such abandonment as is contemplated by this section. In re Jane Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

Proof of Adultery as Justification. — While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927).

Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

Statute of Limitations. — Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same — Renewal of Cohabitation. — Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Venue. — When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails to perform, the venue of an action under the provisions of this section is in that county. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same — Where Husband Is Nonresident. — Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another state, he cannot direct her choice of residence and is indictable under this section in the county of her residence. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Instruction Properly Refused. — Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been willful in order to constitute an abandonment was untenable. Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939).

Defective Instructions. — Where, in a prosecution for abandonment and willful failure to support, the evidence tended to show that the husband was employed and had earnings, and had in some measure made provision for the support of the wife, the adequacy of such support and the willfulness of the defendant's failure to do more were the crucial questions to be submitted to the jury, and an instruction to the effect that defendant's earning capacity made no difference was erroneous, and an instruction that the failure to provide support would be excusable only if the husband had no income or earning capacity whatsoever was inexact. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

Good Faith in Abandonment Is Question for Jury. — In a prosecution of a husband for abandonment the question whether such abandonment was in good faith, for the causes assigned, is for the jury. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Husband Cannot Be Twice Convicted. — A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. State v. Dunston, 78 N.C. 418 (1878).

Condonation by Wife Does Not Bar Prosecution. — Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

Divorce After First Conviction No Defense on New Trial. — Where the husband has been indicted, tried, and convicted under this section for the criminal abandonment of his wife, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. State v. Falkner, 185 N.C. 635, 116 S.E. 168 (1923).

Evidence Held Sufficient. — Evidence that defendant had taken his belongings, unplugged the refrigerator, disconnected the telephone, and left no money was sufficient to permit a reasonable juror to conclude that defendant intentionally abandoned his wife. State v. Talbot, 123 N.C. App. 698, 474 S.E.2d 143 (1996).

III. NONSUPPORT OF CHILDREN.

In order to obtain a conviction under subsection (d) of this section, the State must prove three elements beyond a reasonable doubt: (1) That the defendant was the father of the children; (2) that the defendant failed to provide the children with adequate support; and (3) that such failure was willful. State ex rel. New Bern Child Support Agency ex rel. Lewis v. Lewis, 311 N.C. 727, 319 S.E.2d 145 (1984).

Limitation on Prosecution for Nonsupport of Illegitimate Children Held Constitutional. — The three-year statute of limitations contained in G.S. 49-4(1) for prosecutions under G.S. 49-2 does not violate the equal protection clause of the federal Constitution in that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under subsection (d) of this section of persons who willfully fail to support their legitimate children. State v. Beasley, 57 N.C. App. 208, 290 S.E.2d 730, appeal dismissed and cert. denied, 306 N.C. 559, 294 S.E.2d 225 (1982).

Sufficient Warrant. — A warrant charging defendant with willful refusal and neglect to provide adequate support for his minor children, naming them, was sufficient, abandonment not being an element of the offense since the 1957 amendment rewrote this section. State v. Goodmen, 266 N.C. 659, 147 S.E.2d 44 (1966).

The word "willfully" as used in G.S. 49-2 is used with the same import as in this section. State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

Failure to Support Must Be Willful. — In a prosecution under this section, the failure by a defendant to provide adequate support for his child must be willful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved. State v. Hall, 251 N.C. 211, 110 S.E.2d 868 (1959); State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Defective Instruction on Presumption of Willfulness. — Where the defendant was indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tended to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there was no presumption of willfulness from the failure to provide adequate support under G.S. 14-323 (now repealed), and an instruction that left out this essential element of the crime was held to be reversible error. State v. Roberts, 197 N.C. 662, 150 S.E. 199 (1929).

Sufficient Evidence to Show Willful Abandonment and Failure to Support Minor Child. — Evidence that defendant refused to support his minor child although repeated demands were made on him after the parties had returned to this State, was held to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since this section provides that the abandonment of a minor child shall constitute a continuing offense. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Evidence Insufficient to Infer Willfulness. — Where there was no evidence in the record that the defendant was employed, or that he owned any property, or had any income or any ability whatsoever to contribute to the support of his children, nor any evidence that the defendant had failed to apply himself to some honest calling for the support of himself and family, or that he was a frequenter of drinking houses, or a known common drunkard, so as to bring the case within the presumption raised by G.S. 14-323 (now repealed), the record was devoid of evidence from which the jury might infer that the defendant willfully or intentionally failed to discharge his obligation to support his children, and the defendant's motion for judgment as of nonsuit should have been allowed. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

This section has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941).

This section relates only to legitimate children. An illegitimate child is not protected thereby. Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

Denial of Paternity. — Where the husband in an action for nonsupport for a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. State v. Ray, 195 N.C. 628, 143 S.E. 216 (1928).

Biological Paternity. — The common-law presumption of the husband's paternity is not a rule of substantive law making biological paternity irrelevant in a prosecution under this section. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

Instruction as to Presumption of Legitimacy Held Constitutional. — In a prosecution for willfully refusing to provide adequate support for his child in violation of this section, where the child was conceived while defendant and child's mother were living together as husband and wife; child was born after they had separated but during wedlock, and there was some evidence that her mother had sexual relations with another man after conception and during the period of gestation, a jury instruction on the common-law presumption of the child's legitimacy did not violate defendant's right to a trial by due process of law. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

Rebutting Presumption of Paternity. — To require a defendant-husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of paternity places upon him a burden of production so stringent that, in effect, it unconstitutionally shifts the burden of persuasion to him on this issue. Due process precludes requiring that the defendant, in order to rebut the mandatory presumption, do more than offer some evidence which is sufficient to raise a factual issue as to the paternity of the child. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

This section in express terms constitutes the abandonment of children a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Abandonment of children is a continuing offense, and therefore, termination of a prosecution in defendant's favor will not preclude a subsequent prosecution. State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954).

A parent's willful failure or refusal to provide adequate support for his children is a continuing offense, and is not barred by any statute of limitations until the youngest child shall have reached the age of 18 years. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Autrefois Acquit and Convict. — In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

If the mother is guilty of nonsupport, this section provides a remedy and this remedy is exclusive. Hensen v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949).

A father cannot, by contract, relieve himself of his obligation to support his child. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

Abandonment of Children After Divorce. — The father's duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

Statute of Limitations Repelled by Promise and Gifts. — The promise of a father to support his children and his making gifts to them was sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under this section for his willfully abandoning them. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

§ 14-322.1. Abandonment of child or children for six months.

Any man or woman who, without just cause or provocation, willfully abandons his or her child or children for six months and who willfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall be punished as a Class I felon. (1963, c. 1227; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1983, c. 653, s. 2.)

Legal Periodicals. — For comment, "The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma," 20 Wake Forest L. Rev. 975 (1984).

§ 14-322.2: Repealed by Session Laws 1979, c. 838, s. 28.

§ 14-322.3. Abandonment of an infant under seven days of age.

When a parent abandons an infant less than seven days of age by voluntarily delivering the infant as provided in G.S. 7B-500(b) or G.S. 7B-500(d) and does not express an intent to return for the infant, that parent shall not be prosecuted under G.S. 14-322 or G.S. 14-322.1. (2001-291, s. 7.)

Editor's Note. — Session Laws 2001-291, s. 6, provides: "The Department of Health and Human Services, Division of Public Health, shall develop recommendations for a plan to inform the public as to the provisions of this act. The plan shall contain information on responsible parenting in addition to information about the provisions of the act [Session Laws 2001-291, the Infant Homicide Prevention Act, which decriminalized abandonment of an infant under seven days of age when that infant is voluntarily delivered to certain health care providers, law enforcement officials, social services personnel, or emergency medical service personnel]. The plans shall be targeted at adolescents and young adults, and shall be developed in consultation with law enforcement officials, medical professionals, and representatives of the Department of Public Instruction. Not later than April 1, 2002, the Department of Health and Human Services shall report its recommendations, and the projected cost for implementing its recommendations, to the chairpersons of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, the Senate Appropriations Committee on Justice and Public Safety, and the House Appropriations Subcommittee on Justice and Public Safety."

In addition to the plan developed pursuant to Session Laws 2001-291, s. 6, Session Laws 2003-284, s. 10.8B(a) and (b), effective July 1, 2003, provides: "(a) The Department of Health and Human Services, Division of Public Health and the Division of Social Services, shall incorporate education and awareness of the Infant Homicide Prevention Act pursuant to S.L. 2001-291, into other State-funded programs at the local level.

"(b) The Department shall report on its activities to the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Health and Human Services, and the Fiscal Research Division not later than April 1, 2004."

§§ 14-323 through 14-325: Repealed by Session Laws 1981, c. 683, s. 3.

Cross References. — For present provisions as to abandonment and nonsupport of spouse or children, see G.S. 14-322.

§ 14-325.1. When offense of failure to support child deemed committed in State.

The offense of willful neglect or refusal of a parent to support and maintain a child, and the offense of willful neglect or refusal to support and maintain one's illegitimate child, shall be deemed to have been committed in the State of

North Carolina whenever the child is living in North Carolina at the time of such willful neglect or refusal to support and maintain such child. (1953, c. 677; 1981, c. 683, s. 2.)

Legal Periodicals. — For brief comment on this section, see 31 N.C.L. Rev. 404 (1953).

§ 14-326: Repealed by Session Laws 1981, c. 683, s. 3.

Cross References. — For present provisions as to abandonment and nonsupport of spouse or children, see G.S. 14-322.

§ 14-326.1. Parents; failure to support.

If any person being of full age, and having sufficient income after reasonably providing for his or her own immediate family shall, without reasonable cause, neglect to maintain and support his or her parent or parents, if such parent or parents be sick or not able to work and have not sufficient means or ability to maintain or support themselves, such person shall be deemed guilty of a Class 2 misdemeanor; upon conviction of a second or subsequent offense such person shall be guilty of a Class 1 misdemeanor.

If there be more than one person bound under the provisions of the next preceding paragraph to support the same parent or parents, they shall share equitably in the discharge of such duty. (1955, c. 1099; 1969, c. 1045, s. 3; 1993, c. 539, s. 227; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Person: 1967, c. 848, s. 3.

Cross References. — As to application of this section not being altered by decree of emancipation, see now G.S. 7B-3507.

Legal Periodicals. — For article, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

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Cited in Shealy v. Associated Transp. Inc., 252 N.C. 738, 114 S.E.2d 702 (1960).

ARTICLE 41.

Alcoholic Beverages.

§§ 14-327, 14-328: Repealed by Session Laws 1971, c. 872, s. 3.

§ 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous alcoholic beverages.

(a) Any person who, either individually or as an agent for any person, firm or corporation, shall manufacture for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be punished as a Class H felon.

(b) Any person who, either individually or as agent for any person, firm or corporation, shall, knowing or having reasonable grounds to know of the poisonous qualities thereof, transport for other than personal use, sell or possess for purpose of sale, for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be punished as a Class F felon.

(c) Any person who, either individually or as agent for any person, firm or corporation, shall transport for other than personal use, sell or possess for purpose of sale, any spirituous liquor to be used as a beverage which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a Class 2 misdemeanor. In prosecutions under this subsection and under subsection (b) above, proof of transportation of more than one gallon of spirituous liquor will be prima facie evidence of transportation for other than personal use, and proof of possession of more than one gallon of spirituous liquor will be prima facie evidence of possession for purpose of sale.

(d) Any person who, either individually or as agent for any person, firm or corporation, shall transport or possess, for use as a beverage, any illicit spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a Class 1 misdemeanor: Provided, anyone charged under this subsection may show as a complete defense that the spirituous liquor in question was legally obtained and possessed and that he had no knowledge of the poisonous nature of the beverage. (1873-4, c. 180, ss. 1, 2; Code, s. 983; Rev., s. 3522; C.S., s. 4453; 1961, c. 897; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, ss. 228, 229, 1235; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Applied in State v. Barefoot, 254 N.C. 308, 118 S.E.2d 758 (1961).

§§ 14-330 through 14-332: Repealed by Session Laws 1971, c. 872, s. 3.

Editor's Note. — Section 14-330 was also repealed by Session Laws 1971, c. 168.

ARTICLE 42.

Public Drunkenness.

§ 14-333: Repealed by Session Laws 1971, c. 872, s. 3.

§§ 14-334 through 14-335.1: Repealed by Session Laws 1977, 2nd Session, c. 1134, s. 6.

Cross References. — For present provisions as to public intoxication, see G.S. 14-443 et seq.

ARTICLE 43.

Vagrants and Tramps.

§ 14-336: Repealed by Session Laws 1983, c. 17, s. 1.

§ 14-337: Repealed by Session Laws 1973, c. 108, s. 13.

§§ 14-338, 14-339: Repealed by Session Laws 1983, c. 17, ss. 2, 3.

§ 14-340: Repealed by Session Laws 1971, c. 700.

§ 14-341: Repealed by Session Laws 1971, c. 699.

ARTICLE 44.

Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.

If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a Class 1 misdemeanor. (1905, c. 303; Rev., s. 3442; C.S., s. 4465; 1993, c. 539, s. 230; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-343. Unauthorized dealing in railroad tickets.

If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a Class 2 misdemeanor. (1895, c. 83, s. 1; Rev., s. 3764; C.S., s. 4466; 1969, c. 1224, s. 1; 1993, c. 539, s. 231; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-344. Sale of admission tickets in excess of printed price.

Any person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket, tax, and the authorized service fee. This service fee may not exceed three dollars ($3.00) for each ticket except that a promoter or operator of the property where the event is to be held and a ticket sales agency may agree in writing on a reasonable service fee greater than three dollars ($3.00) for the first sale of tickets by the ticket sales agent. This service fee may be a pre-established amount per ticket or a percentage of each ticket. The existence of the service fee shall be made known to the public by printing or writing the amount of the fee on the tickets which are printed for the event. Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section or as permitted by G.S. 14-344.1 shall be guilty of a Class 2 misdemeanor. (1941, c. 180; 1969, c. 1224, s. 8; 1977, c. 9; 1979, c. 909; 1981, c. 36; 1985, c. 434; 1991, c. 165, s. 1; 1993, c. 539, s. 232; 1994, Ex. Sess., c. 24, s. 14(c); 2008-158, ss. 3, 4; 2009-255, s. 1.)

Editor's Note. — Session Laws 2009-255, s. 1, amended Session Laws 2008-158, s. 4, to delete the June 30, 2009, expiration date for the 2008 act. Therefore, amendments by Session Laws 2008-158 will not expire. Session Laws 2008-158, s. 4, as amended, makes the amendment by that act effective August 1, 2008, and applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-158, s. 3, effective August 1, 2008, and applicable to offenses committed on or after that date, inserted "or as permitted by G.S. 14-344.1" near the end of the paragraph. See Editor's note for effective date, expiration date, and applicability.

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Selling Tickets Not Illegal. — Solicitation to sell tickets in and of itself, without more, is not a crime under any statute or ordinance of record. Roberts v. Swain, 126 N.C. App. 712, 487 S.E.2d 760 (1997).

§ 14-344.1. Internet sale of admission tickets in excess of printed price.

(a) Internet Resale. — A person may resell an admission ticket under this section on the Internet at a price greater than the price on the face of the ticket unless the venue where the event will occur prohibits the Internet ticket resale as provided under subsection (b) of this section. To resell an admission ticket under this section, the person reselling the ticket must offer the ticket for resale on a Web site with a ticket guarantee that meets the requirements of subsection (c) of this section. A prospective purchaser must be directed to the guarantee before completion of the resale transaction. A person who resells an admission ticket under this section acknowledges liability for the informational report required under subsection (e) of this section.

(b) Resale Prohibited. — The venue where an event will occur may prohibit the resale of admission tickets for the event at a price greater than the price on the face of the ticket. To prohibit the resale of tickets under this section, the venue must file a notice of prohibition of the resale of admission tickets for a specified event with the Secretary of State and must post the notice of prohibition conspicuously on its Web site. The primary ticket seller for the event must also post the notice conspicuously on its Web site. A prohibition under this subsection may not become valid until 30 days after the notice is posted on the venue's Web site. The prohibition expires on December 31 of each year unless the prohibition is renewed. To renew a prohibition, a venue must renew its notice of prohibition filed with the Secretary of State and must post the notice as required under this subsection. A venue who files a notice of prohibition must pay a fee in the amount set in G.S. 55-1-22 for filing articles of incorporation. A venue that renews a notice of prohibition must pay a fee in the amount set in G.S. 55-1-22 for filing a paper annual report.

(c) Ticket Guarantee. — A person who resells or offers to resell admission tickets under this section must guarantee to the purchaser a full refund of the amount paid for the ticket under each of the following conditions:

(1) The ticketed event is cancelled. Reasonable handling and delivery fees may be withheld from the refund price of a cancelled ticketed event if the ticket guarantee on the Web site specifically informs the purchaser that handling and delivery fees will be withheld from the refunded amount.

(2) The purchaser is denied admission to the ticketed event. This subdivision does not apply if admission to the ticketed event is denied to the purchaser because of an action or omission of the purchaser.

(3) The ticket is not delivered to the purchaser in the manner described on the Web site or pursuant to the delivery guarantee made by the reseller, and the failure results in the purchaser's inability to attend the ticketed event.

(d) Student Tickets. — This section does not apply to student tickets issued by institutions of higher education in North Carolina for sporting events.

(e) Report on Receipts. — A person who resells or offers to resell admission tickets under this section must report each month to the Department of Revenue, under oath, on a form provided by the Department. The report is due by the 10th day after the end of each month and covers the gross receipts received during the previous month from reselling admission tickets to an event or venue in this State. The report must include all of the following:

(1) The total amount of gross receipts derived from reselling an admission ticket on the Internet to an event or venue in this State. For purposes of this subsection, gross receipts exclude the price printed on the face of the ticket.

(2) The event for which admission tickets are sold and the venue where the event will occur.

(3) The person or venue from whom the reseller purchased admission tickets.

(4) The acquisition price of the admission tickets.

(5) The price received by the reseller for the admission tickets.

(6) The name and address of the person to whom the admission ticket is resold, if the purchaser is a reseller.

(7) Any other information required by the Secretary of Revenue. (2008-158, s. 1; 2009-255, s. 1.)

Editor's Note. — Session Laws 2009-255, s. 1, amended Session Laws 2008-158, s. 4, to delete the June 30, 2009, expiration date for the 2008 act. Therefore, this section as enacted by Session Laws 2008-158 is effective August 1, 2008, and will not expire.

§ 14-344.2. Prohibition on ticket purchasing software.

(a) Definition. — The term "ticket seller" means a person who has executed a written agreement with the management of any venue in North Carolina for a sporting event, theater, musical performance, or public entertainment of any kind to sell tickets to the event over the Internet.

(b) Unfair Trade Practice. — A person who knowingly sells, gives, transfers, uses, distributes, or possesses software that is primarily designed or produced for the purpose of interfering with the operation of a ticket seller who sells, over the Internet, tickets of admission to a sporting event, theater, musical performance, or public entertainment of any kind by circumventing any security measures on the ticket seller's Web site, circumventing any access control systems of the ticket seller's Web site, circumventing any access control solutions of the ticket seller's Web site, or circumventing any controls or measures that are instituted by the ticket seller on its Web site to ensure an equitable ticket buying process shall be in violation of G.S. 75-1.1. The ticket seller and venue hosting the ticketed event have standing to bring a private right of action under G.S. 75-1.1 for violation of this section.

(c) Original Ticket Seller. — A person or firm is not liable under this section with respect to tickets for which the person or firm is the original ticket seller. (2008-158, s. 2; 2009-255, s. 1.)

Editor's Note. — Session Laws 2009-255, s. 1, amended Session Laws 2008-158, s. 4, to delete the June 30, 2009, expiration date for the 2008 act. Therefore, this section as enacted by Session Laws 2008-158 is effective August 1, 2008, and will not expire.

§ 14-345: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(16), effective October 1, 1994.

§ 14-346. Sale of convict-made goods prohibited.

(a) It shall be unlawful to sell or to offer for sale anywhere within the State of North Carolina any articles or commodities manufactured or produced, wholly or in part, in this State or elsewhere by convicts or prisoners, except

(1) Articles or commodities manufactured or produced by convicts on probation or parole or prisoners released part time for regular employment in the free community, and

(2) Products of agricultural or forestry enterprises or quarrying or mining operations in which inmates of any penal or correctional institution of this State are employed, and

(3) Articles and commodities manufactured or produced in any penal or correctional institution of this State for sale to departments, institutions, and agencies supported in whole or in part by the State, or to any political subdivision of this State, for the use of these departments, institutions, agencies, and political subdivisions of the State and not for resale, and

(4) Articles of handicraft made by the inmates of any penal or correctional institution of this State during their leisure hours and with their own materials.

(b) Any person, firm or corporation selling, undertaking to sell, or offering for sale any prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a Class 2 misdemeanor. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4; 1959, c. 170, s. 1; 1969, c. 1224, s. 4; 1993, c. 539, s. 233; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 14-346.1, 14-346.2: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(17), (18).

Article 45.

Regulation of Employer and Employee.

§ 14-347: Repealed by Session Laws 1971, c. 350.

§ 14-348: Repealed by Session Laws 1971, c. 701.

§ 14-349: Repealed by Session Laws 1971, c. 351.

§ 14-350: Repealed by Session Laws 1971, c. 352.

§ 14-351: Repealed by Session Laws 1971, c. 353.

§ 14-352: Repealed by Session Laws 1971, c. 354.

§ 14-353. Influencing agents and servants in violating duties owed employers.

Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a Class 2 misdemeanor. (1913, c. 190, s. 1; C.S., s. 4475; 1969, c. 1224, s. 6; 1993, c. 539, s. 234; 1994, Ex. Sess., c. 24, s. 14(c).)

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Constitutionality. — The first two parts of this section are not repugnant to the "due process of law" clause of U.S. Const., Amend. XIV, and to "the law of the land" clause of U.S. Const., Art. I, § 17, and are a reasonable and proper exercise of the police power of the State. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The acts prohibited in the first clause of this section are stated in words sufficiently explicit, clear and definite to inform any man of ordinary intelligence as to what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Although the second clause of this section employs general terms, the words used are sufficiently explicit and definite to convey to any man of ordinary intelligence and understanding an adequate description of the prohibited act or acts, and to inform him of what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The first two parts of this section are divisible and separable from the remainder of the statute. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

A violation of this section is not a malicious misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

A violation of the first clause of this section is related to unfair trade practices, and is an unfair method of competition. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

And Is Commonly Called "Commercial Bribery." — If a person does the prohibited act or acts specified in the first clause of this section with the intent explicitly stated therein, he is guilty of what is commonly called "commercial bribery." State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Such Practices Are Generally Prohibited. — There is general agreement that where an agent or employee receives money or other considerations from a person in return for the agent's or employee's efforts to further that person's interest in business dealings between him and the principal or employer, such an act or acts on the part of the agent or employee and on the part of the person who gives the money or other consideration is an essential element of the offense prohibited. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The intent specified in the first clause of this section is an essential element of the offense. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

As Is Agreement or Understanding in Second Clause. — The agreement or understanding in the second clause of this section is an essential element of the offense. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

First Clause Does Not Prohibit Customary Tipping. — A contention that the language of the first clause of this section is so broad as to prohibit the customary habit of tipping is untenable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Since Tipping Lacks Intent to Influence. — Customary tipping is in obedience to custom or in appreciation of service, and is done with no intent to influence the action of the person receiving the tip in relation to his or her employer's business, and as to tipping done in such a manner the statute is not applicable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

But If Such Intent Is Present, Tipping May Be Violation. — It is possible that a person by tipping an agent, servant or employee with the intent specified in the first clause of this section could bring himself within its penalties, e.g., by giving substantial amounts or considerations and calling them tips. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Second Clause Is Intended to Prohibit Disloyalty by Employees. — The plain intent and purpose of the second clause of this section is to prohibit any agent, employee or servant from being disloyal and unfaithful to his principal, employer or master. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The third and fourth parts of this section refer to a commission, discount or bonus received by any agent, employee or servant under the circumstances therein specified, and to any person who gives or offers such an agent, employee, or servant such commission, discount or bonus. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Parties to Prohibited Acts Generally Only Witnesses. — The activities necessary to accomplish the offenses prohibited by this section and similar statutes require no violence, embody no traces in lasting form, and frequently, if not almost entirely, have no witnesses other than persons implicated or potentially implicated. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Failure to Prove Conspiracy Does Not Bar Conviction of Substantive Offense. — Although the State failed to prove that one of the defendants was one of the conspirators and was guilty of the conspiracy alleged against him in one count in the indictment, he could still be convicted of the substantive offenses committed by him in violation of this section, as charged against him in other counts. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Cited in State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973); Rose's Stores, Inc. v. Padgett, 62 N.C. App. 404, 303 S.E.2d 344 (1983); In re Computer Technology Corp., 80 N.C. App. 709, 343 S.E.2d 264 (1986).

§ 14-354. Witness required to give self-incriminating evidence; no suit or prosecution to be founded thereon.

No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in G.S. 14-353, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C.S., s. 4476.)

Cross References. — As to constitutional provisions against self-incriminating evidence, see N.C. Const., Art. I, § 11, and note thereto, and the U.S. Const., Amend. V.

Legal Periodicals. — For article discussing the limits to self-incrimination, see 15 N.C.L. Rev. 229 (1937).

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Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-355. Blacklisting employees.

If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a Class 3 misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00); and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C.S., s. 4477; 1993, c. 539, s. 235; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

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Intent of Section. — This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement, and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. Seward v. Receivers of Seaboard Air Line Ry., 159 N.C. 241, 75 S.E. 34 (1912).

Remedial Provisions. — The provisions of this section and former G.S. 14-356 are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

What Constitutes a Violation. — Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevent the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer ore tenus to a complaint setting forth this cause of action is bad. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

Request from Prospective Employer. — Statements made about a former employee in response to a request from a prospective employer are privileged under this section; for this section to be violated, the statements to the prospective employer would have to be unsolicited. Friel v. Angell Care Inc., 113 N.C. App. 505, 440 S.E.2d 111 (1994).

Employer's comments regarding an employee's workers compensation claim and lawsuit were made in response to inquiries by prospective employers concerning job applications made by the employee; such truthful statements made by the employer in the course of the inquires were privileged under G.S. 14-355, and the trial court's grant of summary judgment on the employee's claim of blacklisting was appropriate. Holroyd v. Montgomery County, 167 N.C. App. 539, 606 S.E.2d 353, 2004 N.C. App. LEXIS 2379 (2004), cert. denied, — N.C. —, 613 S.E.2d 690 (2005).

In an action in which a former employee alleged that prospective employers refused to hire her based on information contained in a report that her former employer filed with a consumer reporting agency, the employee's claim for blacklisting under G.S. 14-355 was preempted by 15 U.S.C.S. § 1681t(b)(1)(F) of the Fair Credit Reporting Act because the claim arose under state statutory law and the claim was based on action taken by the former employer while furnishing information to a consumer reporting agency. Joiner v. Revco Disc. Drug Ctrs., Inc., 467 F. Supp. 2d 508, 2006 U.S. Dist. LEXIS 89920 (W.D.N.C. 2006).

Negative References Not Unsolicited. — Plaintiff's claim under this section was dismissed where the negative references given about him were given in response to the requests of potential employers, and for this section to be violated, the statements to the prospective employer would have had to have been unsolicited. Cortes v. McDonald's Corp., 955 F. Supp. 531 (E.D.N.C. 1996).

Punitive damages may not be recovered against a municipality absent statutory authorization; thus, plaintiff could not seek punitive damages from police chief in his official capacity. Houpe v. City of Statesville, 128 N.C. App. 334, 497 S.E.2d 82 (1998), cert. denied, 348 N.C. 72, 505 S.E.2d 871 (1998).

Cited in Scott v. Burlington Mills Corp., 245 N.C. 100, 95 S.E.2d 273 (1956); Arnold v. Sharpe, 37 N.C. App. 506, 246 S.E.2d 556 (1978); Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983).

§ 14-356: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(16).

§ 14-357: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(19).

§ 14-357.1. Requiring payment for medical examination, etc., as condition of employment.

(a) It shall be unlawful for any employer, as defined in subsection (b) of this section, to require any applicant for employment, as defined in subsection (c), to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of the initial act of hiring.

(b) The term "employer" as used in this section shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company, doing business in or operating within the State.

Provided that this section shall not apply to any employer as defined in this subsection who employs less than 25 employees.

(c) The term "applicant for employment" shall mean and include any person who seeks to be permitted, required or directed by any employer, as defined in subsection (b) hereof, in consideration of direct or indirect gain or profit, to engage in employment.

(d) Any employer who violates the provisions of this section shall be liable to a fine of not more than one hundred dollars ($100.00) for each and every violation. It shall be the duty of the Commissioner of Labor to enforce this section. (1951, c. 1094.)

ARTICLE 46.

Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a Class 3 misdemeanor. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a Class 3 misdemeanor. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chowan, Cleveland, Columbus, Craven, Cumberland,

Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson and Yadkin. (1905, cc. 297, 383, 445, 820; Rev., s. 3366; 1907, c. 8; c. 84, s. 1; c. 595, s. 1; cc. 639, 719, 869; Pub. Loc. 1915, c. 18; C.S., s. 4480; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; 1953, c. 474; 1983, c. 623; 1993, c. 539, s. 237; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to ejectment of tenant, see G.S. 42-26 and note thereto.

CASE NOTES

Averment of Fraud Is Essential. — The provisions of this section contravene N.C. Const., Art. I, § 16, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. State v. Williams, 150 N.C. 802, 63 S.E. 949 (1909); Minton v. Early, 183 N.C. 199, 111 S.E. 347 (1922).

Insufficient Indictment. — An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances" should be quashed as insufficient. State v. Williams, 150 N.C. 802, 63 S.E. 949 (1909).

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to defraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a Class 3 misdemeanor. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances, for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Caswell, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person, Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (1905, c. 299, ss. 1-7; Rev., s. 3367; 1907, c. 84, s. 2; c. 238, s. 1; c. 543; c. 595, s. 2; c. 810; C.S., s. 4481; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; 1951, c. 615; 1993, c. 539, s. 238; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to willful destruction of landlord's property by the tenant, see G.S. 42-11.

ARTICLE 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.

(a) If any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor.

(a1) If any person shall maliciously kill, or cause or procure to be killed, any animal by intentional deprivation of necessary sustenance, that person shall be guilty of a Class A1 misdemeanor.

(b) If any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal, every such offender shall for every such offense be guilty of a Class I felony. However, nothing in this section shall be construed to increase the penalty for cockfighting provided for in G.S. 14-362.

(c) As used in this section, the words "torture", "torment", and "cruelly" include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. As used in this section, the word "intentionally" refers to an act committed knowingly and without justifiable excuse, while the word "maliciously" means an act committed intentionally and with malice or bad motive. As used in this section, the term "animal" includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings. However, this section shall not apply to the following activities:

(1) The lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that this section shall apply to those birds exempted by the Wildlife Resources Commission from its definition of "wild birds" pursuant to G.S. 113-129(15a).

(2) Lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry, or aquatic species.

(2a) Lawful activities conducted for the primary purpose of providing food for human or animal consumption.

(3) Activities conducted for lawful veterinary purposes.

(4) The lawful destruction of any animal for the purposes of protecting the public, other animals, property, or the public health.

(5) The physical alteration of livestock or poultry for the purpose of conforming with breed or show standards. (1881, c. 34, s. 1; c. 368, ss. 1, 15; Code, ss. 2482, 2490; 1891, c. 65; Rev., s. 3299; 1907, c. 42; C.S., s. 4483; 1969, c. 1224, s. 2; 1979, c. 641; 1985 (Reg. Sess., 1986), c. 967, s. 1; 1989, c. 670, s. 1; 1993, c. 539, s. 239; 1994, Ex. Sess., c. 24, s. 14(c); 1998-212, s. 17.16(c); 1999-209, s. 8; 2007-211, ss. 1, 2.)

Cross References. — As to livestock, see also G.S. 14-366.

Editor's Note. — Session Laws 2007-211, s. 3, provides: "Section 1 of this act becomes effective December 1, 2007, and applies to offenses committed on or after that date. The remainder of this act is effective when it becomes law [July 11, 2007]."

CASE NOTES

Constitutionality. — Since G.S. 14-360 and N.C. Admin. Code tit. 15, r. 10B.0121 fail to give a person a reasonable opportunity to know whether shooting a particular pigeon is prohibited, and fail to provide standards for those applying the law, G.S. 14-360, in its entirety, is unconstitutionally void for vagueness, as applied to a pigeon shoot. Malloy v. Cooper, 162 N.C. App. 504, 592 S.E.2d 17, 2004 N.C. App. LEXIS 189 (2004), cert. denied, 358 N.C. 376, 597 S.E.2d 133 (2004).

This section is for the protection of animals. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

It is not for the protection of trespassers or mere licensees. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Hence, Unlawful Shooting at Dog Is Not Negligence Per Se. — Where plaintiff, who was struck by a bullet fired by defendant, was at best a mere licensee, the fact that defendant was unlawfully shooting at a dog did not render the act negligence per se, nor impose on defendant absolute liability. Since this section is not for the protection of the class to which plaintiff belonged, its violation did not impose liability in the absence of a showing that defendant knew, or in the exercise of reasonable care should have known, of plaintiff's presence in the vicinity. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Warrantless Seizure Violated Fourth Amendment. — Seizure of emaciated horses from an open field was an unreasonable seizure under the Fourth Amendment where the animal control officers, who had to cut an electrical fence to obtain access to the animals, and who spent three days making arrangements for the seizure of the horses, failed to obtain a warrant during that time. State v. Nance, 149 N.C. App. 734, 562 S.E.2d 557, 2002 N.C. App. LEXIS 315 (2002).

The word "willful" as used in criminal statutes signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939); State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Unnecessary suffering knowingly and willfully permitted constitutes the offense. State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

Finding Required for Conviction. — In order to convict there must be a finding that the act was "willfully and unlawfully" done. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

A dog is a useful animal within the meaning of this section. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Unnecessary to Show Dog Has Pecuniary Value. — It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Punishment in Effort to Train. — Punishment administered to an animal in an honest and good faith effort to train it is not without justification and not willful. State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Anger No Excuse. — Anger does not excuse the killing when it was willful and needless. And under such circumstances the intent is immaterial. State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897).

Evidence of Dog's Presence on Property Properly Excluded. — In a prosecution for needlessly killing a useful dog, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night, is properly excluded from the evidence upon the State's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offenses committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Injury to Prevent Depredations No Defense. — The fact that cows (State v. Butts, 92 N.C. 784 (1885)) or chickens (State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897)) were trespassing on defendant's property was not a defense to an action under this section, where the killing or wounding was unnecessary. See also State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Indictment. — The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. State v. Watkins, 101 N.C. 702, 8 S.E. 346 (1888).

A charge that defendant "did unlawfully and willfully beat" was held sufficient in State v. Allison, 90 N.C. 733 (1884).

Illustrations. — Shooting pigeons for sport (State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893)) and poisoning chickens (State v. Bossee, 145 N.C. 579, 59 S.E. 879 (1907)) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a direct verdict; the question of the willful purpose to injure being for the jury. State v. Isley, 119 N.C. 862, 26 S.E. 35 (1896).

Evidence Sufficient to Sustain Convic-

tion. — Evidence that defendant knew that (1) dogs were being kept, with defendant's consent, at her home and in her backyard, (2) the dogs were tied up with no shelter, food, or water, and the dogs had been allowed to become emaciated, and (3) one dead dog had been left, still tied up, to the point of decay, was sufficient to support a conviction for misdemeanor cruelty to animals. State v. Coble, 163 N.C. App. 335, 593 S.E.2d 109, 2004 N.C. App. LEXIS 368 (2004).

Applied in State v. Holt, 90 N.C. 749 (1884); State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975); State v. Simmons, 36 N.C. App. 354, 244 S.E.2d 168 (1978).

Cited in State ex rel. Bruton v. American Legion Post No. 113, 256 N.C. 691, 124 S.E.2d 885 (1962); Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002); Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 2004 N.C. App. LEXIS 813 (2004); Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005); State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008); Malloy v. Cooper, — N.C. App. —, 673 S.E.2d 783, 2009 N.C. App. LEXIS 246 (2009).

§ 14-360.1. Immunity for veterinarian reporting animal cruelty.

Any veterinarian licensed in this State who has reasonable cause to believe that an animal has been the subject of animal cruelty in violation of G.S. 14-360 and who makes a report of animal cruelty, or who participates in any investigation or testifies in any judicial proceeding that arises from a report of animal cruelty, shall be immune from civil liability, criminal liability, and liability from professional disciplinary action and shall not be in breach of any veterinarian-patient confidentiality, unless the veterinarian acted in bad faith or with a malicious purpose. It shall be a rebuttable presumption that the veterinarian acted in good faith. A failure by a veterinarian to make a report of animal cruelty shall not constitute grounds for disciplinary action under G.S. 90-187.8. (2007-232, s. 1.)

§ 14-361. Instigating or promoting cruelty to animals.

If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a Class 1 misdemeanor. (1881, c. 368, s. 6; Code, s. 2487; 1891, c. 65; Rev., s. 3300; C.S., s. 4484; 1953, c. 857, s. 1; 1969, c. 1224, s. 3; 1985 (Reg. Sess., 1986), c. 967, s. 1; 1989, c. 670, s. 2; 1993, c. 539, s. 240; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

§ 14-361.1. Abandonment of animals.

Any person being the owner or possessor, or having charge or custody of an animal, who willfully and without justifiable excuse abandons the animal is guilty of a Class 2 misdemeanor. (1979, c. 687; 1985 (Reg. Sess., 1986), c. 967, s. 2; 1989, c. 670, s. 3; 1993, c. 539, s. 241; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-362. Cockfighting.

A person who instigates, promotes, conducts, is employed at, allows property under his ownership or control to be used for, participates as a spectator at, or profits from an exhibition featuring the fighting of a cock is guilty of a Class I felony. A lease of property that is used or is intended to be used for an exhibition featuring the fighting of a cock is void, and a lessor who knows this use is made or is intended to be made of his property is under a duty to evict the lessee immediately. (1881, c. 368, s. 2; Code, s. 2483; 1891, c. 65; Rev., s. 3301; C.S., s. 4485; 1953, c. 857, s. 2; 1969, c. 1224, s. 3; 1985 (Reg. Sess., 1986), c. 967, s. 3; 1993, c. 539, s. 242; 1994, Ex. Sess., c. 24, s. 14(c); 2005-437, s. 1.)

§ 14-362.1. Animal fights and baiting, other than cock fights, dog fights and dog baiting.

(a) A person who instigates, promotes, conducts, is employed at, provides an animal for, allows property under his ownership or control to be used for, or profits from an exhibition featuring the fighting or baiting of an animal, other than a cock or a dog, is guilty of a Class 2 misdemeanor. A lease of property that is used or is intended to be used for an exhibition featuring the fighting or baiting of an animal, other than a cock or a dog, is void, and a lessor who knows this use is made or is intended to be made of his property is under a duty to evict the lessee immediately.

(b) A person who owns, possesses, or trains an animal, other than a cock or a dog, with the intent that the animal be used in an exhibition featuring the fighting or baiting of that animal or any other animal is guilty of a Class 2 misdemeanor.

(c) A person who participates as a spectator at an exhibition featuring the fighting or baiting of an animal, other than a cock or a dog, is guilty of a Class 2 misdemeanor.

(d) A person who commits an offense under subsection (a) within three years after being convicted of an offense under this section is guilty of a Class I felony.

(e) This section does not prohibit the lawful taking or training of animals under the jurisdiction and regulation of the Wildlife Resources Commission. (1985 (Reg. Sess., 1986), c. 967, s. 5; 1993, c. 539, ss. 243, 1236; 1994, Ex. Sess., c. 24, s. 14(c); 1997-78, s. 2.)

§ 14-362.2. Dog fighting and baiting.

(a) A person who instigates, promotes, conducts, is employed at, provides a dog for, allows property under the person's ownership or control to be used for, gambles on, or profits from an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony. A lease of property that is used or is intended to be used for an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is void, and a lessor who knows this use is made or is intended to be made of the lessor's property is under a duty to evict the lessee immediately.

(b) A person who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the baiting of that dog or the fighting of that dog with another dog or with another animal is guilty of a Class H felony.

(c) A person who participates as a spectator at an exhibition featuring the baiting of a dog or the fighting of a dog with another dog or with another animal is guilty of a Class H felony.

(d) This section does not prohibit the use of dogs in the lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission.

(e) This section does not prohibit the use of dogs in earthdog trials that are sanctioned or sponsored by entities approved by the Commissioner of Agriculture that meet standards that protect the health and safety of the dogs. Quarry at an earthdog trial shall at all times be kept separate from the dogs by a sturdy barrier, such as a cage, and have access to food and water.

(f) This section does not apply to the use of herding dogs engaged in the working of domesticated livestock for agricultural, entertainment, or sporting purposes. (1997-78, s. 1; 2006-113, s. 3.1; 2006-259, s. 37; 2007-180, s. 1; 2007-181, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2006-113, s. 3.1, as amended by Session Laws 2006-259, s. 37, effective December 1, 2007, is applicable to offenses committed on or after that date.

Subsection (e), as added by Session Laws 2007-180, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

Session Laws 2007-180, s. 2, provides that the Commissioner of Agriculture may take action before December 1, 2007 to approve entities as permitted by G.S. 14-362.2(e) as enacted by this act.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Constitutionality. — To discourage spectators at dogfights is a valid exercise of the State's police power and G.S. 14-362.2, making being a spectator at a dogfight a criminal offense, is not unconstitutionally vague nor overbroad. State v. Arnold, 147 N.C. App. 670, 557 S.E.2d 119, 2001 N.C. App. LEXIS 1244 (2001), cert. denied, 355 N.C. 286, 560 S.E.2d 808 (2002).

§ 14-362.3. Restraining dogs in a cruel manner.

A person who maliciously restrains a dog using a chain or wire grossly in excess of the size necessary to restrain the dog safely is guilty of a Class 1 misdemeanor. For purposes of this section, "maliciously" means the person imposed the restraint intentionally and with malice or bad motive. (2001-411, s. 2.)

§ 14-363. Conveying animals in a cruel manner.

If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a Class 1 misdemeanor. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (1881, c. 368, s. 5; Code, s. 2486; 1891, c. 65; Rev., s. 3302; C.S., s. 4486; 1953, c. 857, s. 3; 1969, c. 1224, s. 4; 1985 (Reg. Sess., 1986), c. 967, s. 1; 1989, c. 670, s. 4; 1993, c. 539, s. 244; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to double damages for injury to agricultural commodities or production systems, see G.S. 1-539.2B.

§ 14-363.1. Living baby chicks or other fowl, or rabbits under eight weeks of age; disposing of as pets or novelties forbidden.

If any person, firm or corporation shall sell, or offer for sale, barter or give away as premiums living baby chicks, ducklings, or other fowl or rabbits under eight weeks of age as pets or novelties, such person, firm or corporation shall be guilty of a Class 3 misdemeanor. Provided, that nothing contained in this section shall be construed to prohibit the sale of nondomesticated species of chicks, ducklings, or other fowl, or of other fowl from proper brooder facilities by hatcheries or stores engaged in the business of selling them for purposes other than for pets or novelties. (1973, c. 466, s. 1; 1985 (Reg. Sess., 1986), c. 967, s. 4; 1993, c. 539, s. 245; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-363.2. Confiscation of cruelly treated animals.

Conviction of any offense contained in this Article may result in confiscation of cruelly treated animals belonging to the accused and it shall be proper for the court in its discretion to order a final determination of the custody of the confiscated animals. (1979, c. 640.)

ARTICLE 48.

Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

ARTICLE 49.

Protection of Livestock Running at Large.

§ 14-365: Repealed by Session Laws 1971, c. 110.

§ 14-366. Molesting or injuring livestock.

If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a Class 2 misdemeanor: provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. Any person violating any provision of this section shall be guilty of a Class 2 misdemeanor. (1850, c. 94, ss. 1, 2; R.C., c. 34, s. 104; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; Rev., s. 3314; C.S., s. 4494; 1969, c. 1224, s. 9; 1993, c. 539, s. 246; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Graham, Haywood, Jackson, Swain, Transylvania: C.S. 4494.

Cross References. — As to double damages for injury to agricultural commodities or production systems, see G.S. 1-539.2B. As to cruelty to animals, see G.S. 14-360.

CASE NOTES

Applied in State v. Pollard, 83 N.C. 597 (1881); State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

§ 14-367. Altering the brands of and misbranding another's livestock.

If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a Class H felony. (1797, c. 485, s. 2, P.R.; R.C., c. 34, s. 57; Code, s. 1001; Rev., s. 3317; C.S., s. 4495; 1993, c. 539, s. 1237; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to cattle brands, their registration, defacement, etc., see G.S. 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places.

If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mock orange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a Class 2 misdemeanor. (1887, c. 338; Rev., s. 3318; C.S., s. 4496; 1969, c. 1224, s. 3; 1993, c. 539, s. 247; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to putting out poisonous foodstuffs, see G.S. 14-401.

§ 14-369: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(20).

Article 50.

Protection of Letters, Telegrams, and Telephone Messages.

§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.

If any person wrongfully obtains, or attempts to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a Class 2 misdemeanor. (1903, c. 599; Rev., s. 3848; C.S., s. 4497; 1993, c. 539, s. 248; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.

If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a Class 2 misdemeanor. (1889, c. 41, s. 1; Rev., s. 3846; C.S., s. 4498; 1993, c. 539, s. 249; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a Class 2 misdemeanor. (1889, c. 41, s. 2; Rev., s. 3728; C.S., s. 4499; 1993, c. 539, s. 250; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to unauthorized connections with telephone or telegraph, see G.S. 14-155.

CASE NOTES

Indictment. — It is necessary to charge, in an indictment for a violation of this section, and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. State v. Bagwell, 107 N.C. 859, 12 S.E. 254 (1890).

ARTICLE 51.

Protection of Athletic Contests.

§ 14-373. Bribery of players, managers, coaches, referees, umpires or officials.

If any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any player or participant in any athletic contest with intent to influence his play, action, or conduct and for the purpose of inducing the player or participant to lose or try to lose or cause to be lost any athletic contest or to limit or try to limit the margin of victory or defeat in such contest; or if any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any referee, umpire, manager, coach, or any other official or an athletic club or team, league, association, institution or conference, by whatever name called connected with said athletic contest with intent to influence his decision or bias his opinion or judgment for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be punished as a Class I felon. (1921, c. 23, s. 1; C.S., s. 4499(a); 1951, c. 364, s. 1; 1961, c. 1054, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1238; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

An essential element of the offense is bribery or offer to bribe with intent to influence the play, action or conduct of a player in any athletic contest. State v. Gold-

berg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964), overruled on other grounds in News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

It is necessary for the State to prove specific intent to influence the play, action or conduct of a player in any athletic contest. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964), overruled on other grounds in News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Competency of Evidence. — Testimony admitted over objections and exceptions as to the bribery of a number of basketball players in other states and rigging of basketball games in other states, was held competent as proof of intent to influence the play, action or conduct of a player in an athletic contest in State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964), overruled on other grounds in News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-374. Acceptance of bribes by players, managers, coaches, referees, umpires or officials.

If any player or participant in any athletic contest shall accept, or agree to accept, a bribe given for the purpose of inducing the player or participant to lose or try to lose or cause to be lost or limit or try to limit the margin of victory or defeat in such contest; or if any referee, umpire, manager, coach, or any other official of an athletic club, team, league, association, institution, or conference connected with an athletic contest shall accept or agree to accept a bribe given with the intent to influence his decision or bias his opinion or judgment and for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be punished as a Class I felon. (1921, c. 23, s. 2; C.S., s. 4499(b); 1951, c. 364, s. 2; 1961, c. 1054, s. 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1239; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-375. Completion of offenses set out in §§ 14-373 and 14-374.

To complete the offenses mentioned in G.S. 14-373 and 14-374, it shall not be necessary that the player, manager, coach, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, coach, or other official actually play or participate in any athletic contest, concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C.S., s. 4499(c); 1951, c. 364, s. 3; 1961, c. 1054, s. 3.)

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-376. Bribe defined.

By a "bribe," as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or in the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, coach, umpire, club or league official, to see which game an admission fee may be charged, or in which athletic contest any player, manager, coach, umpire, referee, or other official is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner defined to cover the true intention of the parties. (1921, c. 23, s. 4; C.S., s. 4499(d); 1951, c. 364, s. 4; 1961, c. 1054, s. 4.)

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-377. Intentional losing of athletic contest or limiting margin of victory or defeat.

If any player or participant shall commit any willful act of omission or commission, in playing of an athletic contest, with intent to lose or try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, or if any referees, umpire, manager, coach, or other official of an athletic club, team, league, association, institution or conference connected with an athletic contest shall commit any willful act of omission or commission connected with his official duties with intent to try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, such person shall be punished as a Class I felon. (1921, c. 23, s. 5; C.S., s. 4499(e); 1951, c. 364, s. 5; 1961, c. 1054, s. 5; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1240; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-378. Venue.

In all prosecutions under this Article, the venue may be laid in any county where the bribe herein referred to was given, offered, or accepted, or in which the athletic contest was carried on in relation to which the bribe was offered, given, or accepted, or the acts referred to in G.S. 14-377 were committed. (1921, c. 23, s. 6; C.S., s. 4606(c); 1951, c. 364, s. 6.)

§ 14-379. Bonus or extra compensation not forbidden.

Nothing in this Article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his duties. (1921, c. 23, s. 7; C.S., s. 4499(f); 1951, c. 364, s. 7; 1961, c. 1054, s. 6.)

§ 14-380: Repealed by Session Laws 1951, c. 364, s. 8.

ARTICLE 51A.

Protection of Horse Shows.

§ 14-380.1. Bribery of horse show judges or officials.

Any person who bribes, or offers to bribe, any judge or other official in any horse show, with intent to influence his decision or judgment concerning said horse show, shall be guilty of a Class 2 misdemeanor. (1963, c. 1100, s. 1; 1969, c. 1224, s. 1; 1993, c. 539, s. 251; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-380.2. Bribery attempts to be reported.

Any judge or other official of any horse show shall report to the resident superior court district attorney any attempt to bribe him with respect to his decisions in any horse show, and a failure to so report shall constitute a Class 2 misdemeanor. (1963, c. 1100, s. 2; 1969, c. 1224, s. 1; 1973, c. 47, s. 2; 1993, c. 539, s. 252; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-380.3. Bribe defined.

The word "bribe," as used in this Article, shall have the same meaning as set forth in G.S. 14-376, in relation to athletic contests. (1963, c. 1100, s. 3.)

§ 14-380.4. Printing Article in horse show schedules.

The provisions of this Article shall be printed on all schedules for any horse show held prior to January 1, 1965. (1963, c. 1100, s. 4.)

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-381. Desecration of State and United States flag.

It shall be unlawful for any person willfully and knowingly to cast contempt upon any flag of the United States or upon any flag of North Carolina by public acts of physical contact including, but not limited to, mutilation, defiling, defacing or trampling. Any person violating this section shall be deemed guilty of a Class 2 misdemeanor.

The flag of the United States, as used in this section, shall be the same as defined in 4 U.S.C.A. 1 and 4 U.S.C.A. 2. The flag of North Carolina, as used in this section, shall be the same as defined in G.S. 144-1. (1917, c. 271; C.S., s. 4500; 1971, c. 295; 1993, c. 539, s. 253; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to state salute to the North Carolina flag, G.S. 144-8.

CASE NOTES

Former Provisions Held Unconstitutional. — See Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971).

Cited in Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987).

§ 14-382. Pollution of water on lands used for dairy purposes.

It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a Class 3 misdemeanor, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222; C.S., s. 4501; 1993, c. 539, s. 254; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.

Any person, firm or corporation owning lands or the standing timber on lands within 400 feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within 400 feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all treetops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of 400 feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such treetops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1913, c. 56; C.S., s. 4502; 1969, c. 1224, s. 1; 1993, c. 539, s. 255; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Constitutionality. — This section constitutes a valid exercise of the police power and is constitutional. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917), aff'd, 249 U.S. 510, 39 S. Ct. 357, 63 L. Ed. 735 (1919).

The motive is immaterial, and where the intent to violate the section is shown the defendant is punishable. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917), aff'd, 249 U.S. 510, 39 S. Ct. 357, 63 L. Ed. 735 (1919).

§ 14-384. Injuring notices and advertisements.

If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a Class 3 misdemeanor. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (1885, c. 302; Rev., s. 3709; C.S., s. 4503; 1993, c. 539, s. 256; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-385. Defacing or destroying public notices and advertisements.

If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a Class 3 misdemeanor. (1876-7, c. 215; Code, s. 981; Rev., s. 3710; C.S., s. 4504; 1993, c. 539, s. 257; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-386: Repealed by Session Laws 1994, Extra Session, c. 14, s. 72(21).

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-388: Repealed by Session Laws 1943, c. 543.

§ 14-389: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(17).

§§ 14-390, 14-390.1: Repealed by Session Laws 1969, c. 970, s. 11.

§ 14-391. Usurious loans on household and kitchen furniture or assignment of wages.

Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale, or purported conditional sale or otherwise, upon any article of household or kitchen furniture, or any assignment of wages, earned or to be earned, and shall willfully:

(1) Take, receive, reserve or charge a greater rate of interest than permitted by law, either before or after the interest may accrue; or
(2) Refuse to give receipts for payments on interest or principal of such loan; or
(3) Fail or refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new

mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security;

shall be guilty of a Class 1 misdemeanor and in addition thereto shall be subject to the provisions of G.S. 24-2. (1907, c. 110; C.S., s. 4509; 1927, c. 72; 1959, c. 195; 1977, c. 807; 1993, c. 539, s. 259; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to interest in general, see G.S. 24-1 et seq.

Editor's Note. — Section 3 of c. 1053, Session Laws 1961, which enacted the North Carolina Consumer Finance Act, provided that this section shall not be applicable to persons licensed under the North Carolina Consumer Finance Act, that is, G.S. 53-164 to 53-191. See Editor's note to G.S. 53-164.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

This section is constitutional. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

Interest Need Not Be Received. — The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

§§ 14-392, 14-393: Repealed by Session Laws 1989, c. 508, s. 4.

Cross References. — As to prohibitions relating to digging and buying of ginseng, see G.S. 106-202.19.

§ 14-394. Anonymous or threatening letters, mailing or transmitting.

It shall be unlawful for any person, firm, or corporation, or any association of persons in this State, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such persons, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1921, c. 112; C.S., s. 4511(a); 1993, c. 539, s. 260; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For note on intentional infliction of emotional distress, see 18 Wake Forest L. Rev. 624 (1982).

CASE NOTES

Constitutionality. — Section 14-3(b), making a misdemeanor offense as to which no specific punishment is prescribed a Class H felony under certain circumstances, and this section set up different punishment levels for the same criminal act without discriminating against any class of defendants, and do not violate equal protection. State v. Glidden, 76 N.C. App. 653, 334 S.E.2d 101 (1985), rev'd on other grounds, 317 N.C. 557, 346 S.E.2d 470 (1986).

Subsection (b) of § 14-3 does not convert

a violation of this section into a felony in any case. State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

The misdemeanor of transmitting an unsigned threatening letter in violation of this section does not fall within any of the classes of misdemeanors made felonious by G.S. 14-3(b). State v. Glidden, 317 N.C. 557, 346 S.E.2d 470 (1986).

Transmission an Essential Element. — For a conviction under this section, there must be a transmission of the anonymous letter which contains at least one of the categories of prohibited language. Unless and until there is a transmission, no crime has been committed. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

What Constitutes Transmission. — There can be no transmission within the meaning of this section without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

Evidence Held Sufficient to Show Transmission. — Evidence that the recipient of threatening letters was familiar enough with the defendant's handwriting to identify him as the author of the threatening letters, that some of the letters appeared in victim's classroom during or immediately following the time period when defendant attended class there, that some of the envelopes were folded, indicating that they could have been mailed to an accomplice who then mailed them from the postmarked location while defendant was in another location, and that no more letters were mailed to the victim after defendant was arrested was sufficient for the jury to find that defendant transmitted the letters as well as wrote them. State v. Glidden, 76 N.C. App. 653, 334 S.E.2d 101 (1985), rev'd on other grounds, 317 N.C. 557, 346 S.E.2d 470 (1986).

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and overrule defendant's motion for judgment as of nonsuit. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

Cited in State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

§ 14-395. Commercialization of American Legion emblem; wearing by nonmembers.

It shall be unlawful for anyone not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Anyone violating the provisions of this section shall be guilty of a Class 3 misdemeanor. (1923, c. 89; C.S., s. 4511(b); 1993, c. 539, s. 261; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-395.1. Sexual harassment.

(a) Offense. — Any lessor of residential real property or the agent of any lessor of residential real property who shall harass on the basis of sex any lessee or prospective lessee of the property shall be guilty of a Class 2 misdemeanor.

(b) Definitions. — For purposes of this section:

(1) "Harass on the basis of sex" means unsolicited overt requests or demands for sexual acts when (i) submission to such conduct is made a term of the execution or continuation of the lease agreement, or (ii) submission to or rejection of such conduct by an individual is used to determine whether rights under the lease are accorded;

(2) "Lessee" means a person who enters into a residential rental agreement with the lessor and all other persons residing in the lessee's rental unit; and

(3) "Prospective lessee" means a person seeking to enter into a residential rental agreement with a lessor. (1989, c. 712, s. 1; 1993, c. 539, s. 262; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Actionable Sexual Harassment. — Given the provisions of G.S. 143-422.2, 115C-335.5, 115C-325 and 14-395.1, there was no question that the right to be free of sexual harassment in the workplace was implicated in declaration of North Carolina's public policy. Whitt v. Harris Teeter, Inc., 165 N.C. App. 32, 598 S.E.2d 151, 2004 N.C. App. LEXIS 1160 (2004), cert. denied, 359 N.C. 75, 605 S.E.2d 151 (2004).

Cited in Whitt v. Harris Teeter, Inc., 165 N.C. App. 32, 598 S.E.2d 151, 2004 N.C. App. LEXIS 1160 (2004).

§§ 14-396, 14-397: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 767, s. 30(18), (19).

§ 14-398. Theft or destruction of property of public libraries, museums, etc.

Any person who shall steal or unlawfully take or detain, or willfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparatus, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of State or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars ($50.00), be guilty of a Class 1 misdemeanor. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars ($50.00), the person committing same shall be punished as a Class H felon. (1935, c. 300; 1943, c. 543; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 265; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Dare: 1983, c. 349.

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Intent. — This section requires, as an essential element of the offenses set forth, a showing that the person charged "willfully" or "wantonly" caused the damage. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

Evidence Held Insufficient. — Evidence was not sufficient to support conviction under this section for water damage to a museum tapestry which was lying on the floor rolled up in a storage room located directly under rest room with malfunctioning toilet which defendant had clogged with paper towels, as there was insufficient evidence as to the condition of the tapestry prior to the resultant flooding. State v. Davis, 86 N.C. App. 25, 356 S.E.2d 607 (1987).

§ 14-399. Littering.

(a) No person, including any firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street or alley except:

(1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or

(2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

(a1) No person, including any firm, organization, private corporation, or governing body, agents, or employees of any municipal corporation shall scatter, spill, or place or cause to be blown, scattered, spilled, or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street, or alley except:

(1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or

(2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

(a2) Subsection (a1) of this section does not apply to the accidental blowing, scattering, or spilling of an insignificant amount of municipal solid waste, as defined in G.S. 130A-290(18a), during the automated loading of a vehicle designed and constructed to transport municipal solid waste if the vehicle is operated in a reasonable manner and according to manufacturer specifications.

(b) When litter is blown, scattered, spilled, thrown or placed from a vehicle or watercraft, the operator thereof shall be presumed to have committed the offense. This presumption, however, does not apply to a vehicle transporting nontoxic and biodegradable agricultural or garden products or supplies, including mulch, tree bark, wood chips, and raw logs.

(c) Any person who violates subsection (a) of this section in an amount not exceeding 15 pounds and not for commercial purposes is guilty of a Class 3 misdemeanor punishable by a fine of not less than two hundred fifty dollars ($250.00) nor more than one thousand dollars ($1,000) for the first offense. In addition, the court may require the violator to perform community service of not less than eight hours nor more than 24 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed. Any second or subsequent violation of subsection (a) of this section in an amount not exceeding 15 pounds and not for commercial purposes within three years after the date of a prior violation is a Class 3 misdemeanor punishable by a fine of not less than five hundred dollars ($500.00) nor more than two thousand dollars ($2,000). In addition, the court may require the violator to perform community service of not less than 16 hours nor more than 50 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed.

(c1) Any person who violates subsection (a1) of this section in an amount not exceeding 15 pounds is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100.00). In addition, the court may require the violator to perform community service of not less than four hours nor more than 12 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed. Any second or subsequent violation of subsection (a1) of this section in an amount not exceeding 15 pounds within three years after the date of a prior violation is an infraction punishable by a fine of not more than two hundred dollars ($200.00). In addition, the court may require the violator to perform community service of not less than eight hours nor more than 24 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed. For purposes of this subsection, the term "litter" shall not include nontoxic and biodegradable agricultural or garden products or supplies, including mulch, tree bark, and wood chips.

(d) Any person who violates subsection (a) of this section in an amount exceeding 15 pounds but not exceeding 500 pounds and not for commercial purposes is guilty of a Class 3 misdemeanor punishable by a fine of not less than five hundred dollars ($500.00) nor more than two thousand dollars ($2,000). In addition, the court shall require the violator to perform community service of not less than 24 hours nor more than 100 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other community service commensurate with the offense committed.

(d1) Any person who violates subsection (a1) of this section in an amount exceeding 15 pounds but not exceeding 500 pounds is guilty of an infraction punishable by a fine of not more than two hundred dollars ($200.00). In addition, the court may require the violator to perform community service of not less than eight hours nor more than 24 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed.

(e) Any person who violates subsection (a) of this section in an amount exceeding 500 pounds or in any quantity for commercial purposes, or who discards litter that is a hazardous waste as defined in G.S. 130A-290 is guilty of a Class I felony.

(e1) Any person who violates subsection (a1) of this section in an amount exceeding 500 pounds is guilty of an infraction punishable by a fine of not more than three hundred dollars ($300.00). In addition, the court may require the violator to perform community service of not less than 16 hours nor more than 50 hours. The community service required shall be to pick up litter if feasible, and if not feasible, to perform other labor commensurate with the offense committed.

(e2) If any person violates subsection (a) or (a1) of this section in an amount exceeding 15 pounds or in any quantity for commercial purposes, or discards litter that is a hazardous waste as defined in G.S. 130A-290, the court shall order the violator to:

(1) Remove, or render harmless, the litter that he discarded in violation of this section;

(2) Repair or restore property damaged by, or pay damages for any damage arising out of, his discarding litter in violation of this section; or

(3) Perform community public service relating to the removal of litter discarded in violation of this section or to the restoration of an area polluted by litter discarded in violation of this section.

(f) A court may enjoin a violation of this section.

(f1) If a violation of subsection (a) of this section involves the operation of a motor vehicle, upon a finding of guilt, the court shall forward a record of the finding to the Department of Transportation, Division of Motor Vehicles, which shall record a penalty of one point on the violator's drivers license pursuant to the point system established by G.S. 20-16. There shall be no insurance premium surcharge or assessment of points under the classification plan adopted under G.S. 58-36-65 for a finding of guilt under this section.

(g) A motor vehicle, vessel, aircraft, container, crane, winch, or machine involved in the disposal of more than 500 pounds of litter in violation of subsection (a) of this section is declared contraband and is subject to seizure and summary forfeiture to the State.

(h) If a person sustains damages arising out of a violation of subsection (a) of this section that is punishable as a felony, a court, in a civil action for the damages, shall order the person to pay the injured party threefold the actual damages or two hundred dollars ($200.00), whichever amount is greater. In addition, the court shall order the person to pay the injured party's court costs and attorney's fees.

(i) For the purpose of the section, unless the context requires otherwise:

(1) "Aircraft" means a motor vehicle or other vehicle that is used or designed to fly, but does not include a parachute or any other device used primarily as safety equipment.

(2) Repealed by Session Laws 1999-454, s. 1.

(2a) "Commercial purposes" means litter discarded by a business, corporation, association, partnership, sole proprietorship, or any other entity conducting business for economic gain, or by an employee or agent of the entity.

(3) "Law enforcement officer" means any law enforcement officer sworn and certified pursuant to Chapter 17C or 17E of the General Statutes, except company police officers as defined in G.S. 74E-6(b)(3). In addition, and solely for the purposes of this section, "law enforcement officer" means any employee of a county or municipality designated by the county or municipality as a litter enforcement officer.

(4) "Litter" means any garbage, rubbish, trash, refuse, can, bottle, box, container, wrapper, paper, paper product, tire, appliance, mechanical equipment or part, building or construction material, tool, machinery, wood, motor vehicle or motor vehicle part, vessel, aircraft, farm machinery or equipment, sludge from a waste treatment facility, water supply treatment plant, or air pollution control facility, dead animal, or discarded material in any form resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations. While being used for or distributed in accordance with their intended uses, "litter" does not include political pamphlets, handbills, religious tracts, newspapers, and other similar printed materials the unsolicited distribution of which is protected by the Constitution of the United States or the Constitution of North Carolina.

(5) "Vehicle" has the same meaning as in G.S. 20-4.01(49).

(6) "Watercraft" means any boat or vessel used for transportation across the water.

(j) It shall be the duty of all law enforcement officers to enforce the provisions of this section.

(k) This section does not limit the authority of any State or local agency to enforce other laws, rules or ordinances relating to litter or solid waste management. (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165; 1973, c. 877; 1977, c. 887, s. 1; 1979, c. 1065, s. 1; 1983, c. 890; 1987, cc. 208, 757; 1989, c. 784, ss. 7.1, 8; 1991, c. 609, s. 1; c. 720, s. 49; c. 725, s. 1; 1993, c. 539, ss. 266, 267, 1241; 1994, Ex. Sess., c. 24, s. 14(c); 1997-518, s. 1; 1998-217, s. 2; 1999-294, s. 4; 1999-454, s. 1; 2001-512, s. 1.)

Local Modification. — Avery, Burke, Caldwell: 1981 (Reg. Sess., 1982), c. 1155; McDowell: 1987, c. 52; Mecklenburg: 1981, c. 373; Mitchell: 1981 (Reg. Sess., 1982), c. 1155; Rutherford: 1983 (Reg. Sess., 1984), c. 977; Wilkes: 1981 (Reg. Sess., 1982), c. 1155.

Editor's Note. — Session Laws 1999-454, s. 2 directs the Commissioner of Motor Vehicles to include at least one question relating to littering on the next drivers license examination prepared by the Division of Motor Vehicles.

Session Laws 2001-512, s. 15, provides: "This act shall not be construed to obligate the General Assembly to appropriate any funds to implement the provisions of this act. Every agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to the agency."

Legal Periodicals. — For comment discussing aesthetics-based municipal regulation in light of State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982), see 18 Wake Forest L. Rev. 1167 (1982).

CASE NOTES

As to validity of regulation based on aesthetic considerations, see State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Private dumpster is a "litter receptacle" within the meaning of G.S. 14-399(a). State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Trial court erred by denying defendants' motion to dismiss littering charges under G.S. 14-399(a) because the State failed to present substantial evidence that a dumpster behind a grocery store, into which defendants deposited plastic bags containing dead animals, was not a litter receptacle. The word "receptacle" in the statute included a broad range of containment vessels. State v. Hinkle, 189 N.C. App. 762, 659 S.E.2d 34, 2008 N.C. App. LEXIS 705 (2008).

Cited in Town of Winterville v. King, 60 N.C. App. 730, 299 S.E.2d 838 (1983).

§ 14-399.1: Repealed by Session Laws 1989, c. 784, s. 7.

§ 14-399.2. Certain plastic yoke and ring type holding devices prohibited.

(a) As used in this section:

(1) "Degradable" means that within one year after being discarded, the yoke or ring type holding device is capable of becoming embrittled or decomposing by photodegradation, biodegradation, or chemo-degradation under average seasonal conditions into components other than heavy metals or other toxic substances.

(2) "Recyclable" means that the yoke or ring type holding device is capable of being collected and processed for reuse as a product or raw material.

(b) No person may sell or distribute for sale in this State any container connected to another by a yoke or ring type holding device constructed of plastic that is neither degradable nor recyclable. No person may sell or distribute for sale in this State any container connected to another by a yoke or ring type holding device constructed of plastic that is recyclable but that is not degradable unless such device does not have an orifice larger than one and three-fourths inches. The manufacturer of a degradable yoke or ring type holding device shall emboss or mark the device with a nationally recognized symbol indicating that the device is degradable. The manufacturer of a recyclable yoke or ring type holding device shall emboss or mark the device with a symbol of the type specified in G.S. 130A-309.10(e) indicating the plastic resin used to produce the device and that the device is recyclable. The manufacturer shall register the symbol with the Secretary of State with a sample of the device.

(c) Any person who sells or distributes for sale a yoke or ring type holding device in violation of this section shall be guilty of a Class 3 misdemeanor punishable by a fine of not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00). In lieu of a fine or any portion thereof or in addition to a fine, any violation of this section may also be punished by a term of community service.

(d) Other than a manufacturer required to use and register a symbol under subsection (b), a person may not be prosecuted under this section if, at the time of sale or distribution for sale, the yoke or holding device bears a symbol meeting the requirements of this section which has been registered with the Secretary of State. (1989, c. 371, s. 1; 1991, c. 236, s. 1; c. 621, s. 14; 1993, c. 539, s. 268; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-400. Tattooing; body piercing prohibited.

(a) It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under 18 years of age. Anyone violating the provisions of this section shall be guilty of a Class 2 misdemeanor.

(b) It shall be unlawful for any person to pierce any part of the body other than ears of another person under the age of 18 for the purpose of allowing the insertion of earrings, jewelry, or similar objects into the body, unless the prior consent of a custodial parent or guardian is obtained. Anyone violating the provisions of this section is guilty of a Class 2 misdemeanor. (1937, c. 112, ss. 1, 2; 1969, c. 1224, s. 8; 1971, c. 1231, s. 1; 1993, c. 539, s. 269; 1994, Ex. Sess., c. 24, s. 14(c); 1998-230, s. 9.)

§ 14-401. Putting poisonous foodstuffs, antifreeze, etc., in certain public places, prohibited.

It shall be unlawful for any person, firm or corporation to put or place (i) any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind, or (ii) any antifreeze that contains ethylene glycol and is not in a closed container, in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field, woods or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a Class 1 misdemeanor. This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops, or trees, to poisons used in rat extermination, or to the accidental release of antifreeze containing ethylene glycol. (1941, c. 181; 1953, c. 1239; 1993, c. 143, s. 1; c. 539, s. 270; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 479 (1941).

For survey of 1980 criminal law, see 59 N.C.L. Rev. 1123 (1981).

CASE NOTES

Constitutionality. — This section is not unconstitutionally vague since the General Assembly intended to prohibit putting poison outside virtually everywhere where an innocent child or animal could find it. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Burden with Respect to Pest Control Exception. — The insect control and rat extermination exception in this section is neither an element of the crime nor an affirmative defense thereto, but is instead a "hybrid" factor in determining criminal liability. The State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a nonfrivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State. In sum, the exception is not a sufficiently independent, distinct substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, to put all the onus of proof on the defendant. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Requirements of Indictment or Warrant. — An indictment or warrant for an arrest under this section need not set forth a charge that defendant's conduct is not within the insect control and rat extermination exception to the statute. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Concrete patio held within definition of section. See State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Rat Poisons Used for Other Purposes. — While parathion is a poison used in rat extermination, if it is put out for purposes other than rat extermination it comes within the scope of the statutory prohibition. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

§ 14-401.1. Misdemeanor to tamper with examination questions.

Any person who, without authority of the entity who prepares or administers the examination, purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law shall be guilty of a Class 2 misdemeanor. (1917, c. 146, s. 10; C.S., s. 5658; 1969, c. 1224, s. 3; 1991, c. 360, s. 2; 1993, c. 539, s. 271; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Section Limited to Examinations "Provided and Prepared by Law". — The portion of this section reading "any examination provided and prepared by law" expressly limits the application of the statute to examinations "provided and prepared by law," i.e., examinations given by the State Board of Medical Examiners, the State Board of Law Examiners, and other examining boards of this class. The statute has no application to college examination papers. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.

It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a Class 2 misdemeanor. (1943, c. 383; 1969, c. 1224, s. 5; 1993, c. 539, s. 272; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.3. Inscription on gravestone or monument charging commission of crime.

It shall be illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1949, c. 1075; 1969, c. 1224, s. 8; 1993, c. 539, s. 273; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.4. Identifying marks on machines and apparatus; application to Division of Motor Vehicles for numbers.

(a) No person, firm or corporation shall willfully remove, deface, destroy, alter or cover over the manufacturer's serial or engine number or any other manufacturer's number or other distinguishing number or identification mark upon any machine or other apparatus, including but not limited to farm equipment, machinery and apparatus, but excluding electric storage batteries, nor shall any person, firm or corporation place or stamp any serial, engine, or other number or mark upon such machinery, apparatus or equipment except as provided for in this section, nor shall any person, firm or corporation purchase or take into possession or sell, trade, transfer, devise, give away or in any manner dispose of such machinery, apparatus, or equipment except by intestate succession or as junk or scrap after the manufacturer's serial or engine number or mark has been willfully removed, defaced, destroyed, altered or covered up unless a new number or mark has been added as provided in this section: Provided, however, that this section shall not prohibit or prevent the owner or holder of a mortgage, conditional sales contract, title retaining contract, or a trustee under a deed of trust from taking possession for the purpose of foreclosure under a power of sale or by court order, of such machinery, apparatus, or equipment, or from selling the same by foreclosure sale under a power contained in a mortgage, conditional sales contract, title retaining contract, deed of trust, or court order; or from taking possession thereof in satisfaction of the indebtedness secured by the mortgage, deed of trust, conditional sales contract, or title retaining contract pursuant to an agreement with the owner.

(b) Each seller of farm machinery, farm equipment or farm apparatus covered by this section shall give the purchaser a bill of sale for such machinery, equipment or apparatus and shall include in the bill of sale the manufacturer's serial number or distinguishing number or identification mark, which the seller warrants to be true and correct according to his invoice or bill of sale as received from his manufacturer, supplier, or distributor or dealer.

(c) Each user of farm machinery, farm equipment or farm apparatus whose manufacturer's serial number, distinguishing number or identification mark has been obliterated or is now unrecognizable, may obtain a valid identification number for any such machinery, equipment or apparatus upon application for such number to the Division of Motor Vehicles accompanied by satisfactory proof of ownership and a subsequent certification to the Division by a member of the North Carolina Highway Patrol that said applicant has placed the number on the proper machinery, equipment or apparatus. The Division of Motor Vehicles is hereby authorized and empowered to issue appropriate identification marks or distinguishing numbers for machinery, equipment or apparatus upon application as provided in this section and the Division is further authorized and empowered to designate the place or places on the machinery, equipment or apparatus at which the identification marks or distinguishing numbers shall be placed. The Division is also authorized to designate the method to be used in placing the identification marks or distinguishing numbers on the machinery, equipment or apparatus: Provided, however, that the owner or holder of the mortgage conditional sales contract, title retaining contract, or trustee under a deed of trust in possession of such encumbered machinery, equipment, or apparatus from which the manufacturer's serial or engine number or other manufacturer's number or distinguishing mark has been obliterated or has become unrecognizable or the purchaser at the foreclosure sale thereof, may at any time obtain a valid identification number for any such machinery, equipment or apparatus upon application therefor to the Division of Motor Vehicles.

(d) Any person, firm or corporation who shall violate any part of this section shall be guilty of a Class 1 misdemeanor. (1949, c. 928; 1951, c. 1110 s. 1; 1953, c. 257; 1975, c. 716, s. 5; 1993, c. 539, s. 274; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.5: Repealed by Session Laws 2004-203, s. 21, effective August 17, 2004.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

(a) It is unlawful for any person, firm, corporation or association to possess, use, store, sell, or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas," or any container or device for holding or releasing that gas; except this section does not apply to the possession, use, storage, sale or transportation of that gas or any container or device for holding or releasing that gas:

(1) By officers and enlisted personnel of the armed forces of the United States or this State while in the discharge of their official duties and acting under orders requiring them to carry arms or weapons;
(2) By or for any governmental agency for official use of the agency;
(3) By or for county, municipal or State law-enforcement officers in the discharge of their official duties;
(4) By or for security guards registered under Chapter 74C of the General Statutes, company police officers commissioned under Chapter 74E of the General Statutes, or campus police officers commissioned under Chapter 74G of the General Statutes provided they are on duty and have received training according to standards prescribed by the State Bureau of Investigation;
(5) For bona fide scientific, educational, or industrial purposes;
(6) In safes, vaults, and depositories, as a means or protection against robbery;
(7) For use in the home for protection and elsewhere by individuals, who have not been convicted of a felony, for self-defense purposes only, as long as the capacity of any:
    a. Tear gas device or container does not exceed 150 cubic centimeters,
    b. Tear gas cartridge or shell does not exceed 50 cubic centimeters, and
    c. Tear gas device or container does not have the capability of discharging any cartridge, shell, or container larger than 50 cubic centimeters.

(b) Violation of this section is a Class 2 misdemeanor.

(c) Tear gas for the purpose of this section shall mean any solid, liquid or gaseous substance or combinations thereof which will, upon dispersion in the atmosphere, cause tears in the eyes, burning of the skin, coughing, difficulty in breathing or any one or more of these reactions and which will not cause permanent damage to the human body, and the substance and container or device is designed, manufactured, and intended to be used as tear gas. (1951, c. 592; 1969, c. 1224, s. 8; 1977, c. 126; 1979, c. 661; 1983, c. 794, s. 9; 1991 (Reg. Sess., 1992), c. 1043, s. 2; 1993, c. 151, s. 1; c. 539, s. 276; 1994, Ex. Sess., c. 24, s. 14(c); 2005-231, s. 10.)

§ 14-401.7. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.

No person, bank, or corporation, without a license authorized by law, shall act as a stockbroker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall be guilty of a Class 3 misdemeanor and pay a fine of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00) for each offense. (1939, c. 310, s. 1004; 1953, c. 970, s. 9; 1993, c. 539, s. 277; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 14-401.8. Refusing to relinquish party telephone line in emergency; false statement of emergency.

Any person who shall willfully refuse to immediately relinquish a party telephone line when informed that such line is needed for an emergency call to a fire department or police department, or for medical aid or ambulance service, or any person who shall secure the use of a party telephone line by falsely stating that such line is needed for an emergency call, shall be guilty of a Class 1 misdemeanor.

The term "party line" as used in this section is defined as a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number. The term "emergency" as used in this section is defined as a situation in which property or human life are in jeopardy and the prompt summoning of aid is essential. (1955, c. 958; 1993, c. 539, s. 278; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Cited in Citizens Tel. Co. v. Telephone Serv. Co., 214 F. Supp. 627 (W.D.N.C. 1963).

§ 14-401.9. Parking vehicle in private parking space without permission.

It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, and provided further, that the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner.

Any person violating any of the provisions of this section shall be guilty of a Class 3 misdemeanor and upon conviction shall be fined not more than ten dollars ($10.00) in the discretion of the court. (1955, c. 1019; 1977, c. 398, s. 2; 1993, c. 539, s. 279; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.10. Soliciting advertisements for official publications of law-enforcement officers' associations.

Every person, firm or corporation who solicits any advertisement to be published in any law-enforcement officers' association's official magazine, yearbook, or other official publication, shall disclose to the person so solicited, whether so requested or not, the name of the law-enforcement association for which such advertisement is solicited, together with written authority from the president or secretary of such association to solicit such advertising on its behalf.

Any person, firm or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. (1961, c. 518; 1969, c. 1224, s. 8; 1993, c. 539, s. 280; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited.

(a) It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human accessibility, any food or eatable substance which that person knows to contain:

(1) Any noxious or deleterious substance, material or article which might be injurious to a person's health or might cause a person any physical discomfort, or

(2) Any controlled substance included in any schedule of the Controlled Substances Act, or

(3) Any poisonous chemical or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical pain and discomfort.

(b) Penalties.

(1) Any person violating the provisions of G.S. 14-401.11(a)(1):

a. Where the actual or possible effect on a person eating the food or substance was or would be limited to mild physical discomfort without any lasting effect, shall be guilty of a Class I felony.

b. Where the actual or possible effect on a person eating the food or substance was or would be greater than mild physical discomfort without any lasting effect, shall be punished as a Class H felon.

(2) Any person violating the provisions of G.S. 14-401.11(a)(2) shall be punished as a Class F felon.

(3) Any person violating the provisions of G.S. 14-401.11(a)(3) shall be punished as a Class C felon. (1971, c. 564; 1973, c. 540, s. 1; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1993, c. 539, s. 1242; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — For structured sentencing provisions, see G.S. 15A-1340.10 et seq.

CASE NOTES

Coffee. — The legislature obviously intended for a beverage such as coffee to be included within this section's definition of "food or an eatable substance." State v. Phillips, 88 N.C. App. 526, 364 S.E.2d 196 (1988), rev'd on other grounds, 325 N.C. 222, 381 S.E.2d 325 (1989).

Cited in State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989); Aycock v. Padgett, 134 N.C. App. 164, 516 S.E.2d 907 (1999).

§ 14-401.12. Soliciting charitable contributions by telephone.

(a) Any professional solicitor who solicits by telephone contributions for charitable purposes or in any way compensates another person to solicit by telephone contributions for charitable purposes shall be guilty of a Class 1 misdemeanor. Any person compensated by a professional solicitor to solicit by telephone contributions for charitable purposes shall be guilty of a Class 1 misdemeanor.

(b) Definitions. — Unless a different meaning is required by the context, the following terms as used in this section have the meanings hereinafter respectively ascribed to them:

(1) "Charitable purpose" shall mean any charitable, benevolent, religious, philanthropic, environmental, public or social advocacy or eleemosynary purpose for religion, health, education, social welfare, art and humanities, civic and public interest.

(2) "Contribution" shall mean any promise, gift, bequest, devise or other grant for consideration or otherwise, of any money or property of any kind or value, including the promise to pay, which contribution is wholly or partly induced by a solicitation. The term "contribution" shall not include payments by members of an organization for membership fees, dues, fines or assessments, or for services rendered to individual members, if membership in such organization confers a bona fide right, privilege, professional standing, honor or other direct benefit, other than the right to vote, elect officers, or hold offices; nor any money, credit, financial assistance or property received from any governmental authority; nor any donation of blood or any anatomical gift made pursuant to the Revised Uniform Anatomical Gift Act. Reference to dollar amounts of "contributions" or "solicitations" in this section means, in the case of payments or promises to pay for merchandise or rights of any description, the value of the total amount paid or promised to be paid for such merchandise or rights, and not merely that portion of the purchase price to be applied to a charitable purpose.

(3) "Professional fund-raising counsel" shall mean any person who for a flat fixed fee under a written agreement plans, conducts, manages, carries on, or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for, or on behalf of any charitable organization but who actually solicits no contributions as a part of such services.

(4) "Professional solicitor" shall mean any person who, for a financial or other consideration, solicits contributions for or on behalf of a charitable organization, whether such solicitation is performed personally or through its agents, servants or employees specially employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; or a person who plans, conducts, manages, carries on, advises or acts as a consultant, whether directly or indirectly, to a charitable organization in connection with the solicitation of contributions but does not qualify as "professional fund-raising counsel" as defined in this section. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the State or the bona fide salaried officer or employee of a parent organization certified as tax exempt shall not be deemed to be a professional solicitor.

(5) The words "solicit" and "solicitation" shall mean the request or appeal, directly or indirectly, for any contribution on the plea or representa-

tion that such contribution will be used for a charitable purpose. Solicitation as defined herein shall be deemed to occur when the request is made, at the place the request is received, whether or not the person making the same actually receives any contribution.

(c) A solicitation by telephone is presumed to be for a charitable purpose if the person making the solicitation states or implies that some other named person or organization, other than the professional solicitor or his employees, is a sponsor or endorser of the solicitation who will share in the proceeds that result from the telephone solicitation. (1981, c. 805, s. 1; 1993, c. 539, s. 281; 1994, Ex. Sess., c. 24, s. 14(c); 2007-538, s. 8.)

Editor's Note. — Session Laws 2007-538, s. 11, provides: "The North Carolina Department of Transportation, Division of Motor Vehicles, in cooperation with the License to Give Trust Fund Commission, shall use available grant-in-aid funds from the State and federal governments and other sources to enhance online access such that donors and prospective donors may update, amend, or revoke information on the donor's or prospective donor's drivers license or donor card."

CASE NOTES

Section Is Unconstitutional. — This section contravenes U.S. Const., Amends. I and XIV and is therefore void and unenforceable. Optimist Club v. Riley, 563 F. Supp. 847 (E.D.N.C. 1982).

§ 14-401.13. Failure to give right to cancel in off-premises sales.

(a) It shall be a Class 3 misdemeanor for any sellers, as defined hereinafter, in connection with an off-premises sale, as defined hereinafter, willfully to:

(1) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(2) Fail to furnish each buyer, at the time he signs the off-premises sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION", which shall be attached to the contract or receipt and easily detachable, and which shall contain in boldface type in a minimum size of 10 points, the following information and statements in the same language, e.g., Spanish, as that used in the contract:

"NOTICE OF CANCELLATION
(enter date of transaction)

____
(date)

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. In the event you purchased antiques at an antique show and cancel, and your residence is out-of-state, you must deliver the purchased goods to the seller.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram, to

____
(name of seller)

at ____________________________________
(address of seller's place of business)

not later than midnight of ____________________
(date)

I hereby cancel this transaction.

____
(date)

________________________________"
(buyer's signature)

(3) Fail, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(4) Fail to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

(5) Misrepresent in any manner the buyer's right to cancel.

(b) Regardless of the seller's compliance or noncompliance with the requirements of the preceding subsection, it shall be a Class 3 misdemeanor for any seller, as defined hereinafter, to willfully fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction. If the seller failed to provide a form Notice of Cancellation to the buyer, then oral notice of cancellation by the buyer is sufficient for purposes of this subsection.

(c) For the purposes of this section, the following definitions shall apply:

(1) Off-Premises Sale. — A sale, lease, or rental of consumer goods or services with a purchase price of twenty-five dollars ($25.00) or more,

whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "off-premises sale" does not include a transaction:

a. Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or
b. In which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U.S.C. 1635) or regulations issued pursuant thereto; or
c. In which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days; or
d. Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services; or
e. In which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion; or
f. Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission; or
g. Executed at an auction; or
h. Sales of motor vehicles defined in G.S. 20-286(10) by motor vehicle sales representatives licensed pursuant to G.S. 20-287 et seq.

(2) Consumer Goods or Services. — Goods or services purchased, leased, or rented primarily for personal, family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.

(3) Seller. — Any person, partnership, corporation, or association engaged in the off-premises sale of consumer goods or services. However, a nonprofit corporation or association, or member or employee thereof acting on behalf of such an association or corporation, shall not be a seller within the meaning of this section.

(4) Place of Business. — The main or permanent branch office or local address of a seller.

(5) Purchase Price. — The total price paid or to be paid for the consumer goods or services, including all interest and service charges.

(6) Business Day. — Any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and Good Friday. (1985, c. 652, s.

1; 1987, c. 551, ss. 1, 2; 1993, c. 141, s. 1; c. 539, s. 282; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-401.14. Ethnic intimidation; teaching any technique to be used for ethnic intimidation.

(a) If a person shall, because of race, color, religion, nationality, or country of origin, assault another person, or damage or deface the property of another person, or threaten to do any such act, he shall be guilty of a Class 1 misdemeanor.

(b) A person who assembles with one or more persons to teach any technique or means to be used to commit any act in violation of subsection (a) of this section is guilty of a Class 1 misdemeanor. (1991, c. 493, s. 1; 1993, c. 332, s. 1; c. 539, s. 283; 1994, Ex. Sess., c. 14, s. 14(b); c. 24, s. 14(a), (c); 1995, c. 509, s. 10.)

CASE NOTES

Evidence Sufficient for Conviction. — Trial court did not err in denying a juvenile's motion to dismiss a charge that he committed a violation of North Carolina's Ethnic Intimidation Statute, G.S. 14-401.14 at the close of all the evidence, as the State presented sufficient evidence that he: (1) sent an E-mail to the African-American victim, which contained racial slurs and was signed "KKK," and directly communicated an intent to harm her; and (2) testified that he sent the E-mail to the victim in protest of her alleged differing treatment against him as compared with others who were African-American. Thus, the State met its burden in showing that the E-mail was sent to the victim for racially motivated reasons. In re B.C.D., 177 N.C. App. 555, 629 S.E.2d 617, 2006 N.C. App. LEXIS 1073 (2006).

Legal Periodicals. — Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Clarifying North Carolina's Ethnic Intimidation Statute and Penalty Enhancement for Bias Crimes, 78 N.C.L. Rev. 2003 (2000).

§ 14-401.15. Telephone sales recovery services.

(a) Except as provided in subsection (c) of this section, it shall be unlawful for any person or firm to solicit or require payment of money or other consideration in exchange for recovering or attempting to recover:

(1) Money or other valuable consideration previously tendered to a telephonic seller, as defined in G.S. 66-260; or

(2) Prizes, awards, or other things of value that the telephonic seller represented would be delivered.

(b) A violation of this section shall be punishable as a Class 1 misdemeanor. Any violation involving actual collection of money or other consideration from a customer shall be punishable as a Class H felony.

(c) This section does not apply to attorneys licensed to practice law in this State, to persons licensed by the North Carolina Private Protective Services Board, or to any collection agent properly holding a permit issued by the Department of Insurance to do business in this State. (1997-482, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

§ 14-401.16. Contaminate food or drink to render one mentally incapacitated or physically helpless.

(a) It is unlawful knowingly to contaminate any food, drink, or other edible or potable substance with a controlled substance as defined in G.S. 90-87(5) that would render a person mentally incapacitated or physically helpless with the intent of causing another person to be mentally incapacitated or physically helpless.

(b) It is unlawful knowingly to manufacture, sell, deliver, or possess with the intent to manufacture, sell, deliver, or possess a controlled substance as defined in G.S. 90-87(5) for the purpose of violating this section.

(c) A violation of this section is a Class H felony. However, if a person violates this section with the intent of committing an offense under G.S. 14-27.3 or G.S. 14-27.5, the violation is a Class G felony.

(d) This act does not apply if the controlled substance added to the food, drink, or other edible or potable substance is done at the direction of a licensed physician as part of a medical procedure or treatment with the patient's consent. (1997-501, s. 2.)

Editor's Note. — Session Laws 1997-501, s. 2, enacted this section as G.S. 14-401.15. It has been redesignated as 14-401.16 at the direction of the Revisor of Statutes.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 417.

§ 14-401.17. Unlawful removal or destruction of electronic dog collars.

(a) It is unlawful to intentionally remove or destroy an electronic collar or other electronic device placed on a dog by its owner to maintain control of the dog.

(b) A first conviction for a violation of this section is a Class 3 misdemeanor. A second or subsequent conviction for a violation of this section is a Class 2 misdemeanor.

(c) This act is enforceable by officers of the Wildlife Resources Commission, by sheriffs and deputy sheriffs, and peace officers with general subject matter jurisdiction.

(d) Repealed by Session Laws 2005-94, s. 1, effective December 1, 2005, and applicable to offenses committed on or after that date. (1993 (Reg. Sess., 1994), c. 699, s. 1-4; 1995 (Reg. Sess., 1996) c. 682; 1997-150; 1998-6, s. 1; 1999-51, s. 1; 2000-12, s. 1; 2004-60, s. 3; 2005-94, s. 1; 2005-305, s. 4.)

Editor's Note. — Session Laws 1993, c. 699, ss. 1 through 4, were codified as this section by the Revisor of Statutes.

§ 14-401.18. Sale of certain packages of cigarettes prohibited.

(a) Definitions. — The following definitions apply in this section:

(1) Cigarette. — Defined in G.S. 105-113.4.

(2) Package. — Defined in G.S. 105-113.4.

(b) Offenses. — A person who sells or holds for sale (other than for export to a foreign country) a package of cigarettes that meets one or more of the following descriptions commits a Class A1 misdemeanor and engages in an unfair trade practice prohibited by G.S. 75-1.1:

(1) The package differs in any respect with the requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, for the placement of labels, warnings, or any other information upon a package of cigarettes that is to be sold within the United States.

(2) The package is labeled "For Export Only," "U.S. Tax Exempt," "For Use Outside U.S.," or has similar wording indicating that the manufacturer did not intend that the product be sold in the United States.

(3) The package was altered by adding or deleting the wording, labels, or warnings described in subdivision (1) or (2) of this subsection.

(4) The package was imported into the United States after January 1, 2000, in violation of 26 U.S.C. § 5754.

(5) The package violates federal trademark or copyright laws, federal laws governing the submission of ingredient information to federal authorities pursuant to 15 U.S.C. § 1335a, federal laws governing the import of certain cigarettes pursuant to 19 U.S.C. § 1681 and 19 U.S.C. § 1681b, or any other provision of federal law or regulation.

(c) Contraband. — A package of cigarettes described in subsection (b) of this section is contraband and may be seized by a law enforcement officer. The procedure for seizure and disposition of this contraband is the same as the procedure under G.S. 105-113.31 and G.S. 105-113.32 for non-tax-paid cigarettes. (1999-333, s. 5; 2002-145, s. 4.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1999-333, s. 5 having been G.S.14-400.18.

§ 14-401.19. Filing false security agreements.

It shall be unlawful for any person, firm, corporation, or any other association of persons in this State, under whatever name styled, to present a record for filing under the provisions of Article 9 of Chapter 25 of the General Statutes with knowledge that the record is not related to a valid security agreement or with the intention that the record be filed for an improper purpose, such as to hinder, harass, or otherwise wrongfully interfere with any person. A violation of this section shall be a Class 2 misdemeanor. (2001-231, s. 5.)

§ 14-401.20. Defrauding drug and alcohol screening tests; penalty.

(a) It is unlawful for a person to do any of the following:

(1) Sell, give away, distribute, or market urine in this State or transport urine into this State with the intent that it be used to defraud a drug or alcohol screening test.

(2) Attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure.

(b) It is unlawful for a person to do any of the following:

(1) Adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test.

(2) Possess adulterants that are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

(3) Sell adulterants with the intent that they be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

(c) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class 1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony. (2002-183, s. 1.)

§ 14-401.21. Practicing "rebirthing technique"; penalty.

(a) It is unlawful for a person to practice a technique, whether known as a "rebirthing technique" or referred to by any other name, to reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death.

(b) A violation of this section is punishable as follows:

(1) For a first offense under this section, the person is guilty of a Class A1 misdemeanor.

(2) For a second or subsequent offense under this section, the person is guilty of a Class I felony.

(c) No State funds shall be used to pay for the rebirthing technique made unlawful by this section and performed in another state notwithstanding that the technique, whether known as a rebirthing technique or referred to by any other name, is lawful in that other state. (2003-205, s. 1; 2004-124, s. 10.2F.)

§ 14-401.22. Concealment of death.

(a) Any person who, with the intent to conceal the death of a person, fails to notify a law enforcement authority of the death or secretly buries or otherwise secretly disposes of a dead human body is guilty of a Class I felony.

(b) Any person who aids, counsels, or abets any other person in concealing the death of a person is guilty of a Class A1 misdemeanor. (2005-288, s. 1.)

§ 14-401.23. Unlawful manufacture, sale, delivery, or possession of Salvia divinorum.

(a) It shall be unlawful for any person to knowingly or intentionally manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver Salvia divinorum or Salvinorin A.

(b) It shall be unlawful for any person to knowingly or intentionally possess Salvia divinorum or Salvinorin A.

(c) A violation of this section is punishable as follows:

(1) For a first or second offense under this section, the person is responsible for an infraction and shall be required to pay a fine of not less than twenty-five dollars ($25.00).

(2) For a third or subsequent offense under this section, the person is guilty of a Class 3 misdemeanor.

(d) For purposes of this section:

(1) "Deliver" means the actual constructive or attempted transfer of Salvia divinorum or Salvinorin A from one person to another.

(2) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of Salvia divinorum or Salvinorin A by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. Manufacture includes any packaging or repackaging of the substance, or labeling or relabeling of its container, except that this term does not include the preparation or compounding of the substance by an individual for the individual's own use.

(3) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a plant.

(e) The provisions of this section shall not apply to:

(1) Employees or contractors of any accredited college or school of medicine or pharmacy at a public or private university in this State while performing medical or pharmacological research for such institution.

(2) The possession, planting, cultivation, growing, or harvesting of a plant strictly for aesthetic, landscaping, or decorative purposes. (2009-538, s. 1.)

Editor's Note. — Session Laws 2009-538, s. 2, made this section effective December 1, 2009, and applicable to acts committed on or after that date.

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden.

(a) It is unlawful for any person, firm, or corporation in this State to sell, give away, or transfer, or to purchase or receive, at any place within this State from any other place within or without the State any pistol or crossbow unless: (i) a license or permit is first obtained under this Article by the purchaser or receiver from the sheriff of the county in which the purchaser or receiver resides; or (ii) a valid North Carolina concealed handgun permit is held under Article 54B of this Chapter by the purchaser or receiver who must be a resident of the State at the time of the purchase.

It is unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee within the State of North Carolina any pistol or crossbow without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same the permit from the sheriff as provided in G.S. 14-403. Any person violating the provisions of this section is guilty of a Class 2 misdemeanor.

(b) This section does not apply to an antique firearm or an historic edged weapon.

(c) The following definitions apply in this Article:

(1) Antique firearm. — Defined in G.S. 14-409.11.

(2) Bolt. — A projectile made to be discharged from a crossbow. The bolt differs from an arrow in that the bolt is heavier and shorter than an arrow.

(3) Crossbow. — A mechanical device consisting of, but not limited to, strings, cables, and prods transversely mounted on either a shoulder or hand-held stock. This device is mechanically held at full or partial draw and released by a trigger or similar mechanism that is incorporated into a stock or handle. When operated, the crossbow discharges a projectile known as a bolt.

(4) Historic edged weapon. — Defined in G.S. 14-409.12.

(5) Manufacturer of crossbows. — A corporation that manufactures or produces crossbows.

(6) Retail dealer of crossbows. — A corporation that sells crossbows to the ultimate consumer of the product.

(7) Wholesale dealer of crossbows. — A corporation that acquires crossbows for sale to another wholesale dealer of crossbows or to a retail dealer of crossbows. (1919, c. 197, s. 1; C.S., s. 5106; 1923, c. 106; 1947, c. 781; 1959, c. 1073, s. 2; 1971, c. 133, s. 2; 1979, c. 895, ss. 1, 2; 1993, c. 287, s. 1; c. 539, s. 284; 1994, Ex. Sess., c. 24, s. 14(c); 2004-183, s. 1; 2004-203, s. 1; 2009-6, s. 2.)

Applicability of This Article. — This Article is applicable to every county of this State except Warren and Watauga.

Session Laws 1959, c. 1073, s. 2, amended this and other sections of this Article by striking out the word "clerk" and the words "clerk of the superior court" wherever they appeared and substituting therefor the word "sheriff," it being the intent and purpose of the amendatory act to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in issuing permits for the purchase of weapons and keeping the records of issuance of such permits and all other duties incident to the purchase, sale and ownership of weapons. Session Laws 1959, c. 1073, s. 4, as amended from time to time, excepts the following counties from the application of the 1959 amendments to this article: Pender, Warren and Watauga.

Ashe was deleted from the list of counties by Session Laws 1995, c. 304; Avery was deleted from the list by Session Laws 1977, c. 35; Bertie was deleted from the list by Session Laws 1983, c. 151; Bladen was deleted from the list by Session Laws 1977, c. 35; Caswell has been deleted from the list pursuant to Session Laws 1977, c. 347; Cherokee was deleted from the list by Session Laws 1977, c. 35; Clay was added to the list by Session Laws 1969, c. 276, and deleted from the list by Session Laws 1979, c. 134; Currituck was deleted from the list by Session Laws 1981, c. 196; Davie was deleted from the list by Session Laws 1977, c. 72; Duplin was deleted from the list by Session Laws 1993, c. 106, effective June 2, 1993; Franklin was deleted from the list by Session Laws 1975, cc. 139, 173; Greene has been deleted from the list pursuant to Session Laws 1977, c. 223; Halifax was deleted from the list by Session Laws 1975, cc. 173, 374; Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted from the list by Session Laws 1969, c. 6; Hertford was deleted from the list by Session Laws 1967, c. 903; Iredell was deleted from the list by Session Laws 1971, c. 410; Jackson was deleted from the list by Session Laws 1975, c. 173; Johnston was deleted from the list by Session Laws 1967, c. 122; Jones was deleted from the list by Session Laws 1969, c. 109; Lee was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Lincoln was deleted from the list by Session Laws 1983 (Reg. Sess., 1984), c. 962; Macon was deleted from the list by Session Laws 1975, c. 173; Madison was deleted from the list by Session Laws 1993 (Reg. Sess., 1994), c. 634; Mecklenburg was deleted from the list by Session Laws 1969, c. 1305; Mitchell was deleted from the list by Session Laws 1993, c. 48, effective May 18, 1993; Moore has been deleted from the list pursuant to Session Laws 1977, c. 235; Pamlico was deleted from the list by Session Laws 1967, c. 6; Pender was deleted from the list by Session Laws 1989 (Reg. Sess., 1990), c. 910, effective July 13, 1990; Perquimans was deleted from the list by Session Laws 1993, c. 64, effective May 24, 1993; Person was deleted from the list by Session Laws 1975, c. 134; Polk was deleted from list by Session Laws 1993 (Reg. Sess., 1994), c. 634; Rockingham was deleted from the list by Session Laws 1979, c. 323; Sampson has been deleted from the list pursuant to Session Laws 1977, c. 347; Stokes was deleted from the list by Session Laws 1975, c. 173; Tyrrell was deleted from the list by Session Laws 1993 (Reg. Sess., 1994), c. 581; Union was deleted from the list by Session Laws 1973, c. 421; Vance was deleted from the list by Session Laws 1969, c. 396; Washington was deleted from the list by Session Laws 1971, c. 192; Wilson was deleted from the list by Session Laws 1963, c. 537; Yancey was deleted from the list by Session Laws 1993 (Reg. Sess., 1994), c. 634.

Effect of Amendments. — Session Laws 2009-6, s. 2, effective March 19, 2009, in subsection (c), substituted "Article" for "section" in the introductory language, and added subdivisions (c)(5) through (c)(7).

§ 14-403. Permit issued by sheriff; form of permit; expiration of permit.

The sheriffs of any and all counties of this State shall issue to any person, firm, or corporation in any county a license or permit to purchase or receive any weapon mentioned in this Article from any person, firm, or corporation offering to sell or dispose of the weapon. The license or permit shall expire five years from the date of issuance. The license or permit shall be in the following form:

North Carolina,

______________ County.

I, ______________, Sheriff of said County, do hereby certify that I have conducted a criminal background check of the applicant, ______________ whose place of residence is ______________ in ______________ (or) in ______________ Township, ______________ County, North Carolina, and have received no information to indicate that it would be a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun. The applicant has further satisfied me as to his, her (or) their good moral character. Therefore, a license or permit is issued to ______________ to purchase one pistol from any person, firm or corporation authorized to dispose of the same.

This license or permit expires five years from its date of issuance.

This ___ day of _______, _____.

____
Sheriff.

(1919, c. 197, s. 2; C.S., s. 5107; 1959, c. 1073, s. 2; 1981 (Reg. Sess., 1982), c. 1395, s. 3; 1995, c. 487, s. 1; 1999-456, s. 59.)

CASE NOTES

Convicted Felon. — Irregardless of whether a criminal defendant pleads guilty or no contest, where a felony conviction is ultimately adjudicated, the defendant is thereafter a convicted felon for the purposes of G.S. 14-404 and prohibited from obtaining a hand gun. Friend v. State, 169 N.C. App. 99, 609 S.E.2d 473, 2005 N.C. App. LEXIS 535 (2005), cert. denied, — N.C. —, 614 S.E.2d 533 (2005).

Cited in Waldron v. Batten, 191 N.C. App. 237, 662 S.E.2d 568, 2008 N.C. App. LEXIS 1193 (2008).

§ 14-404. Issuance or refusal of permit; appeal from refusal; grounds for refusal; sheriff's fee.

(a) Upon application, the sheriff shall issue the license or permit to a resident of that county, unless the purpose of the permit is for collecting, in which case a sheriff can issue a permit to a nonresident, when the sheriff has done all of the following:

(1) Verified, before the issuance of a permit, by a criminal history background investigation that it is not a violation of State or federal law for the applicant to purchase, transfer, receive, or possess a handgun. The sheriff shall determine the criminal and background history of any applicant by accessing computerized criminal history records as maintained by the State Bureau of Investigation and the Federal Bureau of Investigation, by conducting a national criminal history records check, by conducting a check through the National Instant Criminal Background Check System (NICS), and by conducting a criminal history check through the Administrative Office of the Courts.

(2) Fully satisfied himself or herself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant.

(3) Fully satisfied himself or herself that the applicant desires the possession of the weapon mentioned for (i) the protection of the home, business, person, family or property, (ii) target shooting, (iii) collecting, or (iv) hunting.

(b) If the sheriff is not fully satisfied, the sheriff may, for good cause shown, decline to issue the license or permit and shall provide to the applicant within seven days of the refusal a written statement of the reason(s) for the refusal. An appeal from the refusal shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final.

(c) A permit may not be issued to the following persons:

(1) One who is under an indictment or information for or has been convicted in any state, or in any court of the United States, of a felony (other than an offense pertaining to antitrust violations, unfair trade practices, or restraints of trade). However, a person who has been convicted of a felony in a court of any state or in a court of the United States and who is later pardoned may obtain a permit, if the purchase

or receipt of a pistol or crossbow permitted in this Article does not violate a condition of the pardon.

(2) One who is a fugitive from justice.

(3) One who is an unlawful user of or addicted to marijuana or any depressant, stimulant, or narcotic drug (as defined in 21 U.S.C. section 802).

(4) One who has been adjudicated mentally incompetent or has been committed to any mental institution.

(5) One who is an alien illegally or unlawfully in the United States.

(6) One who has been discharged from the armed forces under dishonorable conditions.

(7) One who, having been a citizen of the United States, has renounced his or her citizenship.

(8) One who is subject to a court order that:

a. Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

b. Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner of the person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

c. Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury.

(d) Nothing in this Article shall apply to officers authorized by law to carry firearms if the officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms and state that the purpose for the purchase of the firearms is directly related to the law officers' official duties.

(e) The sheriff shall charge for the sheriff's services upon issuing the license or permit a fee of five dollars ($5.00).

(f) Each applicant for a license or permit shall be informed by the sheriff within 30 days of the date of the application whether the license or permit will be granted or denied and, if granted, the license or permit shall be immediately issued to the applicant.

(g) An applicant shall not be ineligible to receive a permit under subdivision (c)(4) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. (1919, c. 197, s. 3; C.S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73; 1981 (Reg. Sess., 1982), c. 1395, s. 1; 1987, c. 518, s. 1; 1995, c. 487, s. 2; 2006-39, s. 1; 2006-264, s. 4; 2008-210, s. 3(a); 2009-570, s. 7.)

Local Modification. — Caldwell: 1975, c. 478; Craven: 1981 (Reg. Sess., 1982), c. 1200; Lee: 1975, c. 377; Wake: 1979, 2nd Sess., c. 1322.

Effect of Amendments. — Session Laws 2008-210, s. 3(a), effective December 1, 2008, added subsection (g).

Session Laws 2009-570, s. 7, effective August 28, 2009, substituted "subdivision (c)(4)" for "subsection (4) of subsection (c)" in subsection (g).

OPINIONS OF ATTORNEY GENERAL

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971), issued under this section as it read prior to the 1981 (Reg. Sess., 1982) amendment.

More Than One Permit Allowed. — See opinion of Attorney General to Mr. Leroy Reavis, 41 N.C.A.G. 415 (1971); issued under this section as it read prior to the 1981 (Reg. Sess., 1982) amendment.

Board of County Commissioners Without Authority to Increase Fee for Issuance of Permit. — See opinion of Attorney General to Mr. John T. Page, Jr., Attorney for Richmond County Board of Commissioners, 46 N.C.A.G. 134 (1976); issued under this section as it read prior to the 1981 (Reg. Sess., 1982) amendment.

CASE NOTES

Convicted Felon. — Irregardless of whether a criminal defendant pleads guilty or no contest, where a felony conviction is ultimately adjudicated, the defendant is thereafter a convicted felon for the purposes of G.S. 14-404 and prohibited from obtaining a handgun. Friend v. State, 169 N.C. App. 99, 609 S.E.2d 473, 2005 N.C. App. LEXIS 535 (2005), cert. denied, — N.C. —, 614 S.E.2d 533 (2005).

Involuntarily Committed Applicant. — G.S. 14-404(c)(4) did not support the denial of a gun permit application to an applicant since the G.S. 122C-261(e), 122C-262 122C-263, 122C-266, and 122C-268 requirements were not met, even though the applicant was taken for an involuntary psychiatric examination when the applicant was 21 years old; neither inpatient nor outpatient commitment was recommended. Waldron v. Batten, 191 N.C. App. 237, 662 S.E.2d 568, 2008 N.C. App. LEXIS 1193 (2008).

§ 14-405. Record of permits kept by sheriff.

The sheriff shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C.S., s. 5109; 1959, c. 1073, s. 2.)

§ 14-406. Dealer to keep record of sales; exception.

(a) Every dealer in pistols and other weapons mentioned in this Article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State.

(b) This section does not apply to any of the following:

(1) A manufacturer of crossbows.

(2) A wholesale dealer of crossbows for any sale that is either to another wholesale dealer of crossbows or to a retail dealer of crossbows. (1919, c. 197, s. 5; C.S., s. 5110; 1987, c. 115, s. 1; 2009-6, s. 3.)

Effect of Amendments. — Session Laws 2009-6, s. 3, effective March 19, 2009, designated the previously existing provisions as subsection (a), and added subsection (b).

§ 14-406.1. Permit issued to manufacturer, wholesale dealer, or retail dealer of crossbows deemed to be a continuing permit.

(a) Notwithstanding any other provision of this Article, a corporation that is a manufacturer of crossbows, a wholesale dealer of crossbows, or a retail dealer of crossbows may obtain a permit for the purchase or receipt of crossbows, as provided by this section, by applying to the sheriff of the county in which the corporation is located. The permit shall be a continuing permit with no expiration date and shall satisfy the permitting requirements under this Article for each future purchase or receipt of a crossbow by the corporation.

(b) The sheriff of any and all counties of this State shall issue to any corporation that is a manufacturer of crossbows, a wholesale dealer of crossbows, or a retail dealer of crossbows in any county a permit to purchase or receive crossbows from any person, firm, or corporation offering to sell or dispose of crossbows. The permit shall contain an identification number and shall have no expiration date. In determining whether to issue the permit, the sheriff shall apply the standards contained in G.S. 14-404, to the extent applicable.

(c) Notwithstanding G.S. 14-402, a manufacturer of crossbows, wholesale dealer of crossbows, or retail dealer of crossbows that is issued a permit under this section may receive a crossbow delivered to the manufacturer, wholesale dealer, or retail dealer in the course of business without exhibiting the continuing permit to the person delivering the crossbow. (2009-6, s. 1.)

Editor's Note. — Session Laws 2009-6, s. 4, made this section effective March 19, 2009.

§ 14-407: Repealed by Session Laws 1997-6, s. 1, effective March 21, 1997.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 481.

§ 14-407.1. Sale of blank cartridge pistols.

The provisions of G.S. 14-402, 14-405, and 14-406 shall apply to the sale of pistols suitable for firing blank cartridges. The sheriffs of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

North Carolina
______________ County
I, ______________, sheriff of said county, do hereby certify that ______________, whose place of residence is ______________ Street in ______________ (or) in ______________ Township in ______________ County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said ______________ to purchase said pistol from any person, firm or corporation authorized to dispose of the same, this ________ day of ____________, ________.

____
Sheriff

The sheriff shall charge for the sheriff's services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068; 1999-456, s. 59; 2006-264, s. 5.)

§ 14-408. Violation of § 14-406 a misdemeanor.

Any person, firm, or corporation violating any of the provisions of G.S. 14-406 shall be guilty of a Class 2 misdemeanor. (1919, c. 197, s. 7; C.S., s. 5112; 1969, c. 1224, s. 6; 1993, c. 539, s. 285; 1994, Ex. Sess., c. 24, s. 14(c); 1998-217, s. 3(a).)

§ 14-409. Machine guns and other like weapons.

(a) As used in this section, "machine gun" or "submachine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

(b) It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, submachine guns, or other like weapons as defined by subsection (a) of this section: Provided, however, that this subsection shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the sheriff of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States Army, when in discharge of their official duties, officers and soldiers of the militia when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties; the manufacture, use or possession of such weapons for scientific or experimental purposes when such manufacture, use or possession is lawful under federal laws and the weapon is registered with a federal agency, and when a permit to manufacture, use or possess the weapon is issued by the sheriff of the county in which the weapon is located. Provided, further, that any bona fide resident of this State who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the sheriff of the county in which said person lives.

(c) Any person violating any of the provisions of this section shall be guilty of a Class I felony. (1933, c. 261, s. 1; 1959, c. 1073, s. 2; 1965, c. 1200; 1989, c. 680, s. 1; 1993, c. 539, s. 1243; 1994, Ex. Sess., c. 24, s. 14(c); 1999-456, s. 33(b).)

CASE NOTES

Definitions. — The usual and customary definitions of the words used in this section are as follows: A machine gun is defined as an automatic gun using small-arms ammunition for rapid continuous firing; a submachine gun as a lightweight automatic or semiautomatic portable firearm fired from the shoulder or hip; a carbine as a light automatic or semiautomatic military rifle; and an automatic rifle as a rifle capable commonly of either semiautomatic or full automatic fire and designed to be fired without a mount. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

"Automatic". — The word "automatic" as used in connection with a firearm is one using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge and firing it. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

In ordinary usage the word "automatic" is used to describe both automatic and semiautomatic weapons. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A machine gun is automatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A submachine gun can be automatic or semiautomatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Section Excludes Weapons Which Shoot Less Than 31 Times. — The General Assembly intended to include within the prohibition of this section all weapons either automatic or semiautomatic which shoot 31 times or more and to exclude such weapons which shoot less than 31 times. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

This section has a proviso which excludes automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots. Giving the usual and customary meaning to the word "automatic," the proviso would exclude automatic weapons or semiautomatic weapons which shoot less than 31 shots. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

ARTICLE 53.

Sale of Weapons in Certain Other Counties.

§§ 14-409.1 through 14-409.9: Repealed by Session Laws 1995, c. 487, s. 4.

ARTICLE 53A.

Other Firearms.

§ 14-409.10. Purchase of rifles and shotguns out of State.

It shall be lawful for citizens of this State to purchase rifles and shotguns and ammunition therefor in states contiguous to this State. (1969, c. 101, s. 1.)

§ 14-409.11. "Antique firearm" defined.

(a) The term "antique firearm" means any of the following:

(1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured on or before 1898.

(2) Any replica of any firearm described in subdivision (1) of this subsection if the replica is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition.

(3) Any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder substitute, and which cannot use fixed ammunition.

(b) For purposes of this section, the term "antique firearm" shall not include any weapon which:

(1) Incorporates a firearm frame or receiver.

(2) Is converted into a muzzle loading weapon.

(3) Is a muzzle loading weapon that can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof. (1969, c. 101, s. 2; 2006-259, s. 7(a).)

CASE NOTES

Cited in Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

§ 14-409.12. "Historic edged weapons" defined.

The term "historic edged weapon" means any bayonet, trench knife, sword or dagger manufactured during or prior to World War II but in no event later than January 1, 1946. (1971, c. 133, s. 1.)

§§ 14-409.13 through 14-409.38: Reserved for future codification purposes.

ARTICLE 53B.

Firearm Regulation.

§ 14-409.39. Definitions.

The following definitions apply in this Article:

(1) Dealer. — Any person licensed as a dealer pursuant to 18 U.S.C. § 921, et seq., or G.S. 105-80.

(2) Firearm. — A handgun, shotgun, or rifle which expels a projectile by action of an explosion.

(3) Handgun. — A pistol, revolver, or other gun that has a short stock and is designed to be held and fired by the use of a single hand. (1995 (Reg. Sess., 1996), c. 727, s. 1.)

Editor's Note. — The number of this Article was assigned by the Revisor of Statutes, the number in Session Laws 1995 (Reg. Sess., 1996), c. 727, s. 1 having been 53C.

CASE NOTES

Description of Weapon as Revolver Sufficient to Show it Was a Firearm. — Fact that the indictment alleged that the victim was robbed with the threatened use of a revolver, while the evidence presented and the jury instructions described the weapon as a pistol, gun, or firearm, did not amount to a fatal variance between the indictment and the evidence, because G.S. 14-409.39 indicates that a revolver is a handgun and a handgun is included in the definition of a firearm; thus, the level of specificity in the indictment was sufficient. State v. Hussey, — N.C. App. —, 669 S.E.2d 864, 2008 N.C. App. LEXIS 2236 (2008).

Cited in State v. Jackson, 353 N.C. 495, 546 S.E.2d 570, 2001 N.C. LEXIS 529 (2001); State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005).

§ 14-409.40. Statewide uniformity of local regulation.

(a) It is declared by the General Assembly that the regulation of firearms is properly an issue of general, statewide concern, and that the entire field of regulation of firearms is preempted from regulation by local governments except as provided by this section.

(a1) The General Assembly further declares that the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public is not an unreasonably dangerous activity and does not constitute a nuisance per se and furthermore, that it is the unlawful use of firearms and ammunition, rather than their lawful design, marketing, manufacture, distribution, sale, or transfer that is the proximate cause of injuries arising from their unlawful use. This subsection applies only to causes of action brought under subsection (g) of this section.

(b) Unless otherwise permitted by statute, no county or municipality, by ordinance, resolution, or other enactment, shall regulate in any manner the possession, ownership, storage, transfer, sale, purchase, licensing, or registration of firearms, firearms ammunition, components of firearms, dealers in firearms, or dealers in handgun components or parts.

(c) Notwithstanding subsection (b) of this section, a county or municipality, by zoning or other ordinance, may regulate or prohibit the sale of firearms at a location only if there is a lawful, general, similar regulation or prohibition of commercial activities at that location. Nothing in this subsection shall restrict the right of a county or municipality to adopt a general zoning plan that prohibits any commercial activity within a fixed distance of a school or other educational institution except with a special use permit issued for a commercial activity found not to pose a danger to the health, safety, or general welfare of persons attending the school or educational institution within the fixed distance.

(d) No county or municipality, by zoning or other ordinance, shall regulate in any manner firearms shows with regulations more stringent than those applying to shows of other types of items.

(e) A county or municipality may regulate the transport, carrying, or possession of firearms by employees of the local unit of government in the course of their employment with that local unit of government.

(f) Nothing contained in this section prohibits municipalities or counties from application of their authority under G.S. 153A-129, 160A-189, 14-269, 14-269.2, 14-269.3, 14-269.4, 14-277.2, 14-415.11, 14-415.23, including prohibiting the possession of firearms in public-owned buildings, on the grounds or parking areas of those buildings, or in public parks or recreation areas, except nothing in this subsection shall prohibit a person from storing a firearm within a motor vehicle while the vehicle is on these grounds or areas. Nothing contained in this section prohibits municipalities or counties from exercising powers provided by law in declared states of emergency under Article 36A of this Chapter.

(g) The authority to bring suit and the right to recover against any firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association by or on behalf of any governmental unit, created by or pursuant to an act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, injunctive relief, or any other remedy resulting from or relating to the lawful design, marketing, manufacture, distribution, sale, or transfer of firearms or ammunition to the public is reserved exclusively to the State. Any action brought by the State pursuant to this section shall be brought by the Attorney General on behalf of the State. This section shall not prohibit a political subdivision or local governmental unit from bringing an action against a firearms or ammunition marketer, manufacturer, distributor, dealer, seller, or trade association for breach of contract or warranty for defect of materials or workmanship as to firearms or ammunition purchased by the political subdivision or local governmental unit. (1995 (Reg. Sess., 1996), c. 727, s. 1; 2002-77, s. 1.)

CASE NOTES

Cited in Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998).

§§ 14-409.41 through 14-409.44: Reserved for future codification purposes.

ARTICLE 53C.

Sport Shooting Range Protection Act Of 1997.

§ 14-409.45. Definitions.

The following definitions apply in this Article:

(1) Person. — An individual, proprietorship, partnership, corporation, club, or other legal entity.

(2) Sport shooting range or range. — An area designed and operated for the use of rifles, shotguns, pistols, silhouettes, skeet, trap, black powder, or any other similar sport shooting.

(3) Substantial change in use. — The current primary use of the range no longer represents the activity previously engaged in at the range. (1997-465, s. 1.)

§ 14-409.46. Sport shooting range protection.

(a) Notwithstanding any other provision of law, a person who owns, operates, or uses a sport shooting range in this State shall not be subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution resulting from the operation or use of the range if the range was in existence at least three years prior to the effective date of this Article and the range was in compliance with any noise control laws or ordinances that applied to the range and its operation at the time the range began operation.

(b) A person who owns, operates, or uses a sport shooting range is not subject to an action for nuisance on the basis of noise or noise pollution, and a State court shall not enjoin the use or operation of a range on the basis of noise or noise pollution, if the range was in existence at least three years prior to the effective date of this Article and the range was in compliance with any noise control laws or ordinances that applied to the range and its operation at the time the range began operation.

(c) Rules adopted by any State department or agency for limiting levels of noise in terms of decibel level that may occur in the outdoor atmosphere shall not apply to a sport shooting range exempted from liability under this Article.

(d) A person who acquires title to real property adversely affected by the use of property with a permanently located and improved sport shooting range constructed and initially operated prior to the time the person acquires title shall not maintain a nuisance action on the basis of noise or noise pollution against the person who owns the range to restrain, enjoin, or impede the use of the range. If there is a substantial change in use of the range after the person acquires title, the person may maintain a nuisance action if the action is brought within one year of the date of a substantial change in use. This section does not prohibit actions for negligence or recklessness in the operation of the range or by a person using the range.

(e) A sport shooting range that is operated and is not in violation of existing law at the time of the enactment of an ordinance and was in existence at least three years prior to the effective date of this Article, shall be permitted to continue in operation even if the operation of the sport shooting range at a later date does not conform to the new ordinance or an amendment to an existing ordinance, provided there has been no substantial change in use. (1997-465, s. 1.)

§ 14-409.47. Application of Article.

Except as otherwise provided in this Article, this Article does not prohibit a local government from regulating the location and construction of a sport shooting range after the effective date of this Article. (1997-465, s. 1.)

ARTICLE 54.

Sale, etc., of Pyrotechnics.

§ 14-410. (Effective until February 1, 2010) Manufacture, sale and use of pyrotechnics prohibited; exceptions; sale to persons under the age of 16 prohibited.

(a) It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise,

G.S. 14-410 is set out twice. See notes.

use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at concerts or public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: provided, further, that the use of said pyrotechnics in connection with concerts or public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county, or the city if authorized under G.S. 14-413(a1), in which said pyrotechnics are to be exhibited, used or discharged. Written authority from the board of commissioners or city is not required, however, for a concert or public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill, but such exhibition, use, or discharge of pyrotechnics shall be under supervision of experts who have previously secured written authority from The University of North Carolina or the University of North Carolina at Chapel Hill. Notwithstanding any provision of this section, it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. The requirements of G.S. 14-413(b) and G.S. 14-413(c) apply to this section.

(b) Notwithstanding the provisions of G.S. 14-414, it shall be unlawful for any individual, firm, partnership, or corporation to sell pyrotechnics as defined in G.S. 14-414(2), (3), (4)c., (5), or (6) to persons under the age of 16. (1947, c. 210, s. 1; 1993 (Reg. Sess., 1994), c. 660, s. 3; 1995, c. 475, s. 1; 2003-298, s. 2; 2007-38, s. 1.)

Section Set Out Twice. — The section above is effective until February 1, 2010. For the section as amended February 1, 2010, see the following section, also numbered G.S. 14-410.

Local Modification. — Catawba, except Town of Longview: 1983, c. 116 (Repealed May 2008 by 2007-38, s. 3); Durham: 1963, c. 745 (Repealed May 2008 by 2007-38, s. 3); Edgecombe: 1991 (Reg. Sess., 1992), c. 771, s. 1 (Repealed May 2008 by 2007-38, s. 3); Forsyth: 1983, c. 21 (Repealed May 2008 by 2007-38, s. 3); Mecklenburg: 1981, c. 117, s. 2; Moore: 2009-75, s. 3; Nash: 1991 (Reg. Sess., 1992), c. 771, s. 1 (Repealed May 2008 by 2007-38, s. 3); New Hanover: 1989, c. 178, s. 1; Pender: 1957, c. 113; Union: 1983, c. 116 (Repealed May 2008 by 2007-38, s. 3).

Editor's Note. — Session Laws 2007-38, s. 3, provides: "Any local act granting authority to a city to grant permission or a permit for pyrotechnics to be exhibited, used or discharged at concerts or public exhibitions pursuant to G.S. 14-410 or G.S. 14-413 is repealed one year from the effective date of this act." The local modifications for Catawba and Union (from 1983 Sess. Laws, c. 21, as amended by 1983 Sess. Laws, c. 116), Durham (from 1963 Sess. Laws, c. 745), Edgecombe and Nash (from 1991 Sess. Laws, c. 771), and Forsyth (from 1983 Sess. Laws, c. 21) have been deleted as a result.

CASE NOTES

Applied in State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

§ 14-410. (Effective February 1, 2010) Manufacture, sale and use of pyrotechnics prohibited; exceptions; permit required; sale to persons under the age of 16 prohibited.

(a) Except as otherwise provided in this section, it shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell,

G.S. 14-410 is set out twice. See notes.

deal in, transport, possess, receive, advertise, use, handle, exhibit, or discharge any pyrotechnics of any description whatsoever within the State of North Carolina.

(a1) It shall be permissible for pyrotechnics to be exhibited, used, handled, manufactured, or discharged within the State, provided all of the following apply:

(1) The exhibition, use, or discharge is at a concert or public exhibition.

(2) All individuals who exhibit, use, handle, or discharge pyrotechnics in connection with a concert or public exhibition have completed the training required under G.S. 58-82A-2 and are under the direct supervision and control of a display operator who holds a display operator permit issued by the State Fire Marshal under G.S. 58-82A-3. The display operator must be present at the concert or public exhibition and must personally direct all aspects of exhibiting, using, handling, or discharging the pyrotechnics.

(3) The display operator has secured written authority under G.S. 14-413 from the board of county commissioners of the county, or the city if authorized under G.S. 14-413(a1), in which the pyrotechnics are to be exhibited, used or discharged. Written authority from the board of commissioners or city is not required under this subdivision for a concert or public exhibition provided the display operator has secured written authority from The University of North Carolina or the University of North Carolina at Chapel Hill under G.S. 14-413, and pyrotechnics are exhibited on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill.

(a2) Notwithstanding any provision of this section, it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business.

(a3) The requirements of this section apply to G.S. 14-413(b) and G.S. 14-413(c).

(b) Notwithstanding the provisions of G.S. 14-414, it shall be unlawful for any individual, firm, partnership, or corporation to sell pyrotechnics as defined in G.S. 14-414(2), (3), (4)c., (5), or (6) to persons under the age of 16.

(c) The following definitions apply in this Article:

(1) Concert or public exhibition. — A fair, carnival, show of any description, or public celebration.

(2) Display operator. — An individual issued a display operator permit under G.S. 58-82A-3.

(3) State Fire Marshal. — Defined in G.S. 58-80-1. (1947, c. 210, s. 1; 1993 (Reg. Sess., 1994), c. 660, s. 3; 1995, c. 475, s. 1; 2003-298, s. 2; 2007-38, s. 1; 2009-507, s. 1.)

Section Set Out Twice. — The section above is effective February 1, 2010. For the section as in effect until February 1, 2010, see the preceding section, also numbered G.S. 14-410.

Editor's Note. — Session Laws 2009-507, s. 4, provides: "The Commissioner of Insurance must report to the General Assembly by May 1, 2010, on the implementation of this act and may make recommendations regarding additional statutory changes and the need for additional personnel or other resources to implement this act."

Effect of Amendments. — Session Laws 2009-507, s. 1, effective February 1, 2010, and applicable to offenses committed on or after that date, inserted "permit required" in the section heading; and rewrote the section.

§ 14-411. Sale deemed made at site of delivery.

In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. Possession prima facie evidence of violation.

Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. Permits for use at public exhibitions.

(a) For the purpose of enforcing the provisions of this Article, the board of county commissioners of any county, or the governing board of a city authorized pursuant to subsection (a1) of this section, may issue permits for use in connection with the conduct of concerts or public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. Provided that no such permit shall be required for a public exhibition authorized by The University of North Carolina or the University of North Carolina at Chapel Hill and conducted on lands or buildings in Orange County owned by The University of North Carolina or the University of North Carolina at Chapel Hill.

(a1) For the purpose of enforcing the provisions of this Article, a board of county commissioners may authorize the governing body of any city in the county to issue permits pursuant to the provisions of this Article for pyrotechnics to be exhibited, used, or discharged within the corporate limits of the city for use in connection with the conduct of concerts or public exhibitions. The board of county commissioners shall adopt a resolution granting the authority to the city, and it shall remain in effect until withdrawn by the board of county commissioners adopting a subsequent resolution withdrawing the authority. If a city lies in more than one county, the board of county commissioners of each county in which the city lies must adopt an authorizing resolution. If any county in which the city lies withdraws the authority of the city to issue permits for the use of pyrotechnics, the authority of the city to issue permits for the use of pyrotechnics will end, and all counties within which the city lies must resume their authority to issue the permits.

(b) For any indoor use of pyrotechnics at a concert or public exhibition, the board of commissioners or the governing body of an authorized city may not issue any permit unless the local fire marshal or the State Fire Marshal (or in the case of The University of North Carolina or the University of North Carolina at Chapel Hill it may not authorize such concert or public exhibition unless the State Fire Marshal) has certified that:

(1) Adequate fire suppression will be used at the site.

(2) The structure is safe for the use of such pyrotechnics with the type of fire suppression to be used.

(3) Adequate egress from the building is available based on the size of the expected crowd.

(c) The requirements of subsection (b) of this section also apply to any city authorized to grant pyrotechnic permits by local act and to the officer delegated the power to grant such permits by local act.

(d) **(Effective February 1, 2010)** A board of county commissioners or the governing board of a city shall not issue a permit under this section unless the display operator provides proof of insurance in the amount of at least five hundred thousand dollars ($500,000) or the minimum amount required under the North Carolina State Building Code pursuant to G.S. 143-138(e), whichever is greater. A board of county commissioners or the governing board of a city may require proof of insurance that exceeds these minimum requirements. (1947, c. 210, s. 4; 1993 (Reg. Sess., 1994), c. 660, s. 3.1; 1995, c. 509, s. 11; 2003-298, s. 1; 2007-38, s. 2; 2009-507, s. 2.)

Local Modification. — Catawba, except Town of Longview: 1983, c. 116 (Repealed May 2008 by 2007-38, s. 3); Edgecombe: 1991 (Reg. Sess., 1992), c. 771, s. 1 (Repealed May 2008 by 2007-38, s. 3); Forsyth: 1983, c. 21 (Repealed May 2008 by 2007-38, s. 3); Mecklenburg: 1981, c. 117, s. 2; Moore: 2009-75, s. 4; Nash: 1991 (Reg. Sess., 1992), c. 771, s. 1 (Repealed May 2008 by 2007-38, s. 3); New Hanover: 1989, c. 178, s. 1; Union: 1983, c. 116 (Repealed May 2008 by 2007-38, s. 3); city of Charlotte: 1981, c. 88.

Editor's Note. — Subsections (b) and (c) were enacted as (b1) and (b2), respectively, and were redesignated at the direction of the Revisor of Statutes.

Session Laws 2007-38, s. 3, provides: "Any local act granting authority to a city to grant permission or a permit for pyrotechnics to be exhibited, used or discharged at concerts or public exhibitions pursuant to G.S. 14-410 or G.S. 14-413 is repealed one year from the effective date of this act." The local modifications for Catawba and Union (from 1983 Sess. Laws, c. 21, as amended by 1983 Sess. Laws, c. 116), Durham (from 1963 Sess. Laws, c. 745), Edgecombe and Nash (from 1991 Sess. Laws, c. 771), and Forsyth (from 1983 Sess. Laws, c. 21) have been deleted as a result.

Session Laws 2009-507, s. 4, provides: "The Commissioner of Insurance must report to the General Assembly by May 1, 2010, on the implementation of this act and may make recommendations regarding additional statutory changes and the need for additional personnel or other resources to implement this act."

Effect of Amendments. — Session Laws 2009-507, s. 2, effective February 1, 2010, and applicable to offenses committed on or after that date, added subsection (d).

§ 14-414. Pyrotechnics defined; exceptions.

For the proper construction of the provisions of this Article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. This Article shall not apply to the sale, use, or possession of the following:

(1) Explosive caps designed to be fired in toy pistols, provided that the explosive mixture of the explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap.

(2) Snake and glow worms composed of pressed pellets of a pyrotechnic mixture that produce a large, snake-like ash when burning.

(3) Smoke devices consisting of a tube or sphere containing a pyrotechnic mixture that produces white or colored smoke.

(4) Trick noisemakers which produce a small report designed to surprise the user and which include:

   a. A party popper, which is a small plastic or paper item containing not in excess of 16 milligrams of explosive mixture. A string protruding from the device is pulled to ignite the device, expelling paper streamers and producing a small report.

   b. A string popper, which is a small tube containing not in excess of 16 milligrams of explosive mixture with string protruding from both ends. The strings are pulled to ignite the friction-sensitive mixture, producing a small report.

c. A snapper or drop pop, which is a small, paper-wrapped item containing no more than 16 milligrams of explosive mixture coated on small bits of sand. When dropped, the device produces a small report.

(5) Wire sparklers consisting of wire or stick coated with nonexplosive pyrotechnic mixture that produces a shower of sparks upon ignition. These items must not exceed 100 grams of mixture per item.

(6) Other sparkling devices which emit showers of sparks and sometimes a whistling or crackling effect when burning, do not detonate or explode, do not spin, are hand-held or ground-based, cannot propel themselves through the air, and contain not more than 75 grams of chemical compound per tube, or not more than a total of 200 grams if multiple tubes are used. (1947, c. 210, s. 5; 1955, c. 674, s. 1; 1993, c. 437, s. 1.)

OPINIONS OF ATTORNEY GENERAL

What Is Prohibited Within Definition of Pyrotechnics. — See Opinion of Attorney General to Mr. W.I. Adams, Sheriff, Wayne County, 40 N.C.A.G. 174 (1970).

"Party poppers" which contain .0052 grams of explosives are not exempted from this section. See opinion of Attorney General to the Honorable Randolph Riley, District Attorney, Wake County, 54 N.C.A.G. 25 (1984).

§ 14-415. Violation made misdemeanor.

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a Class 2 misdemeanor, except that it is a Class 1 misdemeanor if the exhibition is indoors. (1947, c. 210, s. 6; 1969, c. 1224, s. 3; 1993, c. 539, s. 288; 1994, Ex. Sess., c. 24, s. 14(c); 2003-298, s. 3.)

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

(a) It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in G.S. 14-288.8(c). For the purposes of this section, a firearm is (i) any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, or its frame or receiver, or (ii) any firearm muffler or firearm silencer. This section does not apply to an antique firearm, as defined in G.S. 14-409.11.

Every person violating the provisions of this section shall be punished as a Class G felon.

(b) Prior convictions which cause disentitlement under this section shall only include:

(1) Felony convictions in North Carolina that occur before, on, or after December 1, 1995; and

(2) Repealed by Session Laws 1995, c. 487, s. 3, effective December 1, 1995.

(3) Violations of criminal laws of other states or of the United States that occur before, on, or after December 1, 1995, and that are substantially similar to the crimes covered in subdivision (1) which are punishable where committed by imprisonment for a term exceeding one year.

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding one year, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed. A judgment of a conviction of the defendant or a plea of guilty by the defendant to such an offense certified to a superior court of this State from the custodian of records of any state or federal court shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1; 1973, c. 1196; 1975, c. 870, ss. 1, 2; 1977, c. 1105, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; c. 179, s. 14; 1989, c. 770, s. 3; 1993, c. 539, s. 1245; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 487, s. 3; c. 507, s. 19.5(k); 2004-186, s. 14.1; 2006-259, s. 7(b).)

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Constitutionality. — This section is not constitutionally invalid because the restriction applies during the five years after conviction, discharge from a correctional institution, or termination of a suspended sentence, probation or parole, whichever is later. This merely establishes a class, those convicted of the enumerated crimes who are within five years of the end of their punishment, and the law applies uniformly to all members of the class affected. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied and appeal dismissed, 297 N.C. 303, 254 S.E.2d 924 (1979).

This section is not unconstitutionally vague. It clearly delineates those to whom it applies and the classes of conduct proscribed, so that a person of ordinary intelligence may be apprised of the conduct forbidden. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied and appeal dismissed, 297 N.C. 303, 254 S.E.2d 924 (1979).

Where the defendant's earlier conviction was for second-degree murder, a crime of violence, there was no constitutional difficulty with the classification scheme under this section as applied to defendant, since there was clearly a reasonable relation between the classification, those convicted of a crime of violence, and the purpose of the statute, protection of the people from violence. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied and appeal dismissed, 297 N.C. 303, 254 S.E.2d 924 (1979).

By possessing a firearm, defendant committed a fresh violation of G.S. 14-288.8(c), and defendant's punishment for that new crime could not reasonably be said to re-punish the earlier offense; rather, it only punished the new violation, and accordingly the mere reliance on the earlier conviction to establish that defendant was a recidivist for sentencing purposes did not implicate double jeopardy concerns. State v. Crump, 178 N.C. App. 717, 632 S.E.2d 233, 2006 N.C. App. LEXIS 1671 (2006), cert. denied, appeal dismissed, 361 N.C. 431, 648 S.E.2d 851 (2007).

As amended in 2004, G.S. 14-415.1 is not unconstitutional because it treated all felons the same, protected and preserved the health, safety, and welfare of the citizens of North Carolina, did not violate the ex post facto clauses of U.S. and North Carolina constitutions, and did not violate plaintiff's rights to due process, equal protection, or to bear arms. Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007).

Defendant's prior conviction was not an "offense" within the meaning of the Double Jeopardy Clause when construed with defendant's conviction of possession of a firearm by a felon under G.S. 14-415.1(a). State v. Coltrane, 188

N.C. App. 498, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008), review denied, 362 N.C. 476, 666 S.E.2d 760 (2008).

Amendment of Statute in 1995 and Application to Ex-Felons Did Not Violate Ex Post Facto. — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate ex post facto where the statute was amended in 1995 and applied to all occurrences after that date; ex post facto was also not violated since defendant's 1983 conviction, which was the predicate felony for his conviction under G.S. 14-415.1, was a felony in 1983, was a felony in 1995 when the statute was amended, and was a felony in 2001 when defendant was found in possession of a handgun; finally, the amendment to G.S. 14-415.1 in 1995 did not increase the punishment for defendant's prior 1983 felony, but created a new offense, so ex post facto was also not violated on that ground. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

Amendments to Statutes Criminalizing Possession of Guns by Ex-Felons Are Not Bills of Attainder. — Application of G.S. 14-415.1 to convict defendant, who was convicted of a felony in 1983 and had fully served his sentence on that conviction when he was found in possession of a handgun in 2001, did not violate prohibitions against bills of attainder, or against bills of pain and penalties, since the statute's prohibition of possession of handguns by convicted felons outside their homes or businesses was not enacted as a retroactive punishment, was not historically regarded as punishment, and was not imposed without judicial process; defendant had a trial before being convicted under the statute; defendant was not punished for belonging to a designated class of people, but was convicted for violating a statute that was validly imposed on the group to which he belonged, so there was no violation of the bill of attainder provisions in U.S. Const. art. I, § 10 and N.C. Const. art. I, § 16. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

Statute Not Recidivist Statute. — Judgment was properly entered on defendant's possession of a firearm by a felon charge since G.S. 14-415.1(a) created a substantive offense to which the Sixth Amendment right to a jury trial applied, and did not create a sentencing requirement aimed at reducing recidivism; defendant committed a new substantive offense when defendant violated G.S. 14-415.1 even though defendant did not violate a "consequence of (defendant's) original conviction." State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007).

Ex-Felon's Right to Possess Guns Not a Vested Right and Was Properly Restricted to Home and Business. — Since a convicted felon's re-acquired right to bear arms was subject to regulation and was not completely abridged by a subsequent amendment to G.S. 14-415.1, which prohibited the ex-felon from possessing handguns outside his home or business, and since the regulation was reasonably related to further securing the public's safety, there was no interference with any vested right when the statute was amended to include the ex-felon; he was properly convicted and sentenced for violating the statute without any violation of his right to due process. State v. Johnson, 169 N.C. App. 301, 610 S.E.2d 739, 2005 N.C. App. LEXIS 612 (2005).

Construction with Other Provisions. — Reading G.S. 14-288.8 in pari materia with this section, it is clear that the footnote to G.S. 14-288.8 which reads "nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or ... place of business" does not apply to weapons of mass death and destruction; North Carolina did not intend to restore to its ex-felons the right to possess such weapons within their own homes, in contravention of the general federal prohibition against felons possessing firearms. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

Subsection (a) encompasses a narrow range of guns, while G.S. 14-269.2(b) prohibits any gun, excluding only a BB gun, stun gun, air rifle, or air pistol. In re Cowley, 120 N.C. App. 274, 461 S.E.2d 804 (1995).

Irregardless of whether a criminal defendant pleads guilty or no contest, where a felony conviction is ultimately adjudicated, the defendant is thereafter a convicted felon for the purposes of G.S. 14-404 and prohibited from obtaining a hand gun. Friend v. State, 169 N.C. App. 99, 609 S.E.2d 473, 2005 N.C. App. LEXIS 535 (2005), cert. denied, — N.C. —, 614 S.E.2d 533 (2005).

Construction with Federal Law. — The fact that state law permits a convicted felon to possess a firearm in his home despite his status as a convicted felon whose civil rights have not been restored was not sufficient to insulate the defendant from prosecution under 18 U.S.C. § 922(g)(1); a prior felony conviction is exempt from use as predicate offense under § 922(g)(1) only if the defendant has had his civil rights and his firearm privileges restored. United States v. King, 119 F.3d 290 (4th Cir. 1997).

When North Carolina discharged defendant's 1975 and 1977 convictions, the Felony Firearms Act in effect in 1983 barred his possession of firearms for five years; consequently, the occurrence of his 1988 conviction before the expiration of the five-year period precluded a restoration of his civil rights after the other two convictions, and these were, therefore, properly considered along with the 1988 conviction for purposes of the Federal Armed Career Criminal Act, 18 U.S.C. § 924(e). United States v. O'Neal, 180 F.3d 115, 1999 U.S. App. LEXIS 11167 (4th Cir. 1999), cert. denied, 528 U.S. 980, 120 S. Ct. 433, 145 L. Ed. 2d 339 (1999).

North Carolina's prohibition under G.S. 14.415.1(a) against convicted felons whose civil rights had been otherwise restored from possessing handguns outside their home or lawful place of business was sufficient to satisfy the requirement of 18 U.S.C.S. § 922(g) for a conviction of being a felon in possession of a firearm. United States v. Farmer, — F.3d —, 2002 U.S. App. LEXIS 22819 (4th Cir. Nov. 4, 2002).

In a prosecution under this section, defendant was not subjected to double jeopardy, though he had been tried and acquitted in district court on the charge of carrying a concealed weapon, a charge stemming from the same transaction from which the charge under this section arose, since the warrant in the former action and the indictment in the present action were drawn pursuant to different statutes and elements of the two offenses were separate and distinct. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

Clearly, North Carolina intends to restore to ex-convicts their general citizenship rights but limit their firearms privileges. Therefore, the Felony Firearms Act expressly provides the circumstances under which a "person may not ship, transport, possess or receive firearms," as required by 18 U.S.C. § 921(a)(20). United States v. McLean, 904 F.2d 216 (4th Cir. 1990), cert. denied, 498 U.S. 875, 111 S. Ct. 203, 112 L. Ed. 2d 164 (1990).

Purpose of Repeal of § 14-415.2. — When the Firearms Act became law in 1971, felons were not automatically restored to full citizenship immediately upon their release from prison; however, those felons whose citizenship rights had been restored were exempt from the Act. Then in 1973, North Carolina amended the General Statutes to restore felons to full citizenship immediately upon their unconditional discharge under G.S. 13-1 et seq. When it became apparent that this would make virtually all felons exempt from the Firearms Act, the General Assembly repealed the exemption for felons whose citizenship rights had been restored. United States v. McLean, 904 F.2d 216 (4th Cir. 1990), cert. denied, 498 U.S. 875, 111 S. Ct. 203, 112 L. Ed. 2d 164 (1990).

Section Held Not Ex Post Facto Respecting Alleged Violation on July 31, 1972. — See State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

What Constitutes Conviction Under This Section. — If a defendant enters a plea, including a plea of no contest, so that a felony judgment or imprisonment for more than two years may be imposed then it constitutes a conviction under this section. State v. Watts, 72 N.C. App. 661, 325 S.E.2d 505, cert. denied, 313 N.C. 611, 332 S.E.2d 83 (1985).

Five-Year Period. — Possession beyond the five-year post-release period is simply not a crime in North Carolina. Ex-felons regain the right to possess a gun in North Carolina by the mere passage of time. United States v. Essick, 935 F.2d 28 (4th Cir. 1991).

The current language of G.S. 14-415.1 which contains no time bar for the charge; defendant's conviction of possession of a firearm by a convicted felon was not improper although the possession of a firearm occurred more than five years after the previous conviction. State v. Gaither, 161 N.C. App. 96, 587 S.E.2d 505, 2003 N.C. App. LEXIS 1996 (2003), cert. denied, 358 N.C. 157, 593 S.E.2d 83 (2004).

Sawed-Off Shotguns. — With limited and specific exceptions, no one in North Carolina, ex-felon or otherwise, may possess, store or acquire a sawed-off shotgun for any reason or under any circumstance. United States v. Walker, 39 F.3d 489 (4th Cir. 1994).

State's decision to allege defendant's possession of a handgun required that it produce such evidence at trial, as the category of weapon was an essential element of G.S. 14-415.1(a); as the state failed to do so, there was a fatal variance between the indictment and the evidence, and the state's proof at trial was instead of a specific category of firearm, a sawed-off shotgun. State v. Langley, 173 N.C. App. 194, 618 S.E.2d 253, 2005 N.C. App. LEXIS 1920 (2005), cert. dismissed, — N.C. —, 630 S.E.2d 447 (2006), cert. denied, — N.C. —, 630 S.E.2d 447 (2006).

Simultaneous Possession Only Supports Single Conviction. — Trial court erred by entering two felony convictions for possession of a firearm by a felon because defendant possessed the firearms simultaneously; defendant should have been convicted and sentenced only once for his possession of both firearms. State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340, 2008 N.C. App. LEXIS 1321 (2008).

Prosecution for Possession of Firearm by Ex-Felon in Violation of 18 U.S.C. § 922(g)(1). — In North Carolina, an ex-felon who is more than five years beyond his release date has the same civil rights regarding firearms as nonfelons; for purposes of 18 U.S.C. § 922(g)(1), then, his prior conviction does not exist. Proof of a prior "conviction" under federal law encompasses more than proof of a discrete event in the defendant's past; the government must show the continuing vitality of the conviction, a matter of proof that, under North Carolina law, necessarily implicates the five-year post-release period. United States v. Essick, 935 F.2d 28 (4th Cir. 1991).

In North Carolina, the government must prove, at a minimum, that the defendant possessed a firearm within five years of release from supervision resulting from the prior North Carolina felony. Otherwise, the defendant would as a matter of law stand in the same shoes as any other person who had not been previously convicted of a felony. United States v. Essick, 935 F.2d 28 (4th Cir. 1991).

Felon convicted of manslaughter whose civil rights were restored was entitled to possess firearms or any type of firearm in his home or business, and all restrictions on his possession of firearms ceased after five years. As a result, the district court erred in denying defendant's motion to dismiss count charging him with violating 18 U.S.C. § 922(g)(1) by possessing firearms in his home. United States v. Shoemaker, 2 F.3d 53 (4th Cir. 1993), cert. denied, 510 U.S. 1047, 114 S. Ct. 698, 126 L. Ed. 2d 665 (1994).

Because defendant's underlying state felony conviction occurred within five years of a firearm offense, the defendant's civil rights could not have been fully restored, and the government proved a firearm possession violation despite the fact that it did not independently establish that defendant's civil rights had not been restored at the time of his firearm possession. United States v. Thomas, 52 F.3d 82 (4th Cir.), cert. denied, 516 U.S. 885, 116 S. Ct. 226, 133 L. Ed. 2d 155 (1995).

The General Assembly did not intend a preclusion of consolidation by requiring a separate bill of indictment under this section. Had the General Assembly also intended to preclude consolidation of the related offenses for trial by the requirement of a separate bill of indictment, it would have so stated. State v. Hardy, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

Subsection (c) of this section is clear and unambiguous. It is silent as to the question of consolidation and it simply requires a separate indictment. The mere fact of a requirement of separate indictments constitutes no bar, in and of itself, to consolidation. State v. Hardy, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

Subsection (a). — The first paragraph of subsection (a) creates a substantive criminal offense, complete and definite in its description. State v. Bishop, 119 N.C. App. 695, 459 S.E.2d 830, appeal dismissed, cert. denied, 341 N.C. 653, 462 S.E.2d 518 (1995).

The third paragraph of subsection (a) creates an exception to the offense which allows possession within one's home or place of business. State v. Bishop, 119 N.C. App. 695, 459 S.E.2d 830, appeal dismissed, cert. denied, 341 N.C. 653, 462 S.E.2d 518 (1995).

"Home". — Defendant had plainly surrendered dominion and control of trailer property that he owned when he rented it; thus, it was not his "home" for purposes of this section. State v. Locklear, 121 N.C. App. 355, 465 S.E.2d 61 (1996).

Possession in Own Home or Business. — The first paragraph of subsection (a) of this section creates a substantive criminal offense, complete and definite in its description. The third paragraph of subsection (a) creates an exception to the offense, by excluding from its prohibition the possession of a firearm within one's own home or on his lawful place of business. State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

By using the words "within his own home" in the exception in the third paragraph of subsection (a) of this section, as opposed to some broader terminology, the legislature clearly expressed its intent to limit the applicability of the exception to the confines and privacy of the convicted felon's own premises, over which he has dominion and control to the exclusion of the public. State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

The Legislature intended to limit the exception under this section to the convicted felon's own premises over which he or she has dominion and control to the exclusion of the public. State v. Cloninger, 83 N.C. App. 529, 350 S.E.2d 895 (1986).

Defendant argued that the trial court erred in denying defendant's motion to dismiss the possession of a firearm by a convicted felon charge at the close of all the evidence; however, there was substantial evidence in the record to permit a reasonable juror to conclude that the premises did not constitute defendant's home. State v. Smith, 155 N.C. App. 500, 573 S.E.2d 618, 2002 N.C. App. LEXIS 1636 (2002), cert. denied, 357 N.C. 255, 583 S.E.2d 287 (2003).

Possession in Common Areas. — The exception in the third paragraph of subsection (a) of this section, applying to a person in his own home, does not encompass common areas of an apartment house, such as stairways, hallways and porches. State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

The statutory exception for possession within one's home business does not apply to the common areas of a motel. State v. Cloninger, 83 N.C. App. 529, 350 S.E.2d 895 (1986).

Evidence held sufficient to support a reasonable inference that defendant was on his neighbor's property at the time he fired pistol, and not on his own. State v. Hinson, 85 N.C. App. 558, 355 S.E.2d 232, cert. denied, 320 N.C. 635, 360 S.E.2d 98 (1987).

Operability of Gun. — Where the State produced evidence tending to prove the defendant's constructive possession of a shotgun within five years from the date of a conviction for felonious assault, but there was no evidence as to whether the shotgun was operable, the evidence was sufficient to require the submission of the case to the jury and to support the verdict. State v. Baldwin, 34 N.C. App. 307, 237 S.E.2d 881 (1977).

Inoperability of a handgun or other firearm is not an affirmative defense to a charge of possession of a firearm by a felon. State v. Jackson, 353 N.C. 495, 546 S.E.2d 570, 2001 N.C. LEXIS 529 (2001).

Operability of a firearm is not an essential element of the charge of possession of a firearm by a felon, G.S. 14-415.1, nor is it an affirmative defense. State v. McCree, 160 N.C. App. 200, 584 S.E.2d 861, 2003 N.C. App. LEXIS 1727 (2003).

The statutory measurements language in this section is not applicable to handguns; the specified measurements are qualifying words which distinguish those firearms, other than handguns, which are also covered by this section. State v. Cloninger, 83 N.C. App. 529, 350 S.E.2d 895 (1986).

Proof of barrel length or overall length is not an essential element of the offense of possession of a handgun within five years after conviction of a felonious offense. State v. Cloninger, 83 N.C. App. 529, 350 S.E.2d 895 (1986).

Evidence of Prior Conviction. — In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle, since the State merely introduced defendant's stipulation into evidence so there would be no doubt as to that particular element of the offense being satisfied; the State offered no other evidence in regard to defendant's prior conviction; and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980), appeal dismissed and cert. denied, 301 N.C. 724, 276 S.E.2d 285 (1981).

The state had no alternative but to introduce evidence of defendant's prior convictions in order to meet its burden of showing an element of possession of a firearm by a felon; thus, the trial did not commit error by the admission of the evidence. State v. Faison, 128 N.C. App. 745, 497 S.E.2d 111 (1998).

Trial court did commit prejudicial error under this section in rejecting defendant's tendered limiting stipulation and admitting evidence of an earlier prior voluntary manslaughter conviction, where defendant was not charged with any attendant offenses similar to his prior conviction, and where the jury was not informed that his prior conviction in any way involved use of a firearm. State v. Jackson, 139 N.C. App. 721, 535 S.E.2d 48, 2000 N.C. App. LEXIS 1039 (2000), aff'd in part and rev'd in part on other grounds, 353 N.C. 495 546 S.E.2d 570 (2001).

Where defendant's prior convictions for possession of cocaine were defined by G.S. 90-95(d)(2) as misdemeanors punishable as felonies, they could not support the charges of possession of a firearm by a felon and being a habitual felon under G.S. 14-415.1 and G.S. 14-7.1. State v. Sneed, 161 N.C. App. 331, 588 S.E.2d 74, 2003 N.C. App. LEXIS 2050 (2003).

Trial court did not abuse its discretion in admitting defendant's prior conviction into evidence as under the North Carolina Felony Firearms Act, specifically G.S. 14-415.1(b), records of prior convictions of any offense were admissible in evidence for the purpose of proving a violation of G.S. 14-415.1; as there was no indication that defendant agreed to stipulate to defendant's prior felony conviction, the state had no choice but to introduce evidence of defendant's conviction in order to prove its case as to the charge of possession of a firearm by a felon. State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679, 2007 N.C. App. LEXIS 1674 (2007).

Evidence of defendant's prior convictions for cocaine trafficking was admissible under G.S. 14-415.1(b) and sufficient to support his conviction for possession of a firearm by a felon. State v. Leach, 166 N.C. App. 711, 603 S.E.2d 831 (2004).

Burden of Proof. — Absent any evidence that defendant was within the exception in the third paragraph of subsection (a) of this section, the State was required to prove only that the defendant possessed a handgun within five years of his conviction of a felony specified in subsection (b). Defendant's location at the time of the offense would be a substantive issue, requiring negative proof by the State and an instruction by the court, only upon some positive evidence by defendant that defendant's location was within the exception to this section. State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

G.S. 14-415.1(c) Requirement That Indictment State Penalty for the Prior Offense Is Merely Directory. — Trial court did not err by denying defendant's motion to dismiss an indictment against him for possession of firearms by a felon in violation of G.S. 14-415.1 because the indictment was not fatally defective under G.S. 15A-644, despite the fact that the indictment failed to state the statutory penalty for the underlying felony conviction. Because the provision under G.S. 14-415.1(c) requiring the indictment to state the penalty for the prior offense is not material and does not affect a substantial right, defendant was no less apprised of the conduct that was the subject of the accusation than he would have been if the indictment had included the prior conviction's penalty; furthermore, G.S. 15A-644 did not require the quashing of the bill of indictment under the circumstances in defendant's case because doing so would attribute to the legislature an intent to paramount mere form over substance. State v. Boston, 165 N.C. App. 214, 598 S.E.2d 163 (2004).

Indictment Upheld. — Assuming for the sake of argument that this section required the State to prove the length both of handguns and of "other firearms", an indictment which alleged that defendant "unlawfully, willfully and feloniously did possess and have in his custody a Charter Arms .38 caliber pistol, which is a handgun", but made no mention of the pistol's length, was sufficient to give defendant notice of the offense charged and to allow defendant to prepare his defense. Furthermore, the State produced at trial the pistol alleged to have been possessed by defendant so that the jurors could determine in court the pistol's length. State v. Riggs, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

Omission of the date of defendant's prior conviction of breaking and entering a motor vehicle was not material, did not affect a substantial right relating to defendant's charge of possession of firearm by a convicted felon, and was not fatal to jurisdiction. State v. Inman, 174 N.C. App. 567, 621 S.E.2d 306, 2005 N.C. App. LEXIS 2480 (2005).

Because the date of the offense was not an essential element of the offense of possession of a firearm by a felon in G.S. 14-415.1, the state was properly allowed to amend the indictment under G.S. 15A-923. State v. Coltrane, 188 N.C. App. 498, 656 S.E.2d 322, 2008 N.C. App. LEXIS 194 (2008), review denied, 362 N.C. 476, 666 S.E.2d 760 (2008).

Requested Jury Instructions. — Where defendant, who was not within his own premises, voluntarily confronted his neighbors while armed, although not under a present or imminent threat of death or injury, he was not entitled to a justification instruction to the jury. State v. Napier, 149 N.C. App. 462, 560 S.E.2d 867, 2002 N.C. App. LEXIS 220 (2002).

Trial court properly refused to give defendant's requested special instruction on the defense of justification of possession of a firearm by a felon because the request was not in writing and the evidence showed that defendant possessed the weapon during a time period when he was under no imminent threat of harm. State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005).

Evidence Sufficient to Prove Elements of Offense. — Admission of a certified copy of defendant's prior felony conviction and the victim's testimony that defendant had a gun was sufficient to support defendant's conviction for possession of a firearm by a felon. State v. Hussey, — N.C. App. —, 669 S.E.2d 864, 2008 N.C. App. LEXIS 2236 (2008).

Evidence Was Sufficient to Find Constructive Possession. — Trial court correctly denied defendant's motions to dismiss and submitted the charge of possession of a firearm by a felon to the jury as the evidence was sufficient to raise a jury question regarding defendant's possession of the gun; defendant jointly owned the car with his girlfriend and had been the sole driver of the car the entire day of the robbery, and the State's evidence indicated that the gun could readily be seen when the driver's door was opened, suggesting that defendant must have known of the presence of the gun. State v. Clark, 159 N.C. App. 520, 583 S.E.2d 680, 2003 N.C. App. LEXIS 1491 (2003).

Instruction that the jury could have inferred defendant's constructive possession of a gun based on his control over the area where it was found, between his leg and the inner console of the vehicle he was driving, was proper. State v. Inman, 174 N.C. App. 567, 621 S.E.2d 306, 2005 N.C. App. LEXIS 2480 (2005).

Conviction Upheld. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; the trial court did not err in admitting the in-court and out-of-court identification by a store clerk of defendant as the perpetrator of a robbery. The State presented a sufficient foundation for the admission of a videotape of the robbery into evidence. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

Ineffective Assistance of Counsel Not Found. — Defendant's conviction of robbery with a firearm, G.S. 14-87, and possession of a handgun by a felon, G.S. 14-415.1, was affirmed; defendant did not receive ineffective assistance of counsel pursuant to the test in G.S. 15A-1443(a), as counsel did not err in failing to object to the identification of defendant, or to the introduction of a videotape of the robbery, based on a legitimate trial strategy. State v. Lawson, 159 N.C. App. 534, 583 S.E.2d 354, 2003 N.C. App. LEXIS 1495 (2003).

Trial court did not err in entering conviction against defendant on the charge of possession of a firearm by a convicted felon, because defendant pled guilty to that charge and did not show that the exemption allowing for him to have the firearm within his own home or lawful place of business applied; defendant did not show that he had received ineffective assistance of counsel in pleading guilty to the charge because he could not show that an exemption to that law applied. State v. Allah, 168 N.C. App. 190, 607 S.E.2d 311, 2005 N.C. App. LEXIS 144 (2005), cert. denied, 359 N.C. 636, 618 S.E.2d 232 (2005).

Evidence Held Sufficient to Prove Possession. — Evidence that (1) shortly after a shooting incident a witness saw defendant jumping over a fence into her back yard, near a shed where a rifle was found; (2) a garbage bag defendant was carrying had firearm discharge residue in it; and (3) holes in the bag were consistent with the discharge of a firearm from inside the bag, was sufficient to prove that defendant, a convicted felon, possessed a firearm in violation of G.S. 14-415.1(a). State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257, 2003 N.C. App. LEXIS 1729 (2003).

No Double Jeopardy Violation. — That a cocaine possession offense was used to support both an underlying substantive felony (the "felon" portion of the offense of "felon in possession of a firearm") and a habitual felon indictment did not subject defendant to double jeopardy. State v. Glasco, 160 N.C. App. 150, 585 S.E.2d 257, 2003 N.C. App. LEXIS 1729 (2003).

Evidence Sufficient to Establish Possession. — Evidence was sufficient to establish defendant's possession of the gun found under his jacket. Because defendant acknowledged his possession of the gun in his written statement to the police, it effectively disposed of his argument that there was no evidence of possession. State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374, 2003 N.C. App. LEXIS 2264 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003).

Defendant's motion to dismiss was properly denied because the evidence was sufficient to establish defendant's possession of the gun found under his jacket. Because defendant acknowledged his possession of the gun in his written statement to the police, it effectively disposed of his argument that there was no evidence of possession. State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374, 2003 N.C. App. LEXIS 2264 (2003), cert. denied, 357 N.C. 465, 586 S.E.2d 462 (2003).

Trial court properly denied defendant's motion to dismiss the possession of a firearm by a convicted felon charge because the state presented ample circumstantial evidence suggesting that defendant had possession of a gun before he was tackled to the ground by police officers. State v. Barksdale, 181 N.C. App. 302, 638 S.E.2d 579, 2007 N.C. App. LEXIS 75 (2007).

Evidence that defendant was the owner of the vehicle, had exclusive possession of the vehicle, the vehicle contained other items belonging to defendant, defendant stated that everything in the cargo area belonged to defendant, and the handgun was wrapped in a man's jacket, was sufficient to support defendant's conviction for possession of a firearm by a felon pursuant to G.S. 14-415.1. State v. Smith, — N.C. App. —, 666 S.E.2d 191, 2008 N.C. App. LEXIS 1661 (2008).

Deputy's testimony that an object fell from defendant's person, a .357 revolved was found where the detective saw the object fall, the victim was known the carry a .40 caliber weapon, the victim was shot with a .40 caliber weapon, and the victim's weapon was never found all supported the denial of defendant's motion to dismiss the charge of possession of a firearm by a felon. State v. Dawkins, — N.C. App. —, 675 S.E.2d 402, 2009 N.C. App. LEXIS 513 (2009).

Applied in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973); State v. Cobb, 284 N.C. 573, 201 S.E.2d 878 (1974); State v. Boyd, 154 N.C. App. 302, 572 S.E.2d 192 (2002); State v. Cunningham, 188 N.C. App. 832, 656 S.E.2d 697, 2008 N.C. App. LEXIS 260 (2008).

Cited in State v. King, 75 N.C. App. 618, 331 S.E.2d 291 (1985); State v. Shea, 80 N.C. App. 705, 343 S.E.2d 437 (1986); State v. Alston, 82 N.C. App. 372, 346 S.E.2d 184 (1986); State v. Alston, 323 N.C. 614, 374 S.E.2d 247 (1988); United States v. Tomlinson, 67 F.3d 508 (4th Cir. 1995); State v. McGirt, 122 N.C. App. 237, 468 S.E.2d 833 (1996); State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996); State v. Cunningham, 344 N.C. 341, 474 S.E.2d 772 (1996); State v. Alston, 131 N.C. App. 514, 508 S.E.2d 315 (1998); United States v. Jones, 195 F.3d 205, 1999 U.S. App. LEXIS 29531 (4th Cir. 1999); State v. Carter, 357 N.C. 345, 584 S.E.2d 792, 2003 N.C. LEXIS 832 (2003); State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004); State v. Hagans, 188 N.C. App. 799, 656 S.E.2d 704, 2008 N.C. App. LEXIS 259 (2008); State v. Little, 191 N.C. App. 655, 664 S.E.2d 432, 2008 N.C. App. LEXIS 1502 (2008).

OPINIONS OF ATTORNEY GENERAL

An ex-felon found in possession of a firearm could be prosecuted under the Felony Firearms Act, even though he may have lawfully possessed it prior to the December 1, 1995, amendment since his restoration of rights under Chapter 13, when read in conjunction with this section, expressly prohibits the possession of firearms regardless of the date of felony conviction; the General Assembly clearly intended this section's application to be retroactive. See opinion of Attorney General to Michael P. Martin, Assistant Chief Counsel, Department of the Treasury Bureau of Alcohol, Tobacco, and Firearms, 1997 N.C.A.G. 52 (8/21/97).

§ 14-415.2: Repealed by Session Laws 1975, c. 870, s. 3.

§ 14-415.3. Possession of a firearm or weapon of mass destruction by persons acquitted of certain crimes by reason of insanity or persons determined to be incapable to proceed prohibited.

(a) It is unlawful for the following persons to purchase, own, possess, or have in the person's custody, care, or control, any firearm or any weapon of mass death and destruction as defined by G.S. 14-288.8(c):

(1) A person who has been acquitted by reason of insanity of any crime set out in G.S. 14-415.1(b) or any violation of G.S. 14-33(b)(1), 14-33(b)(8), or 14-34.

(2) A person who has been determined to lack capacity to proceed as provided in G.S. 15A-1002 for any crime set out in G.S. 14-415.1(b) or any violation of G.S. 14-33(b)(1), 14-33(b)(8), or 14-34.

(b) A violation of this section is a Class H felony. Any firearm or weapon of mass death and destruction lawfully seized for a violation of this section shall be forfeited to the State and disposed of as provided in G.S. 15-11.1. (1994, Ex. Sess., c. 13, s. 1.)

Editor's Note. — Section 14-33(b)(1), referred to in this section, was repealed by Session Laws 1995, c. 507, s. 19.5(b).

§§ 14-415.4 through 14-415.9: Reserved for future codification purposes.

ARTICLE 54B.

Concealed Handgun Permit.

§ 14-415.10. Definitions.

The following definitions apply to this Article:

(1) Carry a concealed handgun. — The term includes possession of a concealed handgun.

(1a) Deployed or deployment. — Any military duty that removes a military permittee from the permittee's county of residence during which time the permittee's permit expires or will expire.

(2) Handgun. — A firearm that has a short stock and is designed to be held and fired by the use of a single hand.

(2a) Military permittee. — A person who holds a permit who is also a member of the armed forces of the United States, the armed forces reserves of the United States, the North Carolina Army National Guard, or the North Carolina Air National Guard.

(3) Permit. — A concealed handgun permit issued in accordance with the provisions of this Article.

(3a) Proof of deployment. — A copy of the military permittee's deployment orders or other written notification from the permittee's command indicating the start and end date of deployment and that orders the permittee to travel outside the permittee's county of residence.

(4) Qualified former sworn law enforcement officer. — An individual who retired from service as a law enforcement officer with a local, State,

campus police, or company police agency in North Carolina, other than for reasons of mental disability, who has been retired as a sworn law enforcement officer two years or less from the date of the permit application, and who satisfies all of the following:

a. Immediately before retirement, the individual was a qualified law enforcement officer with a local, State, or company police agency in North Carolina.

b. The individual has a nonforfeitable right to benefits under the retirement plan of the local, State, or company police agency as a law enforcement officer; or has 20 or more aggregate years of law enforcement service and has retired from a company police agency that does not have a retirement plan; or has 20 or more aggregate years of part-time or auxiliary law enforcement service.

c. The individual is not prohibited by State or federal law from receiving a firearm.

(4a) Qualified retired law enforcement officer. — An individual who meets all of the following qualifications:

a. Retired in good standing from service with a public agency located in the United States as a law enforcement officer, other than for reasons of mental instability.

b. Prior to retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of, any person for any violation of law, and had statutory powers of arrest.

c. Prior to retirement, was regularly employed as a law enforcement officer for a total of 15 years or more, or retired after completing probationary periods of service due to a service-connected disability, as determined by the agency.

d. Has a vested right to benefits under the retirement plan of the agency.

(5) Qualified sworn law enforcement officer. — A law enforcement officer employed by a local, State, campus police, or company police agency in North Carolina who satisfies all of the following:

a. The individual is authorized by the agency to carry a handgun in the course of duty.

b. The individual is not the subject of a disciplinary action by the agency that prevents the carrying of a handgun.

c. The individual meets the requirements established by the agency regarding handguns. (1995, c. 398, s. 1; 1997-274, s. 2; 1997-441, ss. 2, 3; 2005-231, ss. 4, 5; 2005-232, s. 1; 2007-427, s. 1; 2009-307, s. 2.)

Editor's Note. — Subdivision (4a) was originally enacted as subdivision (6) by Session Laws 2007-427, s. 1. It has been renumbered as subdivision (4a) to maintain alphabetical order at the direction of the Revisor of Statutes.

Subdivision (4a), as added by Session Laws 2007-427, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2009-307, s. 2, effective January 1, 2010, and applicable to permit applications and renewal applications submitted on or after that date, added "or has 20 or more aggregate years of part-time or auxiliary law enforcement service" at the end of the first sentence of subdivision (4)b., and made related punctuation changes.

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 417.

§ 14-415.11. Permit to carry concealed handgun; scope of permit.

(a) Any person who has a concealed handgun permit may carry a concealed handgun unless otherwise specifically prohibited by law. The person shall carry the permit together with valid identification whenever the person is carrying a concealed handgun, shall disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun when approached or addressed by the officer, and shall display both the permit and the proper identification upon the request of a law enforcement officer. In addition to these requirements, a military permittee whose permit has expired during deployment may carry a concealed handgun during the 90 days following the end of deployment and before the permit is renewed provided the permittee also displays proof of deployment to any law enforcement officer.

(b) The sheriff shall issue a permit to carry a concealed handgun to a person who qualifies for a permit under G.S. 14-415.12. The permit shall be valid throughout the State for a period of five years from the date of issuance.

(c) A permit does not authorize a person to carry a concealed handgun in the areas prohibited by G.S. 14-269.2, 14-269.3, 14-269.4, and 14-277.2, in an area prohibited by rule adopted under G.S. 120-32.1, in any area prohibited by 18 U.S.C. § 922 or any other federal law, in a law enforcement or correctional facility, in a building housing only State or federal offices, in an office of the State or federal government that is not located in a building exclusively occupied by the State or federal government, a financial institution, or on any other premises, except state-owned rest areas or state-owned rest stops along the highways, where notice that carrying a concealed handgun is prohibited by the posting of a conspicuous notice or statement by the person in legal possession or control of the premises. It shall be unlawful for a person, with or without a permit, to carry a concealed handgun while consuming alcohol or at any time while the person has remaining in his body any alcohol or in his blood a controlled substance previously consumed, but a person does not violate this condition if a controlled substance in his blood was lawfully obtained and taken in therapeutically appropriate amounts.

(d) A person who is issued a permit shall notify the sheriff who issued the permit of any change in the person's permanent address within 30 days after the change of address. If a permit is lost or destroyed, the person to whom the permit was issued shall notify the sheriff who issued the permit of the loss or destruction of the permit. A person may obtain a duplicate permit by submitting to the sheriff a notarized statement that the permit was lost or destroyed and paying the required duplicate permit fee. (1995, c. 398, s. 1; c. 507, s. 22.1(c); c. 509, s. 135.3(e); 1997, c. 238, s. 6; 2000-140, s. 103; 2000-191, s. 5; 2005-232, s. 3.)

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.12. Criteria to qualify for the issuance of a permit.

(a) The sheriff shall issue a permit to an applicant if the applicant qualifies under the following criteria:

(1) The applicant is a citizen of the United States and has been a resident of the State 30 days or longer immediately preceding the filing of the application.

(2) The applicant is 21 years of age or older.

(3) The applicant does not suffer from a physical or mental infirmity that prevents the safe handling of a handgun.

(4) The applicant has successfully completed an approved firearms safety and training course which involves the actual firing of handguns and instruction in the laws of this State governing the carrying of a concealed handgun and the use of deadly force. The North Carolina Criminal Justice Education and Training Standards Commission shall prepare and publish general guidelines for courses and qualifications of instructors which would satisfy the requirements of this subdivision. An approved course shall be any course which satisfies the requirements of this subdivision and is certified or sponsored by:

a. The North Carolina Criminal Justice Education and Training Standards Commission,

b. The National Rifle Association, or

c. A law enforcement agency, college, private or public institution or organization, or firearms training school, taught by instructors certified by the North Carolina Criminal Justice Education and Training Standards Commission or the National Rifle Association.

Every instructor of an approved course shall file a copy of the firearms course description, outline, and proof of certification annually, or upon modification of the course if more frequently, with the North Carolina Criminal Justice Education and Training Standards Commission.

(5) The applicant is not disqualified under subsection (b) of this section.

(b) The sheriff shall deny a permit to an applicant who:

(1) Is ineligible to own, possess, or receive a firearm under the provisions of State or federal law.

(2) Is under indictment or against whom a finding of probable cause exists for a felony.

(3) Has been adjudicated guilty in any court of a felony.

(4) Is a fugitive from justice.

(5) Is an unlawful user of, or addicted to marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802.

(6) Is currently, or has been previously adjudicated by a court or administratively determined by a governmental agency whose decisions are subject to judicial review to be, lacking mental capacity or mentally ill. Receipt of previous consultative services or outpatient treatment alone shall not disqualify an applicant under this subdivision.

(7) Is or has been discharged from the armed forces under conditions other than honorable.

(8) Is or has been adjudicated guilty of or received a prayer for judgment continued or suspended sentence for one or more crimes of violence constituting a misdemeanor, including but not limited to, a violation of a misdemeanor under Article 8 of Chapter 14 of the General Statutes, or a violation of a misdemeanor under G.S. 14-225.2, 14-226.1, 14-258.1, 14-269.2, 14-269.3, 14-269.4, 14-269.6, 14-276.1, 14-277, 14-277.1, 14-277.2, 14-277.3A, 14-281.1, 14-283, 14-288.2, 14-288.4(a)(1) or (2), 14-288.6, 14-288.9, 14-288.12, 14-288.13, 14-288.14, 14-318.2, 14-415.21(b), 14-415.26(d), or former G.S. 14-277.3.

(9) Has had entry of a prayer for judgment continued for a criminal offense which would disqualify the person from obtaining a concealed handgun permit.

(10) Is free on bond or personal recognizance pending trial, appeal, or sentencing for a crime which would disqualify him from obtaining a concealed handgun permit.

(11) Has been convicted of an impaired driving offense under G.S. 20-138.1, 20-138.2, or 20-138.3 within three years prior to the date on which the application is submitted.

(c) An applicant shall not be ineligible to receive a concealed carry permit under subdivision (6) of subsection (b) of this section because of involuntary commitment to mental health services if the individual's rights have been restored under G.S. 122C-54.1. (1995, c. 398, s. 1; c. 509, s. 135.3(d); 1997-441, s. 4; 2007-427, s. 5; 2008-210, s. 3(b); 2009-58, s. 1.)

Editor's Note. — Subdivision (b)(8), as amended by Session Laws 2007-427, s. 5, effective December 1, 2007, is applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2008-210, s. 3(b), effective December 1, 2008, added subsection (c).

Session Laws 2009-58, s. 1, effective June 5, 2009, in subdivision (b)(8), substituted "14-277.3A" for "14-277.3" near the middle, added "or former G.S. 14-277.3" at the end, and made a related stylistic change.

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

For 1997 legislative survey, see 20 Campbell L. Rev. 417.

CASE NOTES

Convicted Felon. — Irregardless of whether a criminal defendant pleads guilty or no contest, where a felony conviction is ultimately adjudicated, the defendant is thereafter a convicted felon for the purposes of G.S. 14-404 and prohibited from obtaining a hand gun. Friend v. State, 169 N.C. App. 99, 609 S.E.2d 473, 2005 N.C. App. LEXIS 535 (2005), cert. denied, — N.C. —, 614 S.E.2d 533 (2005).

Cited in Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999); State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.12A. Firearms safety and training course exemption for qualified sworn law enforcement officers and certain other persons.

(a) A person who is a qualified sworn law enforcement officer or a qualified former sworn law enforcement officer is deemed to have satisfied the requirement under G.S. 14-415.12(a)(4) that an applicant successfully complete an approved firearms safety and training course.

(b) A person who is licensed or registered by the North Carolina Private Protective Services Board under Article 1 of Chapter 74C of the General Statutes as an armed security guard, who also has a firearm registration permit issued by the Board in compliance with G.S. 74C-13, is deemed to have satisfied the requirement under G.S. 14-415.12(a)(4) that an applicant successfully complete an approved firearms safety and training course. (1997-274, s. 1; 2005-211, s. 2.)

Editor's Note. — Session Laws 2005-211, s. 2, which added subsection (b), was effective July 20, 2005, and applicable to permit applications submitted on or after that date.

§ 14-415.13. Application for a permit; fingerprints.

(a) A person shall apply to the sheriff of the county in which the person resides to obtain a concealed handgun permit. The applicant shall submit to the sheriff all of the following:

(1) An application, completed under oath, on a form provided by the sheriff.

(2) A nonrefundable permit fee.

(3) A full set of fingerprints of the applicant administered by the sheriff.

(4) An original certificate of completion of an approved course, adopted and distributed by the North Carolina Criminal Justice Education and Training Standards Commission, signed by the certified instructor of the course attesting to the successful completion of the course by the applicant which shall verify that the applicant is competent with a handgun and knowledgeable about the laws governing the carrying of a concealed handgun and the use of deadly force.

(5) A release, in a form to be prescribed by the Administrative Office of the Courts, that authorizes and requires disclosure to the sheriff of any records concerning the mental health or capacity of the applicant.

(b) The sheriff shall submit the fingerprints to the State Bureau of Investigation for a records check of State and national databases. The State Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation as necessary. The sheriff shall determine the criminal and background history of an applicant also by conducting a check through the National Instant Criminal Background Check System (NICS). The cost of processing the set of fingerprints shall be charged to an applicant as provided by G.S. 14-415.19. (1995, c. 398, s. 1; c. 507, ss. 22.2(a), 22.1(b); 2006-39, s. 2.)

Editor's Note. — Session Laws 2003-284, s 14.5(a) and (b), provides:

"(a) The Department of Justice shall report by January 15 each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the receipts, costs for, and number of criminal records checks performed in connection with applications for concealed weapons permits. The report by the Department of Justice shall also include information on the number of applications received and approved for firearms safety courses.

"(b) The Office of State Budget and Management, in consultation with the Department of Justice, shall study the feasibility of adjusting the fees charged for criminal records checks conducted by the Division of Criminal Information of the Department of Justice as a result of the increase in receipts from criminal records checks. The study shall include an assessment of the Division's operational, personnel, and overhead costs related to providing criminal records checks and how those costs have changed since the prior fiscal year. The Office of State Budget and Management shall report its findings and recommendations to the Chairs of the Senate and House of Representatives Appropriations Committees, the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety, and the Fiscal Research Division on or before March 1, 2004."

Session Laws 2003-284, s. 1.2, provides: "This act shall be known as the "Current Operations and Capital Improvements Appropriations Act of 2003'."

Session Laws 2003-284, s. 49.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2003-2005 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2003-2005 fiscal biennium."

Session Laws 2003-284, s. 49.5 contains a severability clause.

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.14. Application form to be provided by sheriff; information to be included in application form.

(a) The sheriff shall make permit applications readily available at the office of the sheriff or at other public offices in the sheriff's jurisdiction. The permit application shall be in triplicate, in a form to be prescribed by the Administrative Office of the Courts, and shall include the following information with regard to the applicant: name, address, physical description, signature, date of birth, social security number, military status, law enforcement status, and the drivers license number or State identification card number of the applicant if used for identification in applying for the permit.

(b) The permit application shall also contain a warning substantially as follows:

"CAUTION: Federal law and State law on the possession of handguns and firearms differ. If you are prohibited by federal law from possessing a handgun or a firearm, you may be prosecuted in federal court. A State permit is not a defense to a federal prosecution."

(c) Any person or entity who is presented by the applicant or by the sheriff with an original or photocopied release form as described in G.S. 14-415.13(a)(5) shall promptly disclose to the sheriff any records concerning the mental health or capacity of the applicant who signed the form and authorized the release of the records. (1995, c. 398, s. 1; 1997-274, s. 3; 2000-140, s. 103; 2000-191, s. 3.)

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.15. Issuance or denial of permit.

(a) Except as permitted under subsection (b) of this section, within 90 days after receipt of the items listed in G.S. 14-415.13 from an applicant, the sheriff shall either issue or deny the permit. The sheriff may conduct any investigation necessary to determine the qualification or competency of the person applying for the permit, including record checks.

(b) Upon presentment to the sheriff of the items required under G.S. 14-415.13 (a)(1), (2), and (3), the sheriff may issue a temporary permit for a period not to exceed 90 days to a person who the sheriff reasonably believes is in an emergency situation that may constitute a risk of safety to the person, the person's family or property. The applicant may submit proof of a protective order issued under G.S. 50B-3 for the protection of the applicant as evidence of an emergency situation. The temporary permit may not be renewed and may be revoked by the sheriff without a hearing.

(c) A person's application for a permit shall be denied only if the applicant fails to qualify under the criteria listed in this Article. If the sheriff denies the application for a permit, the sheriff shall, within 90 days, notify the applicant in writing, stating the grounds for denial. An applicant may appeal the denial, revocation, or nonrenewal of a permit by petitioning a district court judge of the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal. The determination by the court shall be final. (1995, c. 398, s. 1; 2005-343, s. 1.)

Editor's Note. — Session Laws 2005-343, s. 3, provides: "The Administrative Office of the Courts shall develop a standard informational sheet for plaintiffs issued protective orders under Chapter 50B of the General Statutes that explains the plaintiffs' right to apply for a permit under G.S. 14-415.15."

Session Laws 2005-343, s. 1, which inserted the second sentence of subsection (b), was effective October 1, 2005, and applicable to protective orders issued on or after that date.

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.16. Renewal of permit.

(a) At least 45 days prior to the expiration date of a permit, the sheriff of the county where the permit was issued shall send a written notice to the permittee explaining that the permit is about to expire and including information about the requirements for renewal of the permit. The notice shall be sent by first class mail to the last known address of the permittee. Failure to receive a renewal notice shall not relieve a permittee of requirements imposed in this section for renewal of the permit.

(b) The holder of a permit shall apply to renew the permit within the 90-day period prior to its expiration date by filing with the sheriff of the county in which the person resides a renewal form provided by the sheriff's office, a notarized affidavit stating that the permittee remains qualified under the criteria provided in this Article, a newly administered full set of the permittee's fingerprints, and a renewal fee.

(c) Upon receipt of the completed renewal application, including the permittee's fingerprints, and the appropriate payment of fees, the sheriff shall determine if the permittee remains qualified to hold a permit in accordance with the provisions of G.S. 14-415.12. The permittee's criminal history shall be updated, and the sheriff may waive the requirement of taking another firearms safety and training course. If the permittee applies for a renewal of the permit within the 90-day period prior to its expiration date and if the permittee remains qualified to have a permit under G.S. 14-415.12, the sheriff shall renew the permit. The permit of a permittee who complies with this section shall remain valid beyond the expiration date of the permit until the permittee either receives a renewal permit or is denied a renewal permit by the sheriff.

(d) No fingerprints shall be required for a renewal permit if the applicant's fingerprints were submitted to the State Bureau of Investigation after June 30, 2001, on the Automated Fingerprint Information System (AFIS) as prescribed by the State Bureau of Investigation.

(e) If the permittee does not apply to renew the permit prior to its expiration date, but does apply to renew the permit within 60 days after the permit expires, the sheriff may waive the requirement of taking another firearms safety and training course. This subsection does not extend the expiration date of the permit. (1995, c. 398, s. 1; c. 507, s. 22.2(b); 2000-140, s. 103; 2000-191, s. 1; 2009-307, s. 1.)

Effect of Amendments. — Session Laws 2009-307, s. 1, effective January 1, 2010, and applicable to permit applications and renewal applications submitted on or after that date, rewrote the section.

CASE NOTES

Cited in State v. White, 162 N.C. App. 183, 590 S.E.2d 448, 2004 N.C. App. LEXIS 111 (2004).

§ 14-415.16A. Permit extensions and renewals for deployed military permittees.

(a) A deployed military permittee whose permit will expire during the permittee's deployment, or the permittee's agent, may apply to the sheriff for an extension of the military permittee's permit by providing the sheriff with a copy of the permittee's proof of deployment. Upon receipt of the proof, the sheriff shall extend the permit for a period to end 90 days after the permittee's deployment is scheduled to end. A permit that has been extended under this section shall be valid throughout the State during the period of its extension.

(b) A military permittee's permit that is not extended under subsection (a) of this section and that expires during deployment shall remain valid during the deployment and for 90 days after the end of the deployment as if the permit had not expired. The military permittee may carry a concealed handgun during this period provided the permittee meets all the requirements of G.S. 14-415.11(a).

(c) A military permittee under subsection (a) or subsection (b) of this section shall have 90 days after the end of the permittee's deployment to renew the permit. In addition to the requirements of G.S. 14-415.16, the permittee shall provide to the sheriff proof of deployment. The sheriff shall renew the permit upon receipt of this documentation provided the permittee otherwise remains qualified to hold a concealed handgun permit. (2005-232, s. 2.)

§ 14-415.17. Permit; sheriff to retain and make available to law enforcement agencies a list of permittees.

The permit shall be in a certificate form, as prescribed by the Administrative Office of the Courts, that is approximately the size of a North Carolina drivers license. It shall bear the signature, name, address, date of birth, and social security number of the permittee, and the drivers license identification number used in applying for the permit. The sheriff shall maintain a listing of those persons who are issued a permit and any pertinent information regarding the issued permit. The permit information shall be available upon request to all State and local law enforcement agencies.

Within five days of the date a permit is issued, the sheriff shall send a copy of the permit to the State Bureau of Investigation. The State Bureau of Investigation shall make this information available to law enforcement officers and clerks of court on a statewide system. (1995, c. 398, s. 1.)

§ 14-415.18. Revocation or suspension of permit.

(a) The sheriff of the county where the permit was issued or the sheriff of the county where the person resides may revoke a permit subsequent to a hearing for any of the following reasons:

(1) Fraud or intentional or material misrepresentation in the obtaining of a permit.

(2) Misuse of a permit, including lending or giving a permit to another person, duplicating a permit, or using a permit with the intent to unlawfully cause harm to a person or property.

(3) The doing of an act or existence of a condition which would have been grounds for the denial of the permit by the sheriff.
(4) The violation of any of the terms of this Article.
(5) The applicant is adjudicated guilty of or receives a prayer for judgment continued for a crime which would have disqualified the applicant from initially receiving a permit.

A permittee may appeal the revocation, or nonrenewal of a permit by petitioning a district court judge of the district in which the applicant resides. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal.

(b) The court may suspend a permit as part of and for the duration of any orders permitted under Chapter 50B of the General Statutes. (1995, c. 398, s. 1.)

§ 14-415.19. Fees.

(a) The permit fees assessed under this Article are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer to be remitted or credited by the county finance officer in accordance with the provisions of this section. Except as otherwise provided by this section, the permit fees are as follows:

Application fee	$80.00
Renewal fee	$75.00
Duplicate permit fee	$15.00

The county finance officer shall remit forty-five dollars ($45.00) of each new application fee and forty dollars ($40.00) of each renewal fee assessed under this subsection to the North Carolina Department of Justice for the costs of State and federal criminal record checks performed in connection with processing applications and for the implementation of the provisions of this Article. The remaining thirty-five dollars ($35.00) of each application or renewal fee shall be used by the sheriff to pay the costs of administering this Article and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only.

(a1) The permit fees for a retired sworn law enforcement officer who provides the information required by subdivisions (1) and (2) of this subsection to the sheriff, in addition to any other information required under this Article, are as follows:

Application fee	$45.00
Renewal fee	$40.00

(1) A copy of the officer's letter of retirement from either the North Carolina Teachers' and State Employees' Retirement System or the North Carolina Local Governmental Employees' Retirement System.
(2) Written documentation from the head of the agency where the person was previously employed indicating that the person was neither involuntarily terminated nor under administrative or criminal investigation within six months of retirement.

The county finance officer shall remit the proceeds of the fees assessed under this subsection to the North Carolina Department of Justice to cover the cost of performing the State and federal criminal record checks performed in connection with processing applications and for the implementation of the provisions of this Article.

(b) An additional fee, not to exceed ten dollars ($10.00), shall be collected by the sheriff from an applicant for a permit to pay for the costs of processing the applicant's fingerprints, if fingerprints were required to be taken. This fee shall be retained by the sheriff. (1995, c. 398, s. 1; c. 507, s. 22.1(a); 1997-470, s. 1; 2000-140, s. 103; 2000-191, s. 2; 2003-379, s. 1.)

Editor's Note. — Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 15.5(a) and (b), provide: "(a) The Department of Justice shall report by January 15 each year to the Joint Legislative Commission on Governmental Operations, the Chairs of the Senate and House of Representatives Appropriations Committees, and the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety on the receipts, costs for, and number of criminal record checks performed in connection with applications for concealed weapons permits. The report by the Department of Justice shall also include information on the number of applications received and approved for firearms safety courses."

"(b) The Office of State Budget and Management, in consultation with the Department of Justice, shall study the feasibility of adjusting the fees charged for criminal record checks conducted by the Division of Criminal Information of the Department of Justice as a result of the increase in receipts from criminal record checks. The study shall include an assessment of the Division's operational, personnel, and overhead costs related to providing criminal record checks and how those costs have changed since the prior fiscal year. The Office of State Budget and Management shall report its findings and recommendations to the Chairs of the Senate and House of Representatives Appropriations Committees, the Chairs of the Senate and House of Representatives Appropriations Subcommittees on Justice and Public Safety, and the Fiscal Research Division on or before March 1, 2006."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

§ 14-415.20. No liability of sheriff.

A sheriff who issues or refuses to issue a permit to carry a concealed handgun under this Article shall not incur any civil or criminal liability as the result of the performance of the sheriff's duties under this Article. (1995, c. 398, s. 1.)

§ 14-415.21. Violations of this Article punishable as an infraction and a Class 2 misdemeanor.

(a) A person who has been issued a valid permit who is found to be carrying a concealed handgun without the permit in the person's possession or who fails to disclose to any law enforcement officer that the person holds a valid permit and is carrying a concealed handgun, as required by G.S. 14-415.11, shall be guilty of an infraction for the first offense and shall be punished in accordance with G.S. 14-3.1. In lieu of paying a fine for the first offense, the person may surrender the permit. Subsequent offenses for failing to carry a valid permit or for failing to make the necessary disclosures to a law enforcement officer as required by G.S. 14-415.11 shall be punished in accordance with subsection (b) of this section.

(b) A person who violates the provisions of this Article other than as set forth in subsection (a) of this section is guilty of a Class 2 misdemeanor. (1995, c. 398, s. 1.)

§ 14-415.22. Construction of Article.

This Article shall not be construed to require a person who may carry a concealed handgun under the provisions of G.S. 14-269(b) to obtain a concealed handgun permit. The provisions of this Article shall not apply to a person who may lawfully carry a concealed weapon or handgun pursuant to G.S. 14-269(b). A person who may lawfully carry a concealed weapon or handgun pursuant to

G.S. 14-269(b) shall not be prohibited from carrying the concealed weapon or handgun on property on which a notice is posted prohibiting the carrying of a concealed handgun, unless otherwise prohibited by statute. (1995, c. 398, s. 1; 1997-238, s. 5.)

§ 14-415.23. Statewide uniformity.

It is the intent of the General Assembly to prescribe a uniform system for the regulation of legally carrying a concealed handgun. To insure uniformity, no political subdivisions, boards, or agencies of the State nor any county, city, municipality, municipal corporation, town, township, village, nor any department or agency thereof, may enact ordinances, rules, or regulations concerning legally carrying a concealed handgun. A unit of local government may adopt an ordinance to permit the posting of a prohibition against carrying a concealed handgun, in accordance with G.S. 14-415.11(c), on local government buildings, their appurtenant premises, and parks. (1995, c. 398, s. 1.)

Legal Periodicals. — For article, "Public Endangerment or Personal Liberty? North Carolina Enacts a Liberalized Concealed Handgun Statute," see 74 N.C.L. Rev. 2214 (1996).

§ 14-415.24. Reciprocity; out-of-state handgun permits.

(a) A valid concealed handgun permit or license issued by another state is valid in North Carolina if that state grants the same right to residents of North Carolina who have valid concealed handgun permits issued pursuant to this Article in their possession while carrying concealed weapons in that state.

(b) The Attorney General shall maintain a registry of states that meet the requirements of this section on the North Carolina Criminal Information Network and make the registry available to law enforcement officers for investigative purposes.

(c) Every 12 months after the effective date of this subsection, the Department of Justice shall make written inquiry of the concealed handgun permitting authorities in each other state as to: (i) whether a North Carolina resident may carry a concealed handgun in their state based upon having a valid North Carolina concealed handgun permit and (ii) whether a North Carolina resident may apply for a concealed handgun permit in that state based upon having a valid North Carolina concealed handgun permit. The Department of Justice shall attempt to secure from each state permission for North Carolina residents who hold a valid North Carolina concealed handgun permit to carry a concealed handgun in that state, either on the basis of the North Carolina permit or on the basis that the North Carolina permit is sufficient to permit the issuance of a similar license or permit by the other state. (2003-199, s. 1.)

§ 14-415.25. Exemption from permit requirement.

Law enforcement officers and qualified retired law enforcement officers authorized by federal law to carry a concealed handgun pursuant to section 926B or 926C of Title 18 of the United States Code, who are in compliance with the requirements of those sections, are exempt from obtaining the permit described in G.S. 14-415.11. (2007-427, s. 3.)

Editor's Note. — Session Laws 2007-427, s. 7, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

§ 14-415.26. Certification of qualified retired law enforcement officers.

(a) In lieu of obtaining a permit under this Article, a qualified retired law enforcement officer may apply to the North Carolina Criminal Justice Education and Training Standards Commission for certification. The application shall include all of the following:

(1) Verification of completion of the firearms qualification criteria established by the Commission.
(2) Photographic identification indicating retirement status issued by the agency from which the applicant retired from service.
(3) Any other application information required by the Commission.

(b) The Commission shall include with the certification a notice of the limitations applicable under federal or State law to the concealed carry of firearms in this State. The failure to receive a notification under this subsection shall not be a defense to any offense or violation of applicable State or federal laws.

(b1) The Commission shall coordinate with local and State law enforcement officers and with the community college system to provide multiple firearms qualification sites throughout the State where a qualified retired law enforcement officer may satisfy the firearms qualification criteria required for certification under this section.

(c) The Commission shall not incur any civil or criminal liability as the result of the performance of its duties under this section.

(d) It shall be unlawful for an applicant, or any person assisting an applicant, to make a willful and intentional misrepresentation on any form or application submitted to the Commission. A violation of this subsection shall be a Class 2 misdemeanor, and shall result in the immediate revocation of any certification issued by the Commission. A person convicted under this subsection shall be ineligible for certification under this section, or from obtaining a concealed carry permit under State law.

(e) This section shall not exempt any individual engaged in the private protective services profession in this State from fulfilling the registration and training requirements in Chapter 74C of the General Statutes. (2007-427, s. 4; 2009-546, s. 1.)

Editor's Note. — Session Laws 2007-427, s. 7, made this section effective December 1, 2007, and applicable to offenses committed on or after that date.

Effect of Amendments. — Session Laws 2009-546, s. 1, effective August 28, 2009, added subsection (b1).

Article 55.

Regulation of Certain Reptiles.

§ 14-416. Mishandling of certain reptiles declared public nuisance and criminal offense.

The intentional or negligent exposure of other human beings to unsafe contact with venomous reptiles, large constricting snakes, or crocodilians is essentially dangerous and injurious and detrimental to public health, safety and welfare, and is therefore declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this Article. (1949, c. 1084, s. 1; 2009-344, s. 1.)

Editor's Note. — Session Laws 2009-344, s. 1, substituted "Regulation of Certain Reptiles" for "Handling of Poisonous Reptiles" in the Article heading.

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, in the section catchline, substituted "Mishandling of certain reptiles" for "Handling of poisonous reptiles"; substituted "or negligent exposure of other human beings to unsafe contact with venomous reptiles, large constricting snakes, or crocodilians is" for "exposure of human beings to contact with reptiles of a venomous nature being" and substituted "and is therefore" for "the indulgence in and inducement to such exposure is hereby" near the end.

§ 14-417. Regulation of ownership or use of venomous reptiles.

(a) It shall be unlawful for any person to own, possess, use, transport, or traffic in any venomous reptile that is not housed in a sturdy and secure enclosure. Permanent enclosures shall be designed to be escape-proof, bite-proof, and have an operable lock. Transport containers shall be designed to be escape-proof and bite-proof.

(b) Each enclosure shall be clearly and visibly labeled "Venomous Reptile Inside" with scientific name, common name, appropriate antivenom, and owner's identifying information noted on the container. A written bite protocol that includes emergency contact information, local animal control office, the name and location of suitable antivenom, first aid procedures, and treatment guidelines, as well as an escape recovery plan must be within sight of permanent housing, and a copy must accompany the transport of any venomous reptile.

(c) In the event of an escape of a venomous reptile, the owner or possessor of the venomous reptile shall immediately notify local law enforcement. (1949, c. 1084, s. 2; 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote subsection (a) and added subsections (b) and (c).

§ 14-417.1. Regulation of ownership or use of large constricting snakes.

(a) As used in this Article, large constricting snakes shall mean: Reticulated Python, Python reticulatus; Burmese Python, Python molurus; African Rock Python, Python sebae; Amethystine Python, Morelia amethistina; and Green Anaconda, Eunectes murinus; or any of their subspecies or hybrids.

(b) It shall be unlawful for any person to own, possess, use, transport, or traffic in any of the large constricting snakes that are not housed in a sturdy and secure enclosure. Permanent enclosures shall be designed to be escape-proof and shall have an operable lock. Transport containers shall be designed to be escape-proof.

(c) Each enclosure shall be labeled clearly and visibly with the scientific name, common name, number of specimens, and owner's identifying information. A written safety protocol and escape recovery plan shall be within sight of permanent housing, and a copy shall accompany the transport of any of the large constricting snakes. The safety protocol shall include emergency contact information, identification of the local animal control office, and first aid procedures.

(d) In the event of an escape of a large constricting snake, the owner or possessor shall immediately notify local law enforcement. (2009-344, s. 1.)

Editor's Note. — Session Laws 2009-344, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-417.2. Regulation of ownership or use of crocodilians.

(a) All crocodilians, excluding the American alligator, shall be regulated under this Article. It shall be unlawful for any person to own, possess, use, transport, or traffic in any crocodilian that is not housed in a sturdy and secure enclosure. Permanent enclosures shall be designed to be escape-proof and have a fence of sufficient strength to prevent contact between an observer and the crocodilian and shall have an operable lock. Transport containers shall be designed to be escape-proof.

(b) A written safety protocol and escape recovery plan shall be within sight of permanent housing, and a copy must accompany the transport of any crocodilian.

(c) In the event of the escape of a crocodilian, the owner or possessor shall immediately notify local law enforcement. (2009-344, s. 1.)

Editor's Note. — Session Laws 2009-344, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.

(a) It shall be unlawful for any person to handle any reptile regulated under this Article in a manner that intentionally or negligently exposes another person to unsafe contact with the reptile.

(b) It shall be unlawful for any person to intentionally or negligently suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself in an unsafe manner to any reptile regulated under this Article.

(c) Safe and responsible handling of reptiles for purposes of animal husbandry, exhibition, training, transport, and education is permitted under this section. (1949, c. 1084, s. 3; 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote the section.

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; disposition of reptiles.

In any case in which any law-enforcement officer or animal control officer has probable cause to believe that any of the provisions of this Article have been or are about to be violated, it shall be the duty of the officer and the officer is authorized, empowered, and directed to immediately investigate the violation or impending violation and to seize the reptile or reptiles involved, and the officer is authorized and directed to deliver: (i) a reptile believed to be venomous to the North Carolina State Museum of Natural Sciences or to its designated representative for examination for the purpose of ascertaining whether the reptile is regulated under this Article; and, (ii) a reptile believed to be a large constricting snake or crocodilian to the North Carolina Zoological Park for the purpose of ascertaining whether the reptile is regulated under this Article. If the Museum or the Zoological Park or their designated representatives find that a seized reptile is a venomous reptile, large constricting snake, or crocodilian regulated under this Article, the Museum or the Zoological Park or their designated representative shall determine final disposition of the reptile in a manner consistent with the safety of the public. If the Museum or the Zoological Park or their designated representatives find that the reptile is not a venomous reptile, large constricting snake, or crocodilian regulated under this Article, and either no criminal warrants or indictments are initiated in connection with the reptile within 10 days of initial seizure, or a court of law determines that the reptile is not being owned, possessed, used, transported, or trafficked in violation of this Article, then it shall be the duty of the law enforcement officer to return the reptile or reptiles to the person from whom they were seized within 15 days. (1949, c. 1084, s. 4; 1981, c. 203, s. 1; 1993, c. 561, s. 116(g); 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote the section.

§ 14-420. Arrest of persons violating provisions of Article.

If an examination made by the North Carolina State Museum of Natural Sciences or the North Carolina Zoological Park or their designated representatives conducted pursuant to this Article shows that the reptile is a venomous reptile, large constricting snake, or crocodilian subject to this Article, it shall be the duty of the officer making the seizure with probable cause to believe that the reptile is being owned, possessed, used, transported, or trafficked in violation of this Article, to arrest all persons violating any of the provisions of this Article. (1949, c. 1084, s. 5; 1981, c. 203, s. 2; 1993, c. 561, s. 116(h); 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote the section.

§ 14-421. Exemptions from provisions of Article.

This Article shall not apply to the possession, exhibition, or handling of reptiles by employees or agents of duly constituted veterinarians, zoos, serpentariums, museums, laboratories, educational or scientific institutions, public and private, in the course of their educational or scientific work, or Wildlife Damage Control Agents in the course of the work for which they are approved by the Wildlife Resources Commission. (1949, c. 1084, s. 6; 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, inserted "veterinarians, zoos, serpentariums" and "public and private" near the middle, and added "or Wildlife Damage Control Agents in the course of the work for which they are approved by the Wildlife Resources Commission" at the end.

§ 14-422. Criminal penalties and civil remedies for violation.

(a) Any person violating any of the provisions of this Article shall be guilty of a Class 2 misdemeanor.

(b) If any person, other than the owner of a venomous reptile, large constricting snake, or crocodilian, the owner's agent, employee, or a member of the owner's immediate family, suffers a life threatening injury or is killed as the result of a violation of this Article, the owner of the reptile shall be guilty of a Class A1 misdemeanor. This subsection shall not apply to violations that result from incidents that could not have been prevented or avoided by the owner's exercise of due care or foresight, such as natural disasters or other acts of God, or in the case of thefts of the reptile from the owner.

(c) Any person intentionally releasing into the wild a nonnative venomous reptile, a large constricting snake, or a crocodilian shall be guilty of a Class A1 misdemeanor.

(d) Violations of this Article as set forth in subsections (b) or (c) of this section shall constitute wanton conduct within the meaning of G.S. 1D-5(7) and subject the violator to punitive damages in any civil action that may be filed as a result of the violator's actions. (1949, c. 1084, s. 7; 1969, c. 1224, s. 3; 1993, c. 539, s. 289; 1994, Ex. Sess., c. 24, s. 14(c); 2009-344, s. 1.)

Effect of Amendments. — Session Laws 2009-344, s. 1, effective December 1, 2009, and applicable to offenses committed on or after that date, rewrote the section.

ARTICLE 56.

Debt Adjusting.

§ 14-423. Definitions.

As used in this Article, the following definitions apply:

(1) "Debt adjuster" means a person who engages in, attempts to engage in, or offers to engage in the practice or business of debt adjusting.

(2) "Debt adjusting" means entering into or making a contract, express or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business and that person, for consideration, agrees to distribute, or distributes the same among certain specified creditors in accordance with a plan agreed upon. Debt adjusting includes the business or practice of any person who holds himself out as acting or offering or attempting to act for consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or in any way altering the terms of payment of any debt of a debtor, and to that end receives money or other property from the debtor, or on behalf of the debtor, for the payment to, or distribution among, the creditors of the debtor. Debt adjusting also includes the business or practice of debt settlement or foreclosure assistance whereby any person holds himself or herself out as acting for consideration as an intermediary between a debtor and the debtor's creditors for the purpose of reducing, settling, or altering the terms of the payment of any debt of the debtor, whether or not the person distributes the debtor's funds or property among the creditors, and receives a fee or other consideration for reducing, settling, or altering the terms of the payment of the debt in advance of the debt settlement having been completed or in advance of all the services agreed to having been rendered in full.

(3) "Debtor" means an individual who resides in North Carolina, and includes two or more individuals who are jointly and severally, or jointly or severally, indebted to a creditor or creditors.

(3a) "Nominal consideration" means a fee or a contribution to cover the cost of administering a debt management plan not to exceed forty dollars ($40.00) for origination or setup of the debt management plan and ten percent (10%) of the monthly payment disbursed under the debt management plan, not to exceed forty dollars ($40.00) per month.

(4) "Person" means an individual, firm, partnership, limited partnership, corporation, or association. (1963, c. 394, s. 1; 2005-408, s. 2; 2007-79, s. 1.)

Editor's Note. — Session Laws 2005-408, s. 4, as amended by Session Laws 2007-79, s. 1, provides that subdivision (2), as added by s. 2 of the act is effective December 31, 2005. Session Laws 2005-408, s. 4, also provided for the act to expire October 1, 2007, but that sunset provision was repealed by Session Laws 2007-79, s. 1, effective September 1, 2007.

§ 14-424. Engaging, etc., in business of debt adjusting a misdemeanor.

If any person shall engage in, or offer to or attempt to, engage in the business or practice of debt adjusting, or if any person shall hereafter act, offer to act, or attempt to act as a debt adjuster, he shall be guilty of a Class 2 misdemeanor. (1963, c. 394, s. 2; 1969, c. 1224, s. 6; 1993, c. 539, s. 290; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-425. Enjoining practice of debt adjusting; appointment of receiver for money and property employed.

The superior court shall have jurisdiction, in an action brought in the name of the State by the Attorney General or the district attorney of the prosecutorial district as defined in G.S. 7A-60, to enjoin, as an unfair or deceptive trade practice, the continuation of any debt adjusting business or the offering of any debt adjusting services. The Attorney General or the district attorney who brings an action under this section may appoint a receiver for the property and money employed in the transaction of business by such person as a debt adjuster, to ensure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster, and has not been paid to the creditors of the debtors. The court may also assess civil penalties under G.S. 75-15.2 and award attorneys' fees to the State under G.S. 75-16.1. (1963, c. 394, s. 3; 1973, c. 47, s. 2; 1987 (Reg. Sess., 1998), c. 1037, s. 49; 2005-408, s. 3; 2007-79, s. 1.)

Editor's Note. — Session Laws 2005-408, s. 4, provided that the amendments made by s. 3 of that act were to expire October 1, 2007, but that sunset provision was repealed by Session Laws 2007-79, s. 1, effective September 1, 2007.

§ 14-426. Certain persons and transactions not deemed debt adjusters or debt adjustment.

The following individuals or transactions shall not be deemed debt adjusters or as being engaged in the business or practice of debt adjusting:

(1) Any person or individual who is a regular full-time employee of a debtor, and who acts as an adjuster of his employer's debts.

(2) Any person or individual acting pursuant to any order or judgment of a court, or pursuant to authority conferred by any law of this State or of the United States.

(3) Any person who is a creditor of the debtor, or an agent of one or more creditors of the debtor, and whose services in adjusting the debtor's debts are rendered without cost to the debtor.

(4) Any person who at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for the services rendered in adjusting such debts.

(5) An intermittent or casual adjustment of a debtor's debts, for compensation, by an individual or person who is not a debt adjuster or who is not engaged in the business or practice of debt adjusting, and who does not hold himself out as being regularly engaged in debt adjusting.

(6) An attorney-at-law licensed to practice in this State who is not employed by a debt adjuster.

(7) An organization that provides credit counseling, education, and debt management services to debtors if the organization also does all of the following:
  a. Provides individualized credit counseling and budgeting assistance to the debtor without charge prior to the debtor's enrollment in a debt management plan provided by the organization.
  b. Determines that the debtor has the financial ability to make payments to complete the debt management plan and that the plan is suitable for the debtor.
  c. Disburses the debtor's funds to creditors pursuant to a debt management plan that the debtor has paid for with no more than nominal consideration and has agreed to in writing.
  d. Provides to the debtor, periodically and on no less than a quarterly basis, an individualized accounting for the most recent period of all of the debtor's payments and disbursements under the debt management plan and all charges paid by the debtor.
  e. Does not directly or indirectly require the debtor to purchase other services or materials as a condition to participating in the debt management plan.
  f. Does not receive a payment, commission, or other benefit for referring the debtor to a provider of services.
  g. Is accredited by an accrediting organization that the Commissioner of Banks approves as being independent and nationally recognized for providing accreditation to organizations that provide credit counseling and debt management services. (1963, c. 394, s. 4; 2005-408, s. 1; 2007-79, s. 1.)

Editor's Note. — Session Laws 2005-408, s. 4, provided that the amendments made by s. 1 of that act, which were effective October 1, 2005, were to expire October 1, 2007, but that sunset provision was repealed by Session Laws 2007-79, s. 1, effective September 1, 2007.

Article 57.

Use, Sale, etc., of Glues Releasing Toxic Vapors.

§§ 14-427 through 14-431: Repealed by Session Laws 1969, c. 970, s. 11.

Cross References. — For present provisions as to use, sale, etc., of glues releasing toxic vapors, see G.S. 90-113.9 through 90-113.11.

Article 58.

Records, Tapes and Other Recorded Devices.

§ 14-432. Definitions.

The following definitions apply in this Article:

(1) "Article" means the tangible medium upon which sounds or images are recorded or otherwise stored, including any original phonograph record, disc, tape, audio or video cassette, wire, film, or other medium now known or later developed on which sounds or images, or both, can be recorded or otherwise stored, or any copy or reproduction which duplicates, in whole or in part, the original.

(2) "Fixed" means that the work has been recorded in a tangible medium of expression, by or under the authority of the author, and its embodiment is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds or images, or both, that are being transmitted is "fixed" for the purposes of this section if a fixation of the work is being made simultaneously with its transmission.

(3) "Owner" means the person who owns the sounds fixed in any master phonograph record, master disc, master tape, master film, or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films, or other articles on which sound is or can be recorded and from which the transferred sounds are directly or indirectly derived, or the person who owns the rights to record or authorize the recording of a live performance. (1973, c. 1279, s. 1; 1989, c. 589, s. 1; 2003-159, s. 1.)

§ 14-433. Recording of live performances or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.

(a) It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, such article on which sounds are so transferred, without consent of the, owner.

(2) Manufacture, distribute, wholesale or transport any article for profit, or possess for these purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a)(1) of this section.

(3) Recodified as G.S. 14-433(a1)(1) by Session Laws 2003-159, s. 2.

(4) Recodified as G.S. 14-433(a1)(2) by Session Laws 2003-159, s. 2.

(a1) It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live performance, with the intent to sell or cause to be sold, or to use or cause to be used for profit through public performance, the article on which sounds are so transferred, without consent of the owner.

(2) Manufacture, distribute, transport or wholesale any article for profit, or possess for those purposes with the knowledge that the sounds recorded on the article were transferred in violation of subdivision (a1)(1) of this section.

(b) Subdivisions (a)(1) and (a)(2) of this section shall apply only to sound recordings that were initially fixed prior to February 15, 1972. Federal copyright law, 17 U.S.C. § 101 et seq., preempts State prosecution of the acts described in subdivisions (a)(1) and (a)(2) with respect to sound recordings initially fixed on or after February 15, 1972.

(c) This section shall not apply to any person engaged in webcasting or radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with webcast, broadcast or telecast transmission or related uses, or for archival purposes. An Internet service provider who is solely providing a conduit for access to the Internet, shall not be deemed to be using, or causing to be used, recordings that may be transferred over the Internet by third parties in violation of this Article. (1973, c. 1279, s. 1; 1989, c. 589, s. 1; 2003-159, s. 2.)

§ 14-434. Retailing, etc., of certain recorded devices unlawful.

It shall be unlawful for any person to knowingly retail, advertise or offer for sale or resale, sell or resell or cause the sale or resale, rent or cause to rent, or possess for any of these purposes any article that has been produced, manufactured, distributed, or acquired at wholesale in violation of any provision of this Chapter. (1973, c. 1279, s. 1, 1989, c. 589, s. 1.)

§ 14-435. Recorded devices to show true name and address of manufacturer.

(a) A person is guilty of failure to disclose the origin of an article when, for commercial advantage or private financial gain, the person knowingly advertises or offers for sale or resale, or sells or resells, or causes the rental, sale, or resale, or rents, or manufactures, or possesses for these purposes, any article, the packaging, cover, box, jacket, or label of which does not clearly and conspicuously disclose the actual true name and address of the manufacturer of the article and the name of the actual author, artist, performer, producer, programmer, or group.

(b) This section does not require the original manufacturer or authorized licensees of software producers to disclose the contributing authors or programmers. As used in this section, the term “manufacturer” shall not include the manufacturer of the article’s packaging, cover, box, jacket, or label itself. (1973, c. 1279, s. 1; 1989, c. 589, s. 1; 2003-159, s. 3.)

CASE NOTES

Payment of Attorneys’ Fees. — Plaintiffs who filed federal claim to recover statutory damages for the infringing activity of defendants, justifiably seeking protection of their rights under the law, were entitled to attorney’s fees where defendants were convicted in state court for failure to show the true name and address of the manufacturer on packaging on certain sound recordings; defendants’ criminal activity supported a finding of bad faith and wilfulness in the infringement of plaintiff’s copyrights. Arista Records v. Tysinger, 867 F. Supp. 345 (M.D.N.C. 1994).

Cited in Durham Hous. Auth. v. Partee, 189 N.C. App. 388, 658 S.E.2d 69, 2008 N.C. App. LEXIS 535 (2008).

§ 14-436. Recorded devices; civil action for damages.

Any owner of an article as defined in this Article whose work is allegedly the subject of a violation of G.S. 14-433 or G.S. 14-434, shall have a cause of action in the courts of this State for all damages resulting from the violation, including actual, compensatory and incidental damages. (1973, c. 1279, s. 1; 1989, c. 589, s. 1; 2003-159, s. 4.)

§ 14-437. Violation of Article; penalties.

(a) Every individual act in contravention of the provisions of this Article shall constitute a Class 1 misdemeanor, except that the offense is a Class I felony with a maximum fine of one hundred fifty thousand dollars ($150,000) if (i) the offense involves at least 100 unauthorized articles during any 180-day period, or (ii) is a third or subsequent conviction for an offense that involves at least 26 unauthorized articles during any 180-day period.

(b) If a person is convicted of any violation under this Article, the court, in its judgment of conviction, shall order the forfeiture and destruction or other disposition of:

(1) All infringing articles; and

(2) All implements, devices and equipment used or intended to be used in the manufacture of the infringing articles. (1973, c. 1279, s. 1; 1989, c. 589, s. 1; 1993, c. 539, ss. 291, 1246; 1994, Ex. Sess., c. 24, s. 14(c); 2003-159, s. 5.)

CASE NOTES

Payment of Attorneys' Fees. — Plaintiffs who filed federal claim to recover statutory damages for the infringing activity of defendants, justifiably seeking protection of their rights under the law, were entitled to attorney's fees where defendants were convicted in state court for failure to show the true name and address of the manufacturer on packaging on certain sound recordings; defendants' criminal activity supported a finding of bad faith and wilfulness in the infringement of plaintiff's copyrights. Arista Records v. Tysinger, 867 F. Supp. 345 (M.D.N.C. 1994).

§§ 14-438 through 14-440: Reserved for future codification purposes.

ARTICLE 58A.

Audiovisual Recordings.

§ 14-440.1. Unlawful operation of an audiovisual recording device.

(a) Definitions. — The following definitions apply to this section:

(1) "Audiovisual recording device" means a digital or analog video camera, or any other technology or device now known or later developed, capable of recording, copying, or transmitting a motion picture, or any part thereof, regardless of whether audiovisual recording is the sole or primary purpose of the device.

(2) "Motion picture theater" means a movie theater, screening room, or other venue that is being utilized primarily for the exhibition of a motion picture at the time of the offense.

(a1) Misdemeanor Offense. — Any person who knowingly operates or attempts to operate a device capable of functioning as a digital or analog photographic camera for the purpose of recording, copying, or transmitting a part of a motion picture not greater than one image, without the written consent of the motion picture theater owner shall be guilty of a Class 1 misdemeanor.

(b) Felony Offense. — Any person who knowingly operates or attempts to operate an audiovisual recording device in a motion picture theater to transmit, record, or otherwise make a copy of a motion picture, or any part thereof, without the written consent of the motion picture theater owner shall be guilty of a felony, punishable as provided in subsection (c) of this section.

(c) Penalty. — A violation of subsection (b) of this section is punishable as follows:

(1) Unless the conduct is covered under some other provision of law providing greater punishment, any person convicted of a violation of subsection (b) of this section is guilty of:
   - a. A Class I felony, if the violation is a first offense under this section, with a minimum fine of two thousand five hundred dollars ($2,500).
   - b. A Class I felony, if the violation is a second or subsequent offense under this section, with a minimum fine of five thousand dollars ($5,000).

(2) If a person is convicted of a violation of subsection (b) of this section, the court, in its judgment of conviction, shall order the forfeiture and destruction or other disposition of the following:
   - a. All unauthorized copies of motion pictures or other audiovisual works, or any parts thereof.
   - b. All implements, devices, and equipment used or intended to be used in connection with the offense.

(d) Immunity of Certain Persons. — The owner or lessee of a motion picture theater, or the authorized agent or employee of the owner or lessee, who detains any person shall not be held civilly liable for claims arising out of such detention, when the detention is upon the premises of the motion picture theater or in a reasonable proximity thereto, is in a reasonable manner for a reasonable length of time, and, if in detaining the person, the owner, lessee, agent, or employee had, at the time of the detention, probable cause to believe that the person committed an offense under this section. If the person being detained by the owner, lessee, agent, or employee is a minor under the age of 18 years, the owner, lessee, agent, or employee shall call or notify, or make a reasonable effort to call or notify, the parent or guardian of the minor during the period of detention. An owner, lessee, agent, or employee who makes a reasonable effort to call or notify the parent or guardian of the minor shall not be held civilly liable for failing to notify the parent or guardian of the minor.

(e) Authorized Activities. — This section does not prevent any lawfully authorized investigative, protective, law enforcement, or intelligence gathering employee or agent of a local, State, or federal government from operating any audiovisual recording device in a motion picture theater, as part of lawfully authorized investigative, protective, law enforcement, or intelligence gathering activities. (2005-301, s. 1; 2007-463, s. 1; 2007-484, s. 43.7J.)

Editor's Note. — This section, as amended by Session Laws 2007-463, s. 1, effective December 1, 2007, is applicable to offenses committed on or after that date.

§§ 14-441, 14-442: Reserved for future codification purposes.

ARTICLE 59.

Public Intoxication.

§ 14-443. Definitions.

As used in this Article:

(1) "Alcoholism" is the state of a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted; and

(2) "Intoxicated" is the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol; and

(3) A "public place" is a place which is open to the public, whether it is publicly or privately owned. (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 412, s. 4; c. 747, s. 66.)

§ 14-444. Intoxicated and disruptive in public.

(a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

(1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or

(2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or

(3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or

(4) Cursing or shouting at or otherwise rudely insulting others, or

(5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a Class 3 misdemeanor. Notwithstanding the provisions of G.S. 7A-273(1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense. (1977, 2nd Sess., c. 1134, s. 1; 1993, c. 539, s. 292; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Mere public intoxication, standing alone, is no longer unlawful, and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in subdivisions (1)-(5) of subsection (a). State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Section Not Violated. — This statute, making it unlawful for any person in a public place to be intoxicated and disruptive by cursing or shouting at or otherwise rudely insulting others, was not violated by defendant's conduct in standing in a motel parking lot in an intoxicated condition, looking up toward the sky, and shouting "God is alive," and "God is in heaven," and other words which sounded like a foreign language. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Applied in Craven County Hosp. Corp. v. Lenoir County, 75 N.C. App. 453, 331 S.E.2d 690 (1985).

Cited in State v. Baker, 77 N.C. App. 465, 335 S.E.2d 56 (1985).

§ 14-445. Defense of alcoholism.

(a) It is a defense to a charge of being intoxicated and disruptive in a public place that the defendant suffers from alcoholism.

(b) The presiding judge at the trial of a defendant charged with being intoxicated and disruptive in public shall consider the defense of alcoholism even though the defendant does not raise the defense, and may request additional information on whether the defendant is suffering from alcoholism.

(c) Whenever any person charged with committing a misdemeanor under G.S. 14-444 enters a plea to the charge, the court may, without entering a judgment, defer further proceedings for up to 15 days to determine whether the person is suffering from alcoholism.

(d) If he believes it will be of value in making his determination, the district court judge may direct an alcoholism court counselor, if available, to conduct a prehearing review of the alleged alcoholic's drinking history in order to gather additional information as to whether the defendant is suffering from alcoholism. (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 519, s. 1.)

CASE NOTES

Cited in State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§ 14-446. Disposition of defendant acquitted because of alcoholism.

If a defendant is found not guilty of being intoxicated and disruptive in a public place because he suffers from alcoholism, the court in which he was tried may retain jurisdiction over him for up to 15 days to determine whether he is a substance abuser and dangerous to himself or others as provided in G.S. 122C-281. The trial judge may make that determination at the time the defendant is found not guilty or he may require the defendant to return to court for the determination at some later time within the 15-day period. (1977, 2nd Sess., c. 1134, s. 1; 1985, c. 589, s. 6.)

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Cited in State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§ 14-447. No prosecution for public intoxication.

(a) No person may be prosecuted solely for being intoxicated in a public place. A person who is intoxicated in a public place and is not disruptive may be assisted as provided in G.S. 122C-301.

(b) If, after arresting a person for being intoxicated and disruptive in a public place, the law-enforcement officer making the arrest determines that the person would benefit from the care of a shelter or health-care facility as provided by G.S. 122C-301, and that he would not likely be disruptive in such a facility, the officer may transport and release the person to the appropriate facility and issue him a citation for the offense of being intoxicated and disruptive in a public place. This authority to arrest and then issue a citation is granted as an exception to the requirements of G.S. 15A-501(2). (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 519, s. 2; 1985, c. 589, s. 7.)

CASE NOTES

Mere public intoxication, standing alone, is no longer unlawful, and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in G.S. 14-444(a)(1)-(5). State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Those who are intoxicated but not disruptive may be assisted but not arrested. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§§ 14-448 through 14-452: Reserved for future codification purposes.

ARTICLE 60.

Computer-Related Crime.

§ 14-453. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Access" means to instruct, communicate with, cause input, cause output, cause data processing, or otherwise make use of any resources of a computer, computer system, or computer network.

(1a) "Authorization" means having the consent or permission of the owner, or of the person licensed or authorized by the owner to grant consent or permission to access a computer, computer system, or computer network in a manner not exceeding the consent or permission.

(1b) "Commercial electronic mail" means messages sent and received electronically consisting of commercial advertising material, the principal purpose of which is to promote the for-profit sale or lease of goods or services to the recipient.

(2) "Computer" means an internally programmed, automatic device that performs data processing or telephone switching.

(3) "Computer network" means the interconnection of communication systems with a computer through remote terminals, or a complex consisting of two or more interconnected computers or telephone switching equipment.

(4) "Computer program" means an ordered set of data that are coded instructions or statements that when executed by a computer cause the computer to process data.

(4a) "Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection with any of these services.

(5) "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer, computer system, or computer network.

(6) "Computer system" means at least one computer together with a set of related, connected, or unconnected peripheral devices.

(6a) "Data" means a representation of information, facts, knowledge, concepts, or instructions prepared in a formalized or other manner and intended for use in a computer, computer system, or computer network. Data may be embodied in any form including computer printouts, magnetic storage media, optical storage media, and punch cards, or may be stored internally in the memory of a computer.

(6b) "Electronic mail" means the same as the term is defined in G.S. 14-196.3(a)(2).

(6c) "Electronic mail service provider" means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end users of electronic mail services the ability to send or receive electronic mail.

(7) "Financial instrument" includes any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card or marketable security, or any electronic data processing representation thereof.

(7a) "Government computer" means any computer, computer program, computer system, computer network, or any part thereof, that is owned, operated, or used by any State or local governmental entity.

(7b) "Internet chat room" means a computer service allowing two or more users to communicate with each other in real time.

(7c) "Profile" means a configuration of user data required by a computer so that the user may access programs or services and have the desired functionality on that computer.

(8) "Property" includes financial instruments, information, including electronically processed or produced data, and computer software and

computer programs in either machine or human readable form, and any other tangible or intangible item of value.

(8a) "Resource" includes peripheral devices, computer software, computer programs, and data, and means to be a part of a computer, computer system, or computer network.

(9) "Services" includes computer time, data processing and storage functions.

(10) "Unsolicited" means not addressed to a recipient with whom the initiator has an existing business or personal relationship and not sent at the request of, or with the express consent of, the recipient. (1979, c. 831, s. 1; 1993 (Reg. Sess., 1994), c. 764, s. 1; 1999-212, s. 2; 2000-125, s. 3; 2002-157, s. 1; 2009-551, s. 2.)

Effect of Amendments. — Session Laws 2009-551, s. 2, effective December 1, 2009, and applicable to offenses committed on or after that date, added subdivisions (7b) and (7c).

CASE NOTES

Authorization. — Where the evidence showed that defendant removed software from a work computer without consent of the owner, she should have been convicted of misdemeanor damage to computers because no evidence of damages was introduced, as she did not have consent to remove the files, even though she was allowed to operate the computer. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Applied in State v. Ramos, — N.C. App. —, 668 S.E.2d 357, 2008 N.C. App. LEXIS 2025 (2008).

§ 14-453.1. Exceptions.

This Article does not apply to or prohibit:

(1) Any terms or conditions in a contract or license related to a computer, computer network, software, computer system, database, or telecommunication device; or

(2) Any software or hardware designed to allow a computer, computer network, software, computer system, database, information, or telecommunication service to operate in the ordinary course of a lawful business or that is designed to allow an owner or authorized holder of information to protect data, information, or rights in it. (2002-157, s. 2.)

§ 14-453.2. Jurisdiction.

Any offense under this Article committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received in this State. "Electronic communication" means the same as the term is defined in G.S. 14-196.3(a). (2002-157, s. 3.)

§ 14-454. Accessing computers.

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any computer, computer program, computer system, computer network, or any part thereof, for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, unless the object of the scheme or artifice is to obtain educational testing material, a false educational testing score, or a false academic or vocational grade, or

(2) Obtaining property or services other than educational testing material, a false educational testing score, or a false academic or vocational

grade for a person, by means of false or fraudulent pretenses, representations or promises.

A violation of this subsection is a Class G felony if the fraudulent scheme or artifice results in damage of more than one thousand dollars ($1,000), or if the property or services obtained are worth more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any computer, computer program, computer system, or computer network for any purpose other than those set forth in subsection (a) above, is guilty of a Class 1 misdemeanor.

(c) For the purpose of this section, the phrase "access or cause to be accessed" includes introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 19; 1981, cc. 63, 179; 1993, c. 539, s. 293; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 2000-125, s. 4.)

Editor's Note. — The section above was amended by Session Laws 1993 (Reg. Sess., 1994), c. 764, s. 1 in the coded bill drafting format provided by G.S. 120-20.1. The act failed to incorporate the changes in subsection (b) made by Session Laws 1993, c. 539. Subsection (b) is set out in the form above at the direction of the Revisor of Statutes.

CASE NOTES

The trial court did not err in finding the aggravating factor of damage causing great monetary loss where the crime involved the use of computers to divert millions of dollars and where the amount of money involved in the offense was not an element but came into play only at the time of sentencing. State v. Hughes, 136 N.C. App. 92, 524 S.E.2d 63, 1999 N.C. App. LEXIS 1302 (1999).

§ 14-454.1. Accessing government computers.

(a) It is unlawful to willfully, directly or indirectly, access or cause to be accessed any government computer for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, or

(2) Obtaining property or services by means of false or fraudulent pretenses, representations, or promises.

A violation of this subsection is a Class F felony.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a) of this section is guilty of a Class H felony.

(c) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any educational testing material or academic or vocational testing scores or grades that are in a government computer is guilty of a Class 1 misdemeanor.

(d) For the purpose of this section the phrase "access or cause to be accessed" includes introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (2002-157, s. 4.)

§ 14-455. Damaging computers, computer programs, computer systems, computer networks, and resources.

(a) It is unlawful to willfully and without authorization alter, damage, or destroy a computer, computer program, computer system, computer network, or any part thereof. A violation of this subsection is a Class G felony if the damage caused by the alteration, damage, or destruction is more than one thousand dollars ($1,000). Any other violation of this subsection is a Class 1 misdemeanor.

(a1) It is unlawful to willfully and without authorization alter, damage, or destroy a government computer. A violation of this subsection is a Class F felony.

(b) This section applies to alteration, damage, or destruction effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 20; 1981, cc. 63, 179; 1993, c. 539, s. 294; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 1995, c. 509, s. 12; 2000-125, s. 5; 2002-157, s. 5.)

CASE NOTES

Misdemeanor where no damages shown. — Where the evidence showed that defendant removed software from a work computer without consent of the owner, she should have been convicted of misdemeanor damage to computers because no evidence of damages was introduced. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Construction. — G.S. 14-455(b) does not modify G.S. 14-455(a) to limit the crime of damaging computers to damages caused by the introduction of a virus. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Indictment Sufficient. — Where indictment charged defendant with all of the essential elements of the crime of damaging computers, it was not fatally flawed; the indictment alleged that defendant unlawfully and without consent entered a computer system for the purpose of damaging files and caused a loss. State v. Johnston, 173 N.C. App. 334, 618 S.E.2d 807, 2005 N.C. App. LEXIS 2034 (2005).

Error Not to Instruct Jury that Defendant Had to Act "Willfully." — Defendant was entitled to a new trial on the charge of damaging a computer or a computer network under G.S. 14-455(a), because the jury was not instructed that it had to find that defendant acted "willfully" and the error was not harmless where the jury could have found that defendant intended only to delete files that defendant believed defendant's supervisor had consented to and thus, that defendant acted without authorization, but not willfully. State v. Ramos, — N.C. App. —, 668 S.E.2d 357, 2008 N.C. App. LEXIS 2025 (2008).

Court of appeals did not err in ordering a new trial for defendant, who was convicted of damaging a computer system at her workplace in violation of G.S. 14-455 after being fired from her position, because the trial court's refusal to instruct the jury on the element of willfulness was prejudicial error when the jury could reasonably have reached a different result but for the omission; based on defendant's testimony, there was a reasonable possibility that the jury could have found that defendant believed she had her supervisor's permission to delete all of the files that she intentionally deleted and that any deletion of the files was accidental, not willful. State v. Ramos, 363 N.C. 352, 678 S.E.2d 224, 2009 N.C. LEXIS 610 (June 18, 2009).

§ 14-456. Denial of computer services to an authorized user.

(a) Any person who willfully and without authorization denies or causes the denial of computer, computer program, computer system, or computer network services to an authorized user of the computer, computer program, computer system, or computer network services is guilty of a Class 1 misdemeanor.

(b) This section also applies to denial of services effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (1979, c. 831, s. 1; 1993, c. 539, s. 295;

1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 764, s. 1; 2000-125, s. 6.)

§ 14-456.1. Denial of government computer services to an authorized user.

(a) Any person who willfully and without authorization denies or causes the denial of government computer services is guilty of a Class H felony. For the purposes of this section, the term "government computer service" means any service provided or performed by a government computer as defined in G.S. 14-454.1.

(b) This section also applies to denial of services effectuated by introducing, directly or indirectly, a computer program (including a self-replicating or a self-propagating computer program) into a computer, computer program, computer system, or computer network. (2002-157, s. 6.)

§ 14-457. Extortion.

Any person who verbally or by a written or printed communication, maliciously threatens to commit an act described in G.S. 14-455 with the intent to extort money or any pecuniary advantage, or with the intent to compel any person to do or refrain from doing any act against his will, is guilty of a Class H felony. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 21; 1981, cc. 63, 179.)

§ 14-458. Computer trespass; penalty.

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network without authority and with the intent to do any of the following:

(1) Temporarily or permanently remove, halt, or otherwise disable any computer data, computer programs, or computer software from a computer or computer network.

(2) Cause a computer to malfunction, regardless of how long the malfunction persists.

(3) Alter or erase any computer data, computer programs, or computer software.

(4) Cause physical injury to the property of another.

(5) Make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network.

(6) Falsely identify with the intent to deceive or defraud the recipient or forge commercial electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk commercial electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

For purposes of this subsection, a person is "without authority" when (i) the person has no right or permission of the owner to use a computer, or the person uses a computer in a manner exceeding the right or permission, or (ii) the person uses a computer or computer network, or the computer services of an electronic mail service provider to transmit unsolicited bulk commercial electronic mail in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider.

(b) Any person who violates this section shall be guilty of computer trespass, which offense shall be punishable as a Class 3 misdemeanor. If there is damage to the property of another and the damage is valued at less than two thousand five hundred dollars ($2,500) caused by the person's act in violation of this section, the offense shall be punished as a Class 1 misdemeanor. If there is damage to the property of another valued at two thousand five hundred dollars ($2,500) or more caused by the person's act in violation of this section, the offense shall be punished as a Class I felony.

(c) Any person whose property or person is injured by reason of a violation of this section may sue for and recover any damages sustained and the costs of the suit pursuant to G.S. 1-539.2A. (1999-212, s. 3; 2000-125, s. 7.)

CASE NOTES

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

§ 14-458.1. Cyber-bullying; penalty.

(a) Except as otherwise made unlawful by this Article, it shall be unlawful for any person to use a computer or computer network to do any of the following:

(1) With the intent to intimidate or torment a minor:
  a. Build a fake profile or Web site;
  b. Pose as a minor in:
    1. An Internet chat room;
    2. An electronic mail message; or
    3. An instant message;
  c. Follow a minor online or into an Internet chat room; or
  d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor.

(2) With the intent to intimidate or torment a minor or the minor's parent or guardian:
  a. Post a real or doctored image of a minor on the Internet;
  b. Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or
  c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor.

(3) Plant any statement, whether true or false, tending to provoke or that actually provokes any third party to stalk or harass a minor.

(4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network).

(5) Sign up a minor for a pornographic Internet site.

(6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, resulting in intimidation or torment of the minor.

(b) Any person who violates this section shall be guilty of cyber-bullying, which offense shall be punishable as a Class 1 misdemeanor if the defendant is 18 years of age or older at the time the offense is committed. If the defendant is under the age of 18 at the time the offense is committed, the offense shall be punishable as a Class 2 misdemeanor.

(c) Whenever any person pleads guilty to or is guilty of an offense under this section, and the offense was committed before the person attained the age of 18 years, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require. Upon fulfillment of the terms and conditions of the probation provided for in this subsection, the court shall discharge the defendant and dismiss the proceedings against the defendant. Discharge and dismissal under this subsection shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Upon discharge and dismissal pursuant to this subsection, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 15A-146. (2009-551, s. 1.)

Editor's Note. — Session Laws 2009-551, s. 3, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-459: Reserved for future codification purposes.

Article 61.

Trains and Railroads.

§ 14-460. Riding on train unlawfully.

If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine, or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car, or mail car on any train, he shall be guilty of a Class 3 misdemeanor. (1998-128, s. 12.)

§ 14-461. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.

It shall be unlawful for any person to make, manufacture, sell, or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1998-128, s. 12.)

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

(c) Whenever any person pleads guilty to or is guilty of an offense under this section, and the offense was committed before the person attained the age of 18 years, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such reasonable terms and conditions as the court may require. Upon fulfillment of the terms and conditions of the probation provided for in this subsection, the court shall discharge the defendant and dismiss the proceedings against the defendant. Discharge and dismissal under this subsection shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Upon discharge and dismissal pursuant to this subsection, the person may apply for an order to expunge the complete record of the proceedings resulting in the dismissal and discharge, pursuant to the procedures and requirements set forth in G.S. 15A-146. (2009-551, s. 1.)

Editor's Note. — Session Laws 2009-551, s. 2, made this section effective December 1, 2009, and applicable to offenses committed on or after that date.

§ 14-459: Reserved for future codification purposes.

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Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

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